In-House Counsel's Eligibility for Whistleblower Awards: A Critical and Comparative Analysis

Connor Bildfell

IN RESPONSE TO GROWING public concerns over corporate wrongdoing, securities regulators in Canada and the United States (US) have sought to incentivize whistleblowing. The availability of whistleblower awards, which can amount to millions of dollars, has captured the public's imagination and resulted in a new wave of allegations made by employees against their current or former employers regarding violations of securities laws. Most notably, securities regulators have made these awards available to in-house counsel.

In July 2016, the Ontario Securities Commission (OSC) launched a new whistleblower policy offering awards of up to $5 million to individuals who deliver information to the OSC leading to a successful enforcement action. The OSC has taken the position that in-house counsel would, in limited circumstances, be eligible for such awards. The OSC's new policy, alongside similar programs in the US, has raised fundamental questions that strike at the heart of the solicitor-client relationship as it applies between in-house counsel and their current or former employers.

The objective of this article is to engage in the first systematic analysis of in-house counsel's eligibility for whistleblower awards in Canada. Comparative law methodologies are utilized to analyze parallel developments in the US. The analysis unpacks the extent to which in-house counsel's ethical duties may come into conflict with their eligibility for whistleblower awards. In

EN RÉPONSE AUX PRÉOCCUPATIONS croissantes de la population au sujet des conduites frauduleuses et actes répréhensibles commis par des entreprises, les organismes de réglementation des valeurs mobilières au Canada comme aux États-Unis (É.-U.) ont cherché à inciter à la dénonciation de tels actes. L'admissibilité des récompenses à la dénonciation, qui peuvent s'élever jusqu'à des millions de dollars, a ainsi capté l'imagination du public et entraîné une nouvelle vague d'allégations de violations des lois sur les valeurs mobilières de la part d'employés contre leurs employeurs actuels ou passés. Et, fait notable, les organismes de réglementation des valeurs mobilières ont décidé d'autoriser les conseillers juridiques d'entreprises à se prévaloir de telles récompenses.

En juillet 2016, la Commission des valeurs mobilières de l'Ontario (CVMO) adoptait en effet une nouvelle politique en matière de dénonciation aux termes de laquelle des récompenses financières allant jusqu'à 5 million de $ seraient offertes à des personnes qui fournissent à la CVMO des renseignements pouvant aboutir à des mesures fructueuses d'application de la loi. La CVMO a déterminé que les conseillers juridiques d'entreprises feraient partie de ces personnes et seraient donc admissibles, dans certaines circonstances, à bénéficier de telles récompenses. La nouvelle politique de la CVMO, à l'instar de programmes similaires aux États-Unis, a soulevé des questions fondamentales qui sont au cœur des relations entre l'avocat et son client dans la mesure où elle s'applique aux relations entre des

particular, there is a tension between in-house counsel's eligibility for whistleblower awards and two fundamental tenets of the lawyer-client relationship, both premised on the duty of loyalty: (1) the duty to maintain confidentiality, and (2) the duty to avoid conflicts of interest.

Ultimately, this article concludes that the OSC's suggestion that in-house counsel could be eligible for whistleblower awards — or, for that matter, could disclose to securities regulators evidence of their former or current employers' potential wrongdoing in the first place — without breaching their ethical duties is, with respect, somewhat misleading. Though undoubtedly well-intentioned, the OSC's position on in-house counsel's ability to blow the whistle may be an unsustainable attempt to import certain exceptions available in the US to confidentiality rules, exceptions which do not apply in Canada. As such, it is argued, the OSC's attempt to include in-house counsel within the ambit of award eligibility should be abandoned.

conseillers juridiques d'entreprises et leurs employeurs actuels ou antérieurs.

L'objectif de cet article est donc de procéder à l'analyse systématique de l'admissibilité des conseillers juridiques d'entreprises aux récompenses pour dénonciation au Canada. On recourt à des méthodologies de droit comparé afin d'analyser les développements parallèles survenus aux États-Unis. Cette analyse révèle jusqu'à quel point les obligations d'ordre éthique des conseillers juridiques peuvent entrer en conflit avec leur l'admissibilité à recevoir des récompenses financières en cas de dénonciation. Il existe en particulier une tension entre l'admissibilité des conseillers juridiques à des récompenses pour dénonciation et deux composantes fondamentales des relations entre l'avocat et son client qui, toutes deux, se fondent sur l'obligation de loyauté, soit (1) le devoir de respecter la confidentialité, et (2) l'obligation d'éviter les conflits d'intérêts.

En dernier lieu, l'article conclut que la proposition de la CVMO à l'effet d'autoriser les conseillers juridiques d'entreprises à recevoir des récompenses financières en cas de dénonciation ou à communiquer aux organismes de réglementation des valeurs mobilières des preuves de la mauvaise conduite éventuelle de leurs employeurs actuels ou antérieurs, sans pour autant manquer à leurs obligations déontologiques est, en tout respect, quelque peu trompeuse. Quoique sans aucun doute bien intentionnée, la position de la CVMO au sujet de l'admissibilité des conseillers juridiques d'entreprises à dénoncer la mauvaise conduite de leurs entreprises semble être une tentative non durable d'importer des États-Unis certaines exceptions aux règles de la confidentialité, exceptions qui ne s'appliquent pas au Canada. À ce titre, on recommande à la CVMO de retirer sa proposition d'inclure les conseillers juridiques d'entreprises au régime d'admissibilité des récompenses financières.

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INTRODUCTION

In-house counsel are no ordinary employees.[1] Their rights and duties as employees are overlaid with legal and ethical responsibilities that transcend those that apply to other employees. All lawyers owe a constellation of duties to their clients, including a duty of utmost good faith, a duty to maintain confidentiality, and a duty to avoid conflicts of interest. For in-house counsel, the client to whom these duties are owed is, generally speaking, the employer.[2]

In-house counsel play an essential role within their respective organizations. Regardless of size or industry, business organizations are constantly navigating a complex legal landscape that is perpetually in flux and

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1 For the purposes of this article, the term "in-house counsel" refers to any lawyer who is an employee of an organization, other than a law firm, such that the organization is the "client." Thus, "general counsel," "corporate counsel," and other similar positions would fall within the meaning of "in-house counsel." Although in-house counsel serve a variety of organizations, this article focuses on the business organizations context.

2 See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2017 [*FLSC Model Code*] ("[a] lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees" at r 3.2-3, commentary 1); American Bar Association, *Model Rules of Professional Conduct*, Chicago: ABA, 2016 [*ABA Model Code*] ("[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents" at r 1.13(a)).

characterized by uncertainty. In-house counsel are often relied upon to take the lead role in protecting the company's legal and business interests in this challenging environment. To ensure in-house counsel are fully apprised of the factors influencing the organization's business and legal challenges, in-house counsel are made privy to the company's most closely guarded secrets. Accordingly, employers must be able to repose utmost confidence in their in-house counsel, trusting they will observe their legal and ethical responsibilities.[3]

Recently, however, a new set of siren calls has fallen upon the ears of in-house counsel and, some would argue,[4] threatened to undermine their professional responsibilities: whistleblower awards (or "bounties").[5] In response to growing public concerns over corporate wrongdoing, securities regulators in Canada and the United States (US) have sought to incentivize whistleblowing. The availability of these awards, which can amount to millions of dollars, has captured the public's imagination and resulted in a new wave of allegations made by employees against their current or

3 See *Canada (AG) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401 [*FLSC*] ("[a] client must be able to place 'unrestricted and unbounded confidence' in his or her lawyer; that confidence which is at the core of the solicitor-client relationship is a part of the legal system itself, not merely ancillary to it" at para 83).

4 See e.g. Jennifer M Pacella, "Advocate or Adversary? When Attorneys Act as Whistleblowers" (2015) 28:4 Geo J Leg Ethics 1027 (arguing that "[t]he conception of lawyers as whistleblowers runs contrary to the professional culture in which they serve as trusted confidants and advisors to their clients" at 1029). But see Dennis J Ventry Jr, "Stitches for Snitches: Lawyers as Whistleblowers" (2017) 50:4 UC Davis L Rev 1455 (challenging the prevailing wisdom that ethics rules forbid lawyers from blowing the whistle on a client's illegal conduct and thereby receiving a whistleblower award).

5 Ralph Nader, who popularized the term "whistleblowing," defined whistleblowing as "the act of a man or a woman who, believing that the public interest overrides the interest of the organization he [or she] serves, publicly 'blows the whistle' if the organization is involved in corrupt, illegal, fraudulent, or harmful activity" (Ralph Nader, Peter J Petkas & Kate Blackwell, eds, *Whistle Blowing: The Report of the Conference on Professional Responsibility* (New York: Grossman, 1972) at vii). Nader sought to "avoid the negative connotations of terms such as 'informer' and 'snitch', instead invoking the referee in a sports match, blowing the whistle to stop the game when there is unfair play" (Adrian Holliday & Catherine McGregor, "Whistleblowers and the In-House Lawyer: A Question of Ethics and Objectivity", *GC Magazine* (Winter 2014) 85, online: <www.legal500.com>). But see Jamie Darin Prenkert, Julie Manning Magid & Allison Fetter-Harrott, "Retaliatory Disclosure: When Identifying the Complainant Is an Adverse Action" (2013) 91:3 NCL Rev 889 at 928, n 234, cited in Pacella, *supra* note 4 at 1028, n 1 (noting that social science literature defines "whistleblower" more broadly than the law does, viewing "whistleblowers" as embracing all those who report wrongdoing, even non-publicly and for personal gain, to create organizational change, whereas the law tends to define whistleblowers as the more limited group of individuals who disclose wrongdoing publicly and for the purpose of protecting the public).

former employers regarding violations of securities laws. Most notably, these awards are potentially available to in-house counsel.

In Canada, the debate about whether in-house counsel should be eligible for whistleblower awards was sparked by an announcement of a proposal for a new whistleblower program created by the Ontario Securities Commission (OSC).[6] The OSC Whistleblower Policy (the Policy), launched in July 2016,[7] offers compensation of up to $5 million to individuals who come forward to the OSC with information leading to a final order imposing monetary sanctions and/or the making of a voluntary payment of $1 million or more.[8] The program accepts tips related to possible violations of Ontario securities law that has occurred, is ongoing, or is about to occur.[9] The types of misconduct that might be the subject of a tip would include illegal insider trading, market manipulation, and accounting and disclosure violations. The Policy is the first of its kind for Canadian securities regulators and only the second whistleblower program in Canada to offer financial incentives (with the first being the Canada Revenue Agency's Offshore Tax Informant Program, discussed below in Part I(A)).[10] Most significantly for the purposes of this article, the OSC has suggested that, in limited circumstances, in-house counsel would be eligible for whistleblower awards.[11]

The OSC's new Policy, alongside similar programs in the US, has raised fundamental questions that strike at the heart of the solicitor-client relationship as it applies between in-house counsel and their clients/employers: Should in-house counsel be eligible for (multi-million dollar) awards for blowing the whistle on their current or former employers? How can the lawyer's duties to maintain client confidentiality and to avoid conflicts of interest be reconciled with the availability of such awards? Is the granting of such awards to in-house counsel inimical to the lawyer's fiduciary duty to the client? Not surprisingly, in-house counsel's eligibility for

6 Ontario Securities Commission, News Release, "OSC Proposes New Whistleblower Program for Public Comment" (3 February 2015), online: <www.osc.gov.on.ca>.

7 Ontario Securities Commission, News Release, "OSC Launches Office of the Whistleblower" (14 July 2016), online: <www.osc.gov.on.ca>.

8 Ontario Securities Commission, "OSC Policy 15-601: Whistleblower Program" (Toronto: OSC, 14 July 2016), s 1, online: <www.osc.gov.on.ca/documents/en/Securities-Category1/20160714_15-601_policy-whistleblower-program.pdf> [OSC Whistleblower Policy].

9 *Ibid*.

10 See Patricia L Olasker et al, *Blowing the Whistle on the Whistleblower Program*, (8 May 2015), online: Davies Ward Phillips & Vineberg LLP <www.dwpv.com/en>.

11 See Alex Robinson, "OSC Moves Ahead with Whistleblower Policy", *Law Times* (25 July 2016), online: <www.lawtimesnews.com> [Robinson, "OSC Moves Ahead"].

whistleblower awards has been described as both a "thorny issue" and a "hot topic."[12]

The objective of this article is to engage in the first systematic analysis of in-house counsel's eligibility for whistleblower awards in Canada. Given the lack of literature on the topic of whistleblower law in Canada, the infancy of the OSC's new Policy, and the lively debate that is now emerging on the topic, the subject-matter of this analysis is important and in need of detailed, balanced consideration.

As its core thesis, this article attempts to demonstrate that the OSC's suggestion that in-house counsel could seek whistleblower awards—or, for that matter, could disclose to securities regulators evidence of their former or current employers' potential wrongdoing in the first place—without breaching their ethical duties is untenable in practice. With respect, the OSC's position on in-house counsel's ability to blow the whistle appears to be a well-intentioned but unsustainable attempt to import certain exceptions available in the US to confidentiality rules, exceptions which do not generally apply in Canada. As such, unless and until provincial and territorial law societies revise their codes of conduct to permit in-house counsel to blow the whistle in the manner contemplated by the OSC, the OSC's attempt to include in-house counsel within the ambit of award eligibility should be abandoned.

Throughout this article, reference will be made to US scholarship, professional codes of ethics, and jurisprudence. In doing so, this article draws upon comparative law methodologies by analyzing parallel developments in the US and Canada. A discussion of the situation facing in-house counsel in the US is useful in understanding emerging issues in Canada. In particular, the tension between the Dodd-Frank Whistleblower Program's award eligibility provisions and state bar rules is, in many respects, analogous to the tension between the OSC Whistleblower Policy's award eligibility provisions and provincial and territorial bar rules. As the OSC Whistleblower Policy is still in its infancy, detailed academic scholarship on the Policy's implications for in-house counsel has yet to surface. By contrast, in-house counsel in the US have, at least theoretically, been eligible for whistleblower awards for decades, and the American academic literature on the subject is more fully developed. Accordingly, there are many lessons to be learned from the American experience.

12 Julie Sobowale, "In-House Whistleblowing: Where Do Your Loyalties Lie?", *Canadian Corporate Counsel Association Magazine* 9:4 (Winter 2015) 24 at 26, online: <www.cccamagazine.humemediainc.com>.

This article proceeds in four parts. Part I examines the new wave of whistleblower incentive programs. This Part tracks the evolution of modern whistleblower award programs, from medieval *qui tam* suits to the whistleblower revolution ushered in by the Dodd-Frank Whistleblower Program.[13] This Part also reviews the merits of, and concerns over, whistleblower awards. Part II dissects the relationship between in-house counsel's ethical duties and their eligibility for whistleblower awards in the US. This discussion illustrates how in-house counsel's eligibility for whistleblower awards has been met with considerable resistance from academic commentators, bar associations, and the judiciary, and that we can learn important lessons from our US counterparts. Part III then examines the relationship between in-house counsel's ethical duties and their eligibility for whistleblower awards in Canada. This discussion reveals how the range of circumstances in which an exception is available to in-house counsel's duty of confidentiality is considerably narrower in Canada than in the US. Finally, Part IV provides a brief conclusion.

I. THE NEW WAVE OF WHISTLEBLOWER INCENTIVE PROGRAMS

A. The Evolution of Whistleblower Incentives

Whistleblower awards are by no means a recent innovation. The historical roots of whistleblower incentives stretch back to medieval times, to the concept of *qui tam* lawsuits.[14] *Qui tam* is a shortened Latin phrase meaning "an individual who prosecutes for himself as well as on behalf of the King."[15] Such suits allow a private individual to bring an action against an alleged wrongdoer on behalf of the state and then, should the suit succeed, to receive a percentage of the litigation or settlement proceeds. The policy rationale underlying such awards is that a private person who assists the government in recovering funds should be entitled to a "piece of the pie." Accordingly, a *qui tam* lawsuit is simply a whistleblower award in different garb.

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13 U.S. Securities and Exchange Commission, Implementation of the Whistleblower Provisions of Section 21F of the *Securities Exchange Act of 1934* (15 USC § 78u-6), online: <https://www.sec.gov/about/offices/owb/reg-21f.pdf> ["Dodd-Frank Whistleblower Program"].

14 See generally Tod A Lewis, "The False Claims Act and Its 'Quitam' Provision: A Primer" (2000) 49:4 Government Accountants J 36 at 37.

15 Whistleblowers International, *What is a Qui Tam?*, online: <www.whistleblowers-international.com>.

Today, the most prominent and longest running example of *qui tam* legislation is the US *False Claims Act*.[16] As the US District Court for the Southern District of New York has explained, the *False Claims Act* "permits private persons, known as 'relators,' to bring a *qui tam* action on behalf of the United States when private persons have information that the defendant has knowingly submitted or caused the submission of false or fraudulent claims to the United States."[17] Relators are eligible to receive bounties of between 15 and 25 percent of the proceeds of the action or settlement if the government elects to intervene in the action,[18] and between 25 and 30 percent if the government does not intervene.[19] The *False Claims Act* was originally enacted in 1863 to combat fraud committed by government contractors during the American Civil War and, after a spate of defence procurement scandals in the early 1980s, was updated in 1986 to provide for stronger whistleblower incentives.[20] Nearly 10,000 *qui tam* cases have been brought under the *False Claims Act* since 1986, with a number of cases arising in the context of health care or military spending.[21] Essentially any private person can bring a *qui tam* action, including in-house counsel.[22] The catch, however, is that the individual must be able to plead the alleged facts forming the basis of the claim with some particularity. This is where the lawyer's duty of confidentiality makes life difficult for a potential lawyer/relator. If the lawyer/relator lacks sufficient non-confidential information to make out his or her claim, the claim will be dismissed.[23]

16 *False Claims Act*, 31 USC §§ 3729–33 (2010). The *False Claims Act* has been celebrated as the "gold standard of whistleblower protection and bounty rewards" (Pacella, *supra* note 4 at 1050). Twenty-nine US states and the District of Columbia have their own versions of the *False Claims Act* (See Taxpayers Against Fraud Education Fund, *States with False Claims Acts*, online: <www.taf.org>).

17 *United States ex rel Fair Laboratory Practices Associates v Quest Diagnostics Inc*, 2011 US Dist Lexis 37014 at 6 (SDNY Dist Ct) [*Quest Diagnostics I*], aff'd 734 F (3d) 154 (2d Cir 2013) [*Quest Diagnostics II*].

18 Although one's chances of succeeding in a *qui tam* suit increase dramatically if the government intervenes, the Department of Justice has indicated that it elects to intervene only in about 20 percent of cases (see Anne Kates Smith, "The Elusive Rewards and High Costs of Being a Whistleblower", *Kiplinger* (June 2013), online: <www.kiplinger.com>).

19 31 USC § 3730(d)(2) (2010).

20 See Lewis, *supra* note 14 at 37.

21 Kathleen Clark & Nancy J Moore, "Financial Rewards for Whistleblowing Lawyers" (2015) 56:5 Boston College L Rev 1697 at 1705 and 1705, n 27.

22 See Kathleen M Boozang, "The New Relators: In-House Counsel and Compliance Officers" (2012) 6:1 J Health & Life Sciences L 16.

23 See *ibid*.

The primary reason for some regulators' enthusiastic embrace of whistleblower programs is that certain types of wrongdoing are exceedingly difficult, if not impossible, to detect. As the US Congress recognized in 1986, "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity."[24] As American legal scholar Jennifer M Pacella recounts, the legislative history of the *Dodd-Frank Act* indicates that 54.1 percent of fraud schemes in public companies are detected by whistleblowers, compared to a mere 4.1 percent by external auditors.[25] Based on this metric, this makes whistleblower tips 13 times more effective than external audits.[26] These statistics make clear that whistleblowers play an essential role in the detection of wrongdoing.

In Canada as well, whistleblower programs have received broad support. A prime example of this comes from the findings of the Charbonneau Commission, which investigated corruption in Quebec's construction industry. In her final report,[27] Justice France Charbonneau emphasized that "[w]histleblowing must not be seen as an act of betrayal, but as an act of loyalty to society."[28] Whistleblowers, she underscored, play an essential role in bringing to light wrongdoing such as fraud that would otherwise go unnoticed, and whistleblower protection programs should be encouraged.

The observations made above regarding the difficulty of detecting fraud are equally apt in the context of securities law violations. Many types of securities law violations will be brought to light only if an insider decides to blow the whistle. Accordingly, if and to the extent that monetary incentives encourage whistleblowing, such incentives enhance regulators' ability to protect investors and foster greater confidence in capital markets, two core objectives of securities regulation.[29] Furthermore, if the goal is to encourage those who are the closest observers of the wrongdoing to

24 US Senate Committee on the Judiciary, 99th Cong, *5266 False Claims Amendments Act of 1986 Dates of Consideration and Passage* (S Rep No 99-345), reprinted in 1986 USCCAN 5266 at 5269.

25 Pacella, *supra* note 4 at 1033.

26 See *ibid*.

27 Quebec, *Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dan l'industrie de la construction*, by France Charbonneau & Renand Lachance (Montreal: CEIC, November 2015), online: <s3.documentcloud.org/documents/2599890/charbonneau-report-final-recommendations.pdf>.

28 "Charbonneau Commission Finds Corruption Widespread in Quebec's Construction Sector", *CBC News* (24 November 2015), online: <www.cbc.ca>.

29 See *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 41, [2001] 2 SCR 132.

come forward, it stands to reason that there is no better way of ferreting out securities-related misconduct than incentivizing in-house counsel—who are both "the custodian[s] of legal propriety"[30] and the "corporate conscience"[31]—to blow the whistle.

B. Dodd-Frank Revolutionizes Whistleblowing

The recent resurgence of the notion that whistleblowers should be entitled to a "piece of the pie" can be traced to developments in the US. On May 25, 2011, the US Securities and Exchange Commission (SEC) announced[32] a new whistleblower program created under the *Dodd-Frank Act*.[33] The legislative package ushered in the most sweeping reforms to the financial industry since the Great Depression. The Dodd-Frank Whistleblower Program, which sought to emulate the success of the *False Claims Act*'s whistleblower incentives, put in place awards available to those who provide the SEC with tips leading to successful enforcement actions.[34] To qualify for a monetary award, a whistleblower must have "voluntarily" provided "original information" to the SEC that leads to a successful enforcement action in which the SEC obtains monetary sanctions exceeding $1 million (USD).[35] The range for awards is between 10 and 30 percent of the money collected, with no upper cap.[36] To put the potential financial payouts in perspective, the largest whistleblower award received by an individual to date is a staggering $30 million (USD), awarded in September 2014.[37] As one SEC official stated upon the announcement of this award, "[t]his

30 See Holliday & McGregor, *supra* note 5.

31 See Paul D Paton, "Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era" (2005) 84:3 Can Bar Rev 533.

32 US Securities and Exchange Commission, Press Release, 2011-116, "SEC Adopts Rules to Establish Whistleblower Program" (25 May 2011), online: <www.sec.gov> [SEC, "SEC Adopts Rules"].

33 *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111–203, 124 Stat 1376 (2010) [*Dodd-Frank Act*] (the *Dodd-Frank Act* put in place a host of regulatory measures affecting the financial industry in order to prevent a recurrence of the financial crisis of 2008–2009).

34 See US Securities and Exchange Commission, *Office of the Whistleblower*, "Frequently Asked Questions", online: <www.sec.gov>.

35 15 USC § 78u-6(a) (2012).

36 15 USC § 78u-6(b) (2012).

37 See US Securities and Exchange Commission, Press Release, 2014-206, "SEC Announces Largest-Ever Whistleblower Award" (22 September 2014), online: <www.sec.gov>.

record-breaking award sends a strong message about our commitment to whistleblowers and the value they bring to law enforcement."[38]

On many accounts, the Dodd-Frank Whistleblower Program has been a success. Mary L Schapiro, former SEC Chair, declared, "[w]hile the SEC has a history of receiving a high volume of tips and complaints, the quality of the tips we have received has been better since Dodd-Frank became law."[39] Since the program went into effect in August 2011, more than $107 million (USD) has been awarded to 33 whistleblowers.[40] In 2015 alone, more than $37 million (USD) was paid to reward whistleblowers for providing original information leading to a successful enforcement action.[41] Though the metric is by no means a perfect measure of success, the number of tips received is impressive: in 2015 alone, the SEC received nearly 4,000 tips.[42] Without a doubt, Dodd-Frank has revolutionized the whistleblowing field.[43]

Despite frequent affirmations of whistleblowing's importance, regulators in Canada have been slow to adopt Dodd-Frank-style whistleblower incentives. Whistleblower awards have arguably never truly been part of Canadian regulatory culture, and even when such awards are available, their

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38 *Ibid*.

39 SEC, "SEC Adopts Rules", *supra* note 32. See also Richard L Cassin, "SEC: 14,000 Tips Later, Whistleblower Award Program Has 'Transformed the Agency'" (1 September 2016), *The FCPA Blog* (blog), online: <www.fcpablog.com/blog/2016/9/1/sec-14000-tips-later-whistleblower-award-program-has-transfo.html> (Andrew Ceresney, director of the SEC's enforcement division, stated that "[t]he SEC whistleblower program has had a transformative impact on the agency, enabling us to bring high quality enforcement cases quicker using fewer resources").

40 See Cassin, *supra* note 39 (statistics current as of September 1, 2016).

41 US Securities and Exchange Commission, *2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program* at 1, online: <www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf>.

42 See *ibid* at 1.

43 This is made evident by the recent proliferation of law firms specializing in "whistleblower law". One firm even markets itself as offering clients the "top whistleblower lawyers" (see Katz, Marshall & Banks, LLP, online: <www.kmblegal.com>). Firms specializing in whistleblower law, often boutiques, will often take on files on a contingency basis (*i.e.*, they will receive a percentage of the financial award, if any, granted to the whistleblower upon the resolution of the particular matter). Although the nature of whistleblower files is inherently speculative, firms specializing in whistleblower law gain expertise in assessing the likelihood of success of various claims, thus reducing the probability that the firm will take on a file and be left "holding the bag" at the end of the day due to an unsuccessful claim. The expansion of the whistleblower law niche has likely been propelled somewhat by regulatory requirements providing that if a whistleblower wants to submit a tip anonymously, that must be done through a lawyer. This is the case under both the Dodd-Frank Whistleblower Program and the OSC Policy.

quantum is modest compared to US awards.[44] Until very recently, the Canada Revenue Agency (CRA) was the only Canadian organization that provided financial incentives to whistleblowers. In 2014, the CRA launched the Offshore Tax Informant Program (OTIP), which is modelled on a US counterpart.[45] The OTIP permits the CRA to make financial awards to individuals who provide information related to major international tax non-compliance that leads to the collection of taxes owing.[46] The program contemplates an award of between 5 and 15 percent when more than $100,000 in federal taxes are collected. Judging by several criteria, the OTIP has been a success. At a roundtable hosted by the Society of Trust and Estate Practitioners in 2016, the CRA reported that between January 2014 and April 2016, it received "2,984 calls (812 of which were from potential informants) and 333 written submissions."[47] The CRA further indicated that it had "entered into over a dozen contracts with informants."[48] Notably, the OTIP is silent on whether in-house counsel could be eligible for an award. In the absence of any indication to the contrary, it would appear that in-house counsel would, at least in theory, be eligible. Although the Canadian Competition Bureau has had a whistleblower program in place since May 31, 2013, its program stops short of providing financial incentives

44 The OSC Whistleblower Policy provides for awards of between 5 and 15 percent of the total monetary sanctions imposed or voluntary payments made, up to a maximum of $5 million (though that cap is lowered to $1,500,000 in certain circumstances) (see OSC Whistleblower Policy, *supra* note 8, s 18). By contrast, the Dodd-Frank Whistleblower Program provides for awards of between 10 and 30 percent of the total monetary sanctions imposed and/or voluntary payments made, with no maximum payout (see 15 USC § 78u-6(b) (2012)). The US *False Claims Act* contemplates awards of up to 30 percent of the proceeds of the relevant action or settlement (see 31 USC § 3730(d)(2) (2012)).

45 The US Internal Revenue Service (IRS) established the IRS Whistleblower Office in 2007 as a result of "amendments to the legal authority for paying awards to individuals who report suspected tax compliance issues. Under the IRS's whistleblower program, thousands of whistleblowers have reported suspected tax compliance issues," resulting in a considerable increase in "audits and investigations" (see Steven J Miller, Deputy Commissioner for Services and Enforcement, "IRS Whistleblower Program" (Washington, DC: Department of the Treasury Internal Revenue Service, 20 June 2012), online: <www.irs.gov/pub/whistleblower/field_directive_dated_june_20_2012.pdf>. Between fiscal year 2011 and June 30, 2015, the IRS Whistleblower Office awarded over $315 million to whistleblowers (see US Government Accountability Office, *IRS Whistleblower Program*, GAO-16-20 (October 2015), online: <www.gao.gov/assets/680/673440.pdf>.

46 See Canada Revenue Agency, *Offshore Tax Informant Program*, online: <www.cra-arc.gc.ca>.

47 Josh Kumar, *CRA Provides OTIP Update*, (10 August 2016), online: Dentons <www.canadiantaxlitigation.com>.

48 *Ibid*.

for tips, instead relying on whistleblower protections such as anti-retaliation provisions and confidentiality assurances.[49]

C. The Merits of Whistleblower Awards

To many, whistleblower awards represent the logical next step in the creation of a comprehensive whistleblower regime. The first element in a well-designed whistleblower program is a set of whistleblower protections. These often include guarantees of confidentiality and anonymity, prohibitions against retaliation by current or former employers, and other protections. At their core, whistleblower protections aim to remove any disincentives that might make prospective whistleblowers reluctant to come forward. Yet, there are two sides to this coin. The other element in many well-designed whistleblower programs is whistleblower *incentives*. Rather than remove potential barriers to whistleblowing, whistleblower incentives reward action seen to be desirable by regulators. The basic objective of such incentives is to appeal to the whistleblower's inner *homo economicus* by tipping the cost-benefit analysis in favour of disclosure. To date, the principal tool used by regulators in this respect has been monetary awards.

A groundswell of support has developed among academics, practitioners, and policymakers for the proposition that financial incentives for whistleblowing are not only useful in encouraging prospective whistleblowers to "do the right thing," but also essential if we are to deal effectively with corporate wrongdoing. As US attorney Stephen M Kohn highlights,[50] a group of researchers from the University of Toronto and University of Chicago carried out a detailed study of whistleblower claims alleging corporate fraud between 1996 and 2004 in the US and concluded, as basic intuition would suggest, that "a strong monetary incentive to blow the whistle does motivate people with information to come forward."[51] The researchers made three further notable observations painting whistleblower awards in a positive light:

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49 See Government of Canada, Competition Bureau, "Whistleblowing Initiative: Fact Sheet" (16 March 2016), online: <www.competitionbureau.gc.ca>.

50 Stephen M Kohn, "Whistleblower Reward Laws: Reform or Enhance?" (Washington, DC: National Whistleblower Center, 6 December 2013), online: <thewhistleblowersblog.wp.lexblogs.com>.

51 Alexander Dyck, Adair Morse & Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?" (2010) 65:6 J Finance 2213 at 2215.

1. "[T]here is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits."[52]
2. "Monetary incentives seem to work well, without the negative side effects often attributed to them," which include the submission of false tips, the undermining of internal reporting systems, and the erosion of a trusting team culture.[53]
3. "A natural implication of our findings is that the role of monetary incentives should be expanded."[54]

Legal scholar Jennifer M Pacella argues that the "bounty model" is salutary in some respects, including its ability to offset the social and other pressures (discussed below) that have traditionally accompanied whistleblowing, and may be superior to models focused solely on anti-relation protections.[55]

The cost of "doing the right thing" and acting ethically can be exceedingly high. The high costs of whistleblowing are felt primarily by the whistleblower, while most of the benefits accrue to society as a whole.[56] Whistleblower incentives are said to offset, at least in part, the financial and non-financial harm suffered by the whistleblower. These harms include "whistleblower stigma,"[57] the end of one's career,[58] and other negative consequences.[59] The social stigma alone is more than enough to make

52 *Ibid* at 2246.

53 *Ibid* at 2248.

54 *Ibid* at 2251.

55 Pacella, *supra* note 4 at 1033–36.

56 See Richard Moberly, "Protecting Whistleblowers by Contract" (2008) 79:4 U Colo L Rev 975 at 981, cited in Pacella, *supra* note 4 at 1034.

57 See Lois A Lofgren, "Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?", Case Note, (1993) 38:2 SDL Rev 316 at 316, cited in Peter D Banick, "The 'In-House' Whistleblower: Walking the Line Between 'Good Cop, Bad Cop'" (2011) 37:4 Wm Mitchell L Rev 1868 ("critics view whistleblowers as 'snitches,' 'stool pigeons,' or 'industrial spies'" at 1869).

58 See David Milstead, "Should Corporate Whistle-Blowers Be Rewarded?", *The Globe and Mail* (4 July 2015), online: <www.theglobeandmail.com>.

59 See Naseem Faqihi, "Choosing Which Rule to Break First: An In-House Attorney Whistleblower's Choices After Discovering a Possible Federal Securities Law Violation" (2014) 82:6 Fordham L Rev 3341 ("[e]mpirical evidence has shown that whistleblowers can suffer psychological, professional, and even physical harm as a result of their disclosures" at 3341); Pacella, *supra* note 4 ("[d]ifficulties on an emotional, personal, and professional level abound, as most whistleblowers have described their experiences as risky, dangerous, and nightmarish, often resulting in various forms of retaliation" at 1034); Frederick D Lipman, *Whistleblowers: Incentives, Disincentives, and Protection Strategies* (Hoboken, NJ:

a prospective whistleblower think twice. From "snitch" to "stool pigeon" to "squealer," all manner of derogatory terms are cast at those who choose to "go public." There are examples of whistleblowers who were celebrated as heroes after their act of bravery, such as Sherron Watkins, former Vice President of Enron and now an icon within the business community for having blown the whistle on Enron. Yet, examples of whistleblowers being lionized are few and far between, and even those who eventually receive a warm public reception were at first the targets of much hatred and vitriol from those who would have preferred that they stay silent. Moreover, the reality is that for many (if not most) professionals, the individual's decision to blow the whistle may well eliminate any chance of securing future employment in his or her chosen field.[60] As Oliver Budde, former in-house counsel for Lehman Brothers, aptly put it, "standing up for your integrity may mean you sacrifice your career."[61]

In sum, part of the rationale for whistleblower awards is to compensate whistleblowers for the "difficult choice between telling the truth and the risk of committing career suicide."[62] In the absence of whistleblower awards, legal scholar Geoffrey Christopher Rapp points out that both ethical and economic factors—such as the ethical commitment to one's team and the desire to maintain social bonds and to protect one's job and the jobs of colleagues—favour silence, and only ethical factors—such as the moral imperative to do what is right and to protect the public interest—favour whistleblowing.[63] Monetary awards address this imbalance, albeit imperfectly, by adding an economic consideration favouring whistleblowing and "doing the right thing," and from this perspective can be viewed positively.

John Wiley & Sons, 2012) at 57–60 (outlining the financial and non-financial disincentives whistleblowers face).

60 See Holliday & McGregor, *supra* note 5; Faqihi, *supra* note 59 at 3350 (noting that whistleblowers may be "blacklisted" by the industry). No laws exist that preclude former whistleblowers from being blacklisted by an entire industry.

61 Quoted in Holliday & McGregor, *supra* note 5. In light of the risk to human capital faced by a prospective whistleblower (*i.e.*, the risk that the whistleblower's investment of time and resources into his or her chosen career will be lost), some have advocated for the adoption of a minimum floor for whistleblower awards (see e.g. Robert Howse & Ronald J Daniels, "Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy" in Ronald J Daniels & Randall Morck, eds, *Corporate Decision-Making in Canada* (Calgary: University of Calgary Press, 1995) 525 at 536).

62 US Senate, 111th Cong, 2nd Sess, *The Restoring American Financial Stability Act of 2010* (S Rep No 111-176) (2010) at 111, cited in Pacella, *supra* note 4 at 1034.

63 Geoffrey Christopher Rapp, "States of Pay: Emerging Trends in State Whistleblower Bounty Schemes" (2012) 54:1 S Tex L Rev 53 at 59, cited in Pacella, *supra* note 4 at 1035.

D. The Concerns over Whistleblower Awards

Despite the enthusiastic support many have expressed for whistleblower awards, there remains considerable debate concerning the merits, propriety, and effectiveness of such awards. Robert Howse and Ronald J. Daniels highlight five of the most frequently cited critiques:

(1) the information divulged pursuant to whistleblower programs may have been disclosed anyway even if smaller awards had been offered (*i.e.*, "over-rewarding");
(2) business organizations are made vulnerable to false claims submitted by opportunistic whistleblowers who seek to extract a settlement from the company;[64]
(3) rewarding external whistleblowing undermines internal reporting mechanisms;[65]
(4) because the quantum of the award is often based on the amount of the penalty or settlement and, therefore, the seriousness and extent of the wrongdoing, a moral hazard is created, since whistleblowers have an incentive to report wrongdoing *later* rather than *earlier*, and to do so only after serious consequences have resulted; and
(5) the practice of rewarding external whistleblowing may have deleterious effects on trust and team spirit within business organizations.[66]

Some of these concerns have been expressed in more colourful prose in a letter written by a company commenting on the OSC's Whistleblower Program, which reads: "We fear that the proposed whistle-blower program supports a type of avaricious mentality among employees and agents who, lured by exponentially rising bounties, have every incentive to report malfeasance to the Commission instead of to their company."[67] An industry group raised similar concerns in similarly colourful prose, citing "bounty

64 Authorities can potentially discourage the submission of false tips by requiring whistleblowers to sign a declaration affirming that the information submitted is true and complete to the best of the whistleblower's knowledge. See e.g. US Securities Exchange Commission, Form TCR, "Tip, Complaint or Referral", online: <www.sec.gov>.

65 See e.g. Olasker et al, *supra* note 10. Under the Dodd-Frank Whistleblower Program, for example, internal reporting is not required to be considered for an award (see 17 CFR §§ 240.21F-4(b)(7), 240.21F-4(c) (2017)). The OSC Policy adopts the same position (see OSC Whistleblower Policy, *supra* note 8, s 16). However, the extent to which external reporting may interfere with internal compliance and reporting mechanisms is a factor considered by these two regulators when determining the quantum of the whistleblower award.

66 Howse & Daniels, *supra* note 61 at 527.

67 Quoted in Milstead, *supra* note 58.

hunting behaviour and framing companies for financial gains."[68] There is a sense that the availability of whistleblower awards result in unfairness to companies, depriving them of the chance to resolve the issue internally. But several studies have challenged these claims.[69]

There is also the more basic argument that monetary awards simply do not work. One study suggests that "monetary rewards can frequently affect the level of reporting, unless the underlying violation is perceived as morally offensive."[70] Although the general finding is significant, the caveat is equally important. The researchers found that "when the whistleblower attaches an ethical significance to the act of reporting, monetary rewards are not consequential in determining his or her actions."[71] So, for example, if a co-worker were to uncover evidence that a charity's bookkeeper was embezzling funds to purchase a new sports car for himself, we might expect that monetary incentives would have little to no impact on the co-worker's likelihood of blowing the whistle. The conduct is so plainly immoral that we might reasonably question whether monetary rewards would have any appreciable effect on the likelihood of whistleblowing.

Several major regulatory authorities have considered, and ultimately rejected, the "bounty model. " The Financial Conduct Authority (FCA) and the Bank of England Prudential Regulation Authority (PRA) issued a report in July 2014 concluding, "[t]he research showed that introducing financial incentives for whistleblowers would be unlikely to increase the number or quality of the disclosures we receive from them."[72] The FCA and PRA jointly declined to adopt US-style whistleblower awards, instead focusing on whistleblower protections. In another common law jurisdiction, Australia, securities regulators continue to debate whether to adopt US-style whistleblower awards and, if so, how to fund such a program.[73] In Australia, there appears to be at least some trepidation about whistleblower awards.

68 *Ibid*.

69 See e.g. Kohn, *supra* note 50 (arguing that *qui tam* laws do not lead to an increase in frivolous allegations or a decrease in the use of internal reporting mechanisms).

70 Faqihi, *supra* note 59 at 3348, citing Yuval Feldman & Orly Lobel, "The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality" (2010) 88:6 Tex L Rev 1151 at 1202.

71 Faqihi, *supra* note 59 at 3348.

72 Financial Conduct Authority and Bank of England Prudential Regulation Authority, "Financial Incentives for Whistleblowers" (London: FCA, July 2014) at 1, online: <www.fca.org.uk>. This report provides a concise summary of the hazards that accompany the offering of financial incentives to whistleblowers (see *ibid* at 3).

73 See Michael Edwards, "US-Style Whistleblower Rewards to Be Considered Amid Review of Protection Laws", *ABC News* (28 August 2016), online: <www.abc.net.au>.

Perhaps most notably, Quebec's securities regulator, L'Autorité des marchés financiers (the "AMF"), departed from the OSC's position vis-à-vis whistleblower awards—not just for in-house counsel, but for *all* whistleblowers. While the OSC gave the green light to whistleblower awards, the AMF declined to offer awards in its whistleblower program, which launched on June 20, 2016.[74] The AMF stated that it had conducted a thorough analysis of the evidence concerning the efficacy of monetary awards in whistleblower programs—including programs and studies carried out in the US, United Kingdom (UK), and Australia—and ultimately concluded that there was no guarantee that financial awards generate increases in high-quality whistleblowing.[75] The key pillar of an effective whistleblower program, the AMF concluded, is whistleblower *protections*. Accordingly, the AMF's whistleblower program emphasizes anti-retaliation measures, confidentiality, anonymity, and immunity from civil lawsuits. The fact that two securities regulators in Canada, looking at the same body of evidence, reached opposite conclusions concerning the efficacy and desirability of monetary whistleblower awards demonstrates that such awards remain a source of debate and concern.

Others reject whistleblower awards on a moral basis. For example, Paul Moore, ex-head of regulatory risk at a major UK banking and insurance company, argues that whistleblowers "shouldn't be speaking up for the purposes of making money…[but instead] because [they] care about the difference between right and wrong."[76] Moore's sentiments accord with the moral proposition that whistleblowers should not receive financial compensation for acting ethically. In a world driven by carrots and sticks, this perspective emphasizes the "purity" and "altruism" of doing good without any ulterior motive. In the eyes of some, putting an unseemly price tag on the act of whistleblowing reduces it to mere "bounty hunting"—it is said to taint the whistleblower's motives.[77]

74 See Autorité des marchés financiers, Press Release, "AMF Launches Whistleblower Program" (20 June 2016), online: <www.lautorite.qc.ca>.

75 See Autorité des marchés financiers, Press Release, "No Rewards for Whistleblowers" (18 February 2016), online: <www.lautorite.qc.ca>.

76 Holliday & McGregor, *supra* note 5.

77 As Yuan Wang notes, this sentiment was expressed during 2006 deliberations over whether bureaucratic whistleblowers should receive monetary compensation for uncovering wrongdoing. Edward Keyserlingk, then Canada's public service integrity commissioner, testified before Parliament that monetary incentives are "a kind of motivation I would hope we don't have to appeal to" (see Yuan Wang, "Is a Whistleblower Incentive Program Right for Canada?" (12 March 2010) at 12, online: <www.uwaterloo.ca>. See also Ventry Jr, *supra* note 4 (stating that there is an "uneasy or 'icky' feeling associated with paying someone to do the right thing" at 1459)).

The realist would respond that it is not the motive that counts; it is the outcome. If monetary awards bring about a reduction in corporate wrongdoing, we should not get hung up on questions of morality. Moreover, some argue, it cannot be immoral to compensate someone for the professional and personal damage that individual suffers by coming forward and speaking out in the interests of ethics and justice. According to this view, whistleblower awards do nothing more than offset (to a limited degree) the harms that accompany whistleblowing, and whistleblowers are rightly entitled to such compensation for their act of bravery and personal sacrifice.

Whether or not one supports whistleblower awards generally, one cannot deny that the complexity of the debate multiplies exponentially when in-house counsel become potential recipients, as they are subject to additional layers of professional ethical responsibilities. This is the subject to which I will now turn.

II. THE RELATIONSHIP BETWEEN IN-HOUSE COUNSEL'S ETHICAL DUTIES AND THEIR ELIGIBILITY FOR WHISTLEBLOWER AWARDS IN THE US

Parts II and III of this article discuss several key ethical duties, as understood in the US and then Canada, that bear on in-house counsel's eligibility to blow the whistle and thereby receive financial awards. It must be acknowledged up front, however, that this article's purpose is not to engage in a nuanced and comprehensive treatment of solicitor-client privilege, confidentiality, or any other aspect of lawyers' ethical duties. Instead, the objective here is more modest: to explore these ethical duties to the extent necessary to demonstrate why the OSC's Policy permitting in-house counsel to be eligible for whistleblower awards is potentially problematic when considered in light of Canadian lawyers' ethical duties and, as such, should be abandoned.

One factor complicating the discussion that follows is that ethical duties vary by jurisdiction, both between countries and between states or provinces within a particular country. To simplify the discussion, the analysis below will focus on the model codes of conduct set out by the American Bar Association (the ABA Model Code)[78] and the Federation of Law Societies of Canada (the FLSC Model Code).[79] Each model code

78 *ABA Model Code*, *supra* note 2.

79 *FLSC Model Code*, *supra* note 2.

articulates a set of ethical principles that can be adopted by state bars and provincial and territorial law societies, though these provisions can be, and often are, modified to some extent.[80]

An additional complicating factor is that, in many cases, it will be unclear which set(s) of ethical rules apply. Many in-house counsel work for national or multinational organizations that have multiple offices and that may be cross-listed in different jurisdictions. Further, counsel may be advising the organization across jurisdictions. Although the codes of conduct adopted in certain jurisdictions such as Ontario and New York are more likely to be implicated due to the frequency with which corporations are headquartered in those jurisdictions, there is no reason why the codes of other jurisdictions could not apply either instead of, or in addition to, those codes.[81]

A. The Duty of Confidentiality and the Duty to Avoid Conflicts of Interest

Two fundamental tenets of the lawyer-client relationship in the US are (1) the lawyer's duty of confidentiality, and (2) the lawyer's duty to avoid conflicts of interest, both of which arise from the overarching duty of loyalty to the client.[82]

1. The Duty of Confidentiality

Subject to limited exceptions, a lawyer has a duty not to disclose information relating to the provision of legal services to a client unless the client consents.[83] This broad language captures not only privileged information, but also any information "relating to the representing of the client."[84]

80 Unlike state, provincial, and territorial codes of conduct, the model codes are not enforceable through professional discipline.

81 Sections 15(1)(c)-(d) of the OSC Whistleblower Policy, *supra* note 8, expressly contemplate the possibility that another jurisdiction's ethical code might apply. These provisions state that a lawyer would not be eligible for a whistleblower award based on information obtained in connection with the provision of legal services, unless disclosure of that information would otherwise be permitted by a lawyer "under applicable provincial or territorial bar or law society rules, or the equivalent rules applicable in another jurisdiction". The Dodd-Frank Whistleblower Program provides similarly, referencing "the applicable state attorney conduct rules" (see 17 CFR §§ 240.21F-4(b)(4)(i)-(ii) (2017)).

82 See *ABA Model Code*, *supra* note 2, rr 1.6–1.8.

83 See *ibid*, r 1.6.

84 *Ibid*.

Moreover, pursuant to Rule 1.9(c)(1)–(2) of the ABA Model Code, this duty continues even after the lawyer-client relationship has ended.[85]

But the prohibition against disclosing confidential information is not absolute. For in-house counsel in the US, one of the most consequential exceptions is the "financial harm" exception. Following a spate of financial scandals in the 2000s—beginning with Sherron Watkins' decision to blow the whistle on Enron, which brought the issue of whistleblowing into the public eye[86]—financial accounting practices and corporate governance requirements underwent major legal changes.[87] As part of these reforms, the ABA revised its Model Code in 2003 to provide for a broader set of circumstances in which lawyers would be permitted to disclose confidential information to third parties.[88] Rule 1.6(b)(2) of the ABA Model Code permits a lawyer to disclose confidential information "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."[89] Additionally, Rule 1.6(b)(3) permits a lawyer to disclose confidential information in order to "prevent, mitigate or rectify" such injury, even if the crime or fraud has already occurred.[90] The normative rationale underlying these exceptions is that lawyers should have a duty to protect the public from financial harm.[91]

In addition to the exceptions to confidentiality noted above, Rule 1.13 of the ABA Model Code—which also formed part of the 2003 amendments to the ABA Model Code—has significant implications for in-house counsel's potential eligibility for whistleblower awards. Rule 1.13 permits a lawyer who works for an organization to disclose confidential information where the lawyer knows that someone associated with the organization is acting illegally and in a manner that is likely to result in substantial injury to the organization, provided the lawyer has exhausted internal reporting channels and the lawyer reasonably believes disclosure is necessary to prevent substantial injury to the organization.[92] In short, Rule 1.13 outlines

85 *Ibid*.

86 See generally Sherron S Watkins, "Ethical Conflicts at Enron: Moral Responsibility in Corporate Capitalism" (2003) 45:4 Cal Manag Rev 6.

87 See Sobowale, *supra* note 12 at 24.

88 *Ibid*.

89 *ABA Model Code*, *supra* note 2.

90 *Ibid*.

91 See Sobowale, *supra* note 12 at 24.

92 *ABA Model Code*, *supra* note 2.

a mandatory reporting pathway that *requires* in-house counsel to "report up" the corporate hierarchy, and then *permits* counsel, if necessary to prevent substantial injury to the organization, to "report out."[93]

It must be noted, however, that states have not adopted the ABA Model Code uniformly. For example, the New York Rules of Professional Conduct do not contain a "financial harm" exception; rather, lawyers practising in New York are permitted to reveal confidential information to the extent reasonably necessary to prevent "reasonably certain death or substantial bodily harm."[94] Nor do the New York Rules of Professional Conduct permit a lawyer to reveal confidential information to prevent the client from committing a *fraud*; rather, the exception only permits a lawyer to reveal confidential information to the extent reasonably necessary to prevent the client from committing a *crime*.[95] This would include some, but not all, forms of securities fraud.[96] Hence, the relevant ethical rules are not without variation between states.

2. The Duty to Avoid Conflicts of Interest

In addition to the general prohibition against disclosing confidential information, a lawyer must not represent a client if the lawyer is in a conflict of interest, which may take the form of a conflict between different clients, or between personal interests and client interests.[97] The discussion of this duty need only be brief, and it will focus on conflicts between personal and client interests. The ABA Model Code provides that a conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by...a personal interest of the lawyer."[98] Further, at least under the New York Rules of Professional Conduct, a lawyer is prohibited from acting for a client when his or her "professional judgment...will be adversely affected by the lawyer's own financial, business, property or other personal interests."[99] The ABA Model Code also provides that a lawyer is barred from "knowingly acquir[ing] an

93 The requirement to "report up" does not typically result in a breach of confidentiality, as the information stays within the organization (see Pacella, *supra* note 4 at 1045).

94 See New York State Bar Association, *New York Rules of Professional Conduct*, New York: NYSBA, 2017, r 1.6(b)(1) [*New York Rules of Professional Conduct*].

95 *Ibid*, r 1.6(b)(2).

96 See Barry Temkin, "May Lawyers Collect Whistleblower Awards Under Dodd-Frank Act?" (2013) 250:90 NYLJ 1.

97 *ABA Model Code*, *supra* note 2, r 1.7.

98 *Ibid*, r 1.7(2).

99 *New York Rules of Professional Conduct*, *supra* note 94, r 1.7(2).

ownership, possessory, security or other pecuniary interest adverse to a client," unless there is disclosure and informed consent.[100]

B. In-House Counsel's Eligibility for Whistleblower Awards under Dodd-Frank

The Dodd-Frank Whistleblower Program contains two important provisions dealing with in-house counsel's eligibility for whistleblower awards. First, § 240.21F-4(b)(4)(i) warns prospective whistleblowers that they will not be eligible for an award "[i]f you obtained the information through a communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise." Second, § 240.21F-4(4)(b)(4)(ii) warns prospective whistleblowers that they will not be eligible for an award "[i]f you obtained the information in connection with the legal representation of a client on whose behalf you or your employer or firm are providing services, and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure of that information would otherwise be permitted by an attorney pursuant to § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise."

As US legal scholars Kathleen Clark and Nancy J Moore observe, the two exceptions noted above—which exclude information that is (1) subject to solicitor-client privilege, or (2) obtained in connection with legal representation (*i.e.*, confidential)—would ordinarily preclude lawyers from obtaining whistleblower awards.[101] Indeed, the SEC has stated that the rules regarding award eligibility are intended to send "a clear, important signal to attorneys, clients and others that there will be no prospect of financial benefit for submitting information in violation of an attorney's ethical obligations."[102] Yet, "what the regulation takes away with one hand, it partially gives back with another."[103] Information that is privileged or confidential may nonetheless form the basis of a whistleblower award if the lawyer would be permitted to disclose the information (1) under applicable state

100 *ABA Model Code*, *supra* note 2, r 1.8.

101 Clark & Moore, *supra* note 21 at 1745.

102 *Securities Whistleblower Incentives and Protections*, 76 Fed Reg 34300 (2011) (codified at 17 CFR §§ 240, 249 (2017)) [SEC, Final Rules Commentary]; Greg Keating et al, "Retaliation and Whistleblower Claims by In-House Counsel", (March 2013) at 8, online: Littler Mendelson, PC <www.littler.com>.

103 Clark & Moore, *supra* note 21 at 1745.

bar rules; (2) under § 205.3(d)(2) (the "Part 205 Rules"), which is the SEC's earlier SOX regulation (discussed below); or (3) "otherwise."[104]

One author has described the scope of these exceptions permitting disclosure as "alarmingly broad,"[105] opening up the possibility that in-house counsel might qualify for a whistleblower award. Most significant, from the perspective of in-house counsel, is the Dodd-Frank Whistleblower Program's incorporation of the Part 205 Rules.[106] These rules came about through the *Sarbanes-Oxley Act*[107] (commonly referred to as "SOX") reforms of 2002.[108] They created "new confidentiality exceptions for lawyers appearing or practising before the SEC."[109] The phrase "appearing or practising" before the SEC is remarkably broad in scope: it covers not only those who appear before the SEC in an administrative proceeding, but also those advising on a US securities law issue regarding a document that will be filed with the SEC, or otherwise transacting any business with, or communicating with, the SEC.[110] In section 307 of SOX, Congress mandated the SEC to enact rules "setting forth minimum standards of professional conduct" that require securities lawyers to report evidence of violations of securities law, breaches of fiduciary duties, or similar violations of the issuers they represent to the lawyer's superiors within the organization and, if that fails, to the board of directors.[111] The Part 205 Rules do not suggest that in-house counsel must resign if efforts to report "up the ladder" fail.[112] Importantly, the Part 205 Rules permit in-house counsel to disclose

104 17 CFR §§ 240.21F-4(b)(4)(i)-(ii) (2017).

105 Pacella, *supra* note 4 at 1046.

106 For a more detailed discussion of the Part 205 Rules, see Ventry Jr, *supra* note 4.

107 *Sarbanes-Oxley Act of 2002*, Pub L No 107-204, 116 Stat 745 (2002).

108 The SOX reforms came on the heels of "major corporate and accounting scandals, such as those involving Enron, Tyco International, and WorldCom" (see New York County Lawyers' Association, Committee on Professional Ethics, Formal Opinion 746 (7 October 2013) at 2, online: NYCLA <www.nycla.org> [NYCLA Opinion]).

109 See Clark & Moore, *supra* note 21 at 1745.

110 *Ibid* at 1747.

111 9 USC 15 § 7245 (2012). The SEC's final rules requiring the lawyer to "report up" are contained in 17 CFR § 205.3(b) (2017) (see Pacella, *supra* note 4 at 1030–31). The SEC initially floated the idea of imposing a positive duty on in-house counsel to report evidence of wrongdoing to the SEC (*i.e.*, requiring a "noisy withdrawal"), but the SEC eventually dropped the idea in favour of less controversial internal reporting obligations (see *Implementation of Standards of Professional Conduct for Attorneys*, 68 Fed Reg 6324-01 (2003) (to be codified at 17 CFR § 205, 240 and 249); Nick Morgan & Haley Greenberg, "Is the SEC Encouraging Unethical Whistleblowing by Counsel?" (2014) 20:8 Westlaw J Securities Litigation & Regulation 1 at 1; Faqihi, *supra* note 59 at 3359).

112 Compare *FLSC Model Code*, *supra* note 2, r 3.2-8.

confidential information to the SEC if certain conditions are met. Section 205.3(d)(2) provides:

> [in-house counsel] may reveal to the [SEC], without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
>
> (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
>
> (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury…; suborning perjury…; or committing any act…that is likely to perpetrate a fraud upon the Commission; or
>
> (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.[113]

The effect of these provisions is that securities lawyers in the US find themselves subject to two layers of ethical standards bearing on their eligibility for whistleblower awards: state bar rules and the SEC's Part 205 Rules. The exceptions contained in these two layers of standards largely mirror those contained in the ABA Model Code. But not all states have adopted the ABA Model Rules, and conflicts persist with respect to when permissive reporting is allowed.[114] As a consequence, the SEC's Part 205 Rules often provide for a broader set of circumstances in which disclosure is permitted—namely, where the lawyer "reasonably believes" disclosure to the SEC is "necessary" in order (1) "[t]o prevent the issuer from committing a material violation that is likely to cause" substantial financial injury to the organization or investors, (2) to prevent the issuer "from committing perjury," or (3) "to rectify the consequences of a material violation that caused or may cause substantial injury" to the organization or investors in "furtherance of which the [lawyer's] services were used."[115] While both the state bar rules and the SEC's Part 205 Rules share the requirement that in-house counsel first report "up the ladder," the second step of reporting externally is permitted in a wider range of circumstances under the Part 205 Rules. In particular, it is the third exception—allowing

113 17 CFR § 205.3(d)(2) (2017).

114 Pacella, *supra* note 4 at 1045.

115 17 CFR § 205.3(d) (2017).

for disclosure in order to *rectify* the consequences of a material violation causing financial harm—that is most likely to be invoked by current or former in-house counsel seeking a whistleblower award.[116]

Given this dual-layered structure of ethical standards, which has no equivalent in Canada,[117] many have questioned whether the SEC's rules displace the more restrictive standards set out in state bar rules. Given the scope of this article, it is not necessary to canvass this debate in full. In short, the SEC included what is called a "pre-emption clause" in Part 205.6(c) providing that, as long as the lawyer complies in good faith with the SEC's rules, the lawyer shall not be subject to inconsistent standards imposed by any state or other US jurisdiction in which the attorney is admitted or practices.[118] The purported effect is to trump state bar rules. To this author's knowledge, the courts have yet to rule on the issue of whether SEC regulations can pre-empt state ethics rules, which leaves lawyers in a state of uncertainty.[119] Further exacerbating this uncertainty is the fact that a number of academic commentators and organizations have questioned whether such a pre-emption clause can truly have its purported effect.[120] Even state bar associations have raised concerns that the more permissive Part 205 Rules conflict with state bar rules, leading them to issue warnings to lawyers that they must abide by the more restrictive state bar standards.[121]

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116 See Clark & Moore, *supra* note 21 at 1746, n 274.

117 Securities commissions in Canada have not promulgated standalone codes of conduct applicable to lawyers appearing or practicing before them.

118 17 CFR § 205.6(c) (2017). See Morgan & Greenberg, *supra* note 111 at 3.

119 See Morgan & Greenberg, *supra* note 111 at 3; Clark & Moore, *supra* note 21 (noting that "[t]he issue of SOX pre-emption was never judicially resolved." Clark and Moore add that "it is not clear how a lawyer's disclosure under the Dodd-Frank program will result in a judicial determination of whether SOX pre-empts more restrictive state confidentiality rules, given that the statute requires the SEC to keep whistleblowers' identities confidential" at 1761).

120 See Morgan & Greenberg, *supra* note 111; Clark & Moore, *supra* note 21 ("we acknowledge that the pre-emptive status of the SEC's SOX regulation is at least questionable" at 1761); Barry R Temkin & Ben Moskovitz, "Lawyers as Whistleblowers Under the Dodd-Frank Wall Street Reform Act" (July/August 2012) 84:6 NY St BJ 10 at 18–22 (arguing that the SOX regulation does not pre-empt less permissive state confidentiality rules); Bruce A Green & Jordan Thomas, "Approaching Attorney Whistleblowing Post-Dodd Frank", *Law360* (11 April 2012), online: <www.law360.com> ("[a]lthough some may disagree, our view is that an attorney may disclose confidential information in accordance with [the Part 205 Rules] without regard to conflicting state confidentiality rules").

121 See Ethics Committee of the Washington State Bar Association, "Internal Formal Ethics Opinion 2003" (26 July 2003), cited in Pacella, *supra* note 4 at 1042 (stating that lawyers practicing in the state of Washington should not disclose confidential information otherwise than in accordance with Washington's state bar rules, and that the permissive disclosures allowed by the Part 205 Rules should not be followed).

It is conceivable, however, that the SOX reforms expanded the confidentiality exceptions available to in-house counsel who would otherwise be subject to more restrictive state bar standards, thereby increasing—perhaps significantly—the ability of in-house counsel to seek whistleblower awards.[122] Finally, it is worth noting that due to the restrictive manner in which statistics are reported under the Dodd-Frank Whistleblower Program, there is no way of determining how many tips, if any, have been submitted by in-house counsel, nor is there any method for determining how many awards, if any, have been granted to in-house counsel.[123]

To foreshadow arguments to come, the exceptions to the duty of confidentiality available in the US are, at least on paper, more permissive than those in Canada. The practical consequence is that in-house counsel south of the border have, at least in theory, greater leeway to disclose information to outside parties concerning a current or former employer's potential misconduct without breaching their ethical obligations. This, in turn, opens the door for in-house counsel to blow the whistle. The broader discretion that in-house counsel have to submit tips to regulatory authorities is a critical distinguishing factor. But before turning to that context, it will first be useful to examine several streams of argument in opposition to in-house counsel's eligibility for whistleblower awards that have emerged in the US.

C. Opposition to In-House Counsel's Eligibility for Whistleblower Awards

There are lessons to be learned from the reactions of various individuals and institutions in the US to in-house counsel's eligibility for whistleblower awards. The general tenor is this: the prospect of in-house counsel being remunerated for whistleblowing may not be such a good idea after all.

1. State Bar Associations

Some of the most strident opposition to in-house counsel's award eligibility has come from state bar associations. The leading example comes

122 See Clark & Moore, *supra* note 21 at 1700.

123 The Dodd-Frank Whistleblower Program allows whistleblowers to submit tips anonymously (though they must eventually provide identity-related information to the SEC to establish award eligibility), and the SEC is obliged to keep their identities secret (see 8 USC 15 § 78u-6(h)(2)(A) (2012), providing that "the Commission shall not disclose any information, including information...which could reasonably be expected to reveal the identity of a whistleblower," except in limited circumstances).

from New York. In October 2013, the professional ethics panel of the New York County Lawyers' Association (NYCLA) responded to the establishment of the Dodd-Frank Whistleblower Program by releasing a formal opinion.[124] The NYCLA concluded that it would be unethical under most circumstances for current or former in-house counsel to reveal confidential information in hopes of receiving a whistleblower award. The panel's opinion centered upon the two ethical duties referred to above: (1) the duty of confidentiality, and (2) the duty to avoid conflicts of interest.

With respect to the first duty, the NYCLA stated that "disclosure of confidential information in order to collect a whistleblower bounty is unlikely, in most instances, to be ethically justifiable."[125] The NYCLA emphasized that even when the alleged corporate wrongdoing rises to the level of criminality and has been perpetrated through the lawyer's services, thus presumptively falling within the established exceptions to confidentiality contained in the New York Rules of Professional Conduct, "preventing wrongdoing is not the same as collecting a bounty."[126] The NYCLA stated that there would be few circumstances in which it would be "reasonably necessary" to disclose confidential information for the purpose of collecting a whistleblower award.[127] The panel pointed out that "reporting out" is *permitted*, not *mandated* under the relevant rules.[128] The NYCLA also highlighted that lawyers of former clients, including former in-house counsel, would equally be barred from seeking awards.[129]

With respect to the second duty, the panel expressed the view that lawyers practising in New York presumptively may not seek whistleblower awards because doing so creates a conflict between the lawyer's interests and the client's. The NYCLA stated that an anticipated award in excess of $100,000 "presumptively gives rise to a conflict of interest between the

124 NYCLA Opinion, *supra* note 108. For a sharp critique of the NYCLA's opinion, see Ventry Jr, *supra* note 4 at 1510–44.

125 NYCLA Opinion, *supra* note 108 at 9.

126 *Ibid*.

127 *Ibid* at 7–9. See also Green & Thomas, *supra* note 120 ("[t]he large potential monetary awards offered by Dodd-Frank could motivate attorneys to become whistleblowers when [the Part 205 Rules] or an exception to the state confidentiality rule gives them discretion to report misconduct. But attorneys must be careful not to jump the gun by failing earnestly to go up the chain of command when required to do so. Disclosures outside the corporation are permitted only where 'necessary,' and they are unlikely to be deemed necessary when a conscientious lawyer could have convinced higher-ups to avert or rectify misconduct themselves").

128 NYCLA Opinion, *supra* note 108 at 7–8.

129 *Ibid* at 12–14.

lawyer's personal interest and that of the client," and that a conflict of interest would arise in the overwhelming majority of cases.[130] The panel noted that when a lawyer is contemplating whether to blow the whistle externally, "a financial incentive might tend to cloud a lawyer's professional judgment" and "[t]he prospect of financial benefit could place the attorney's personal interests in potential conflict with those of the client."[131] The NYCLA further noted that a lawyer confronted with potential corporate wrongdoing must dispassionately evaluate complex considerations such as whether a potential violation is material, whether it is criminal, whether the lawyer should report the wrongdoing up the corporate ladder, and whether the misconduct should be reported to an outside body.[132] A financial incentive may tend to cloud a lawyer's judgment.[133] The panel underscored that threats abound to a lawyer's duty to exercise "objective, dispassionate professional judgment" when the lawyer has the prospect of a whistleblower award in his or her mind.[134] The opinion added that, at least under the New York Rules of Professional Conduct, this conflict of interest would not likely be waivable by the client.[135] Finally, the NYCLA concluded that a lawyer's eligibility for whistleblower awards offends the fiduciary duty to the client because the lawyer could be seeking personal gain at the expense of the client or former client, thereby failing to act in the client or former client's best interest.[136]

2. The American Bar Association

The ABA has also expressed its disapproval of policies permitting lawyers to receive whistleblower awards. As the details of the Dodd-Frank Whistleblower Program were being ironed out, the ABA submitted a comment letter to the SEC in which the ABA expressed its concerns, challenging the proposal on two principal grounds.[137] First, the prospect of a substantial

130 *Ibid* at 11.

131 *Ibid* at 10–11.

132 *Ibid* at 10.

133 *Ibid* at 10–11. For a similar argument, see Temkin & Moskovitz, *supra* note 120 at 12 (arguing that the "complex and potentially disparate considerations [involved in representing an organization] are sufficiently challenging to the most diligent and experienced corporate counsel without adding the additional temptation of a substantial personal monetary bounty. The prospect that lawyers may personally benefit by reporting out alleged corporate misconduct could cloud their professional judgment").

134 NYCLA Opinion, *supra* note 108 at 10.

135 *Ibid* at 11–12 (citing *New York Rules of Professional Conduct*, *supra* note 94, r 1.7(b)).

136 *Ibid* at 13.

137 Letter from Stephen N Zack, President of the American Bar Association, to the US Securities and Exchange Commission (20 May 2011), online: <www.sec.gov>.

award may undermine the confidential relationship between lawyer and client. Second, whistleblower awards create a conflict of interest. The ABA underscored that "[i]n their representation of clients, lawyers should be focused solely on providing the most competent and professionally responsible representation, not on the benefits they may obtain were they to use for personal gain the information they have been provided by their clients."[138]

3. Academic Commentators and Practitioners

Academic commentators and legal practitioners, too, have lamented the availability of monetary awards for in-house counsel. One law firm commentary warns that the disconnect between the permissive Dodd-Frank award eligibility provisions and state bar rules creates "the perfect storm."[139] As another author summarizes:

> There is a growing concern in the U.S. that as the "relator's share" awarded to whistleblowers continues to rise and is increasingly well publicized, and the number of statutes encouraging reporting and providing for recovery to those who report increases, lawyers serving as in-house counsel or compliance officers may turn the tables against their employers.[140]

Some have argued, pointing to the history and nature of the legal profession, that whistleblowing by in-house counsel represents a "further slide down the slippery slope on which [the legal] profession has been riding—away from the ideals of zealous client representation, based upon the bedrock principle of clients' absolute confidence in their attorneys' duty of confidentiality."[141] Allowing for monetary compensation for such activity, some argue, may just be the next step down this slippery slope.

D. The US Case Law on In-House Counsel's Ability to Receive Whistleblower Awards

The US judiciary has indicated that in-house counsel who make disclosures in an attempt to receive whistleblower awards tread a fine line. Given that

138 *Ibid* at 3.

139 Morgan & Greenberg, *supra* note 111 at 3.

140 Renato Pontello, "Canada Considers: Should In-House Counsel Be Eligible for Whistleblower Compensation?", *Canadian Lawyer* (12 October 2015), online: <www.canadianlawyermag.com>.

141 C Evan Steward, "In-House Counsel as Whistleblower: A Rat with a Remedy?" (2009) Practising Law Institute, Ethics in Context 145 at 153, cited in Banick, *supra* note 57 at 1885.

whistleblower awards have only recently become a possibility for in-house counsel in Canada, Canadian courts have yet to render a decision on the issue. But there is much to be learned from the more developed US jurisprudence. Although, to date, no case has been brought forward involving in-house counsel seeking a whistleblower award under the Dodd-Frank Whistleblower Program,[142] several cases have emerged in which a lawyer sought an award through a *qui tam* suit under the *False Claims Act*, which as noted above is essentially a form of whistleblower award.

According to two US scholars writing in 2015, of the nearly 10,000 *qui tam* cases brought under the *False Claims Act* since the regime was strengthened in 1986, a mere five have involved a lawyer/relator suing a former employer.[143] Not a single case has involved in-house counsel suing his or her *current* employer.[144] In each case, in-house counsel raised the relevant issue internally first, only to be retaliated against.[145] Also, in each case, the court dismissed the action before trial.[146] While two were dismissed on grounds unrelated to legal ethics, three were dismissed on the basis that the applicable state bar rules prevented the lawyer/relator from disclosing the information necessary to proceed with the suit.[147] In none of these three cases did the court find that lawyers are *per se* excluded from whistleblower award eligibility.[148] These three cases are reviewed below, with a view to illustrating, through concrete examples, how the relationship between in-house counsel's ethical duties and the availability of monetary incentives for whistleblowing is viewed through the eyes of the US judiciary.

1. Doe

In the 1994 case of *United States ex rel John Doe v X Corp*,[149] the first case in which a court examined a lawyer's duty of confidentiality in the context of a *False Claims Act* suit, the US District Court for the Eastern District of Virginia rendered a decision casting doubt upon in-house counsel's eligibility for whistleblower awards. X Corp., a major government supplier of computer equipment, hired Doe as in-house counsel. Doe became concerned that X Corp. might be violating certain federal acquisition regulations. He

142 See Clark & Moore, *supra* note 21 at 1748.
143 See *ibid* at 1705.
144 See *ibid*.
145 See *ibid* at 1705–06.
146 See *ibid* at 1706.
147 See *ibid* at 1706.
148 See *ibid*.
149 862 F Supp 1502 (ED Va 1994).

reported his concerns to his supervisors only to be met with a termination notice. Upon his departure, Doe took with him approximately 4,300 copies of X Corp. documents he believed supported his allegations that X Corp. had defrauded the government. To remedy what he believed to be fraudulent practices by his former employer, Doe instigated a *qui tam* action under the *False Claims Act*.

Ultimately, Doe's claim was dismissed because, in the Court's view, he could not ethically disclose the confidential information that allegedly supported the action. The Court reasoned that "[b]ecause the complaint contains X Corp.'s confidences and secrets, which Doe has been enjoined under state law from disclosing, Doe cannot serve as a relator in this action."[150] The Court also noted that "lawyers are not *per se* barred from serving as *qui tam* relators against former clients"[151] and that "to the extent that state law permits a disclosure of client confidences, such as to prevent a future or ongoing crime or fraud, then the attorney's use of the *qui tam* mechanism to expose that fraud should be encouraged, not deterred."[152]

Doe illustrates two broad principles. First, in-house counsel fly dangerously close to the sun when they seek whistleblower awards in exchange for client-related information. As the Court recognized, where a lawyer's disclosure of client confidences is prohibited by professional ethical duties, that attorney risks disciplinary proceedings should he or she attempt to make the disclosure in an attempt to seek compensation.[153] Second, it would appear some courts are willing to embrace the proposition that, provided ethical responsibilities are observed, in-house counsel can, and should be encouraged to, seek and receive whistleblower awards.

2. Bury

The second major US decision exploring the tension between a lawyer's ethical duties and in-house counsel's eligibility for whistleblower awards came in 2002, in the case of *Bury v Community Hospitals of Central California*.[154] Robert Bury, former in-house counsel for a hospital, sued his former employer under California's *False Claims Act*[155] after his termination. Like its federal counterpart, the California *False Claims Act* requires a *qui tam* plaintiff to disclose all material evidence and information the

150 *Ibid* at 1509–10.

151 *Ibid* at 1506.

152 *Ibid* at 1507–08.

153 *Ibid* at 1507.

154 2002 Cal App Unpub Lexis 1035 (Cal Ct App 2002).

155 *False Claims Act* §§ 12650–12656 (2012).

plaintiff possesses. The issue before the California Court of Appeal was whether Bury's ethical duties precluded his action.

The Court stated that Bury's suit could proceed only if California state bar rules did not prevent Bury from disclosing sufficient information to support his claim. Unlike the rules applicable in New York, California's state bar rules do not provide for an exception to confidentiality based on client fraud; disclosure is permitted only to prevent criminal acts likely to result in death or substantial bodily harm.[156] Consequently, the Court concluded, Bury could not pursue his claim.

3. Quest Diagnostics

The third case in this saga, *United States ex rel Fair Laboratory Practices Associates v Quest Diagnostics Inc*,[157] offers the leading modern statement on in-house counsel's ability to pursue whistleblower awards through *qui tam* suits. A former in-house counsel, Bibi, attempted to bring a *qui tam* action under the federal *False Claims Act* against a medical diagnostics services company, Quest Diagnostics, that had purchased his former employer, Unilab. During his tenure, Bibi had allegedly advised Unilab that its pricing practices violated federal anti-kickback laws, only to be frozen out of the company and eventually replaced.

The United States District Court for the Southern District of New York[158] found that Bibi had violated his ethical duties by attempting to blow the whistle on his former employer. Specifically, two breaches occurred: (1) Bibi sought to represent a client with adverse interests to a former client in "the same or a substantially related matter," and (2) Bibi attempted to use confidential information to the disadvantage of a former client. The latter finding is the relevant one for present purposes. Rule 1.6(b) of the New York Rules of Professional Responsibility provides that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary…to prevent the client from committing a crime."[159] This is the "ongoing or future crime" exception.[160]

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156 State Bar of California, *California Rules of Professional Conduct*, r 3-100(B). See Clark & Moore, *supra* note 21 at 1708.

157 *Supra* note 17.

158 For additional commentary on this decision, see Cole J Schlabach, "Second Circuit: In-House Counsel May Not Seek to Profit as Whistleblowers Against Former Employers, (13 November 2013), online: DLA Piper LLP Publications <www.dlapiper.com>.

159 *New York Rules of Professional Conduct*, *supra* note 94, r 1.6(b)(2).

160 This exception typically applies when "(1) the attorney's advice was sought in furtherance of a knowingly unlawful end and (2) the unlawful end was a crime or civil fraud of moral

However, unlike the ABA Model Code, New York's Rules of Professional Responsibility do not permit the disclosure of confidential information to *rectify* injury resulting from client crimes.[161] Accordingly, the District Court held that Bibi's disclosure had exceeded the scope of this exclusion because it contained confidential information pertaining to crimes *already completed*.[162] The District Court held that Bibi's decision to "'spill his guts' and freely disclose Unilab's confidential information" went beyond anything that was authorized under the "ongoing or future crime" exception, making it "virtually impossible to identify and distinguish each improper disclosure."[163] Consequently, the Court dismissed the suit.

On appeal, the US Court of Appeals for the Second Circuit upheld the lower court's decision, finding that the dismissal of the suit was necessary to prevent the use of Bibi's unethical disclosures against the defendants. In *obiter*, the Second Circuit cited the formal opinion issued by the NYCLA, discussed above, stating that "[a]s a general principle, there are few circumstances, if any, in which…it would be reasonably necessary within the meaning of [the 'ongoing or future crime' exception] for a lawyer to pursue the steps necessary to collect a bounty as a reward for revealing confidential material."[164]

Quest Diagnostics illustrates how US courts view the tension between in-house counsel's ability to disclose information regarding current or former employers (and, in turn, in-house counsel's potential eligibility for whistleblower awards) and a lawyer's ethical duties. The judgment suggests that even when applying US ethical standards—which, as will be discussed below, provide for a wider set of circumstances in which disclosure of confidential information is permitted—the argument that in-house counsel have breached their ethical duties in making disclosure will not be easily dismissed. In sum, the sanctity of the lawyer-client relationship will,

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turpitude" (Schlabach, *supra* note 158, citing James A Gardner, "The Crime or Fraud Exception to the Attorney-Client Privilege" (1961) 47:7 ABA J 708 at 709).

161 See *New York Rules of Professional Conduct*, *supra* note 94, r 1.6(b)(2) (permitting disclosure to "prevent the client from committing a crime"). Compare *ABA Model Code*, *supra* note 2, r 1.6(b)(3) (permitting disclosure "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services").

162 *Quest Diagnostics I*, *supra* note 17 at 33–38.

163 *Ibid* at 42.

164 *Quest Diagnostics II*, *supra* note 17 at 11, n 17 (the Second Circuit declined to rule on the issue of whether counsel had also breached the prohibition against representing a party adverse in interest to a former client in "the same or a substantially related matter").

in many if not most circumstances, trump the objective of encouraging in-house counsel to blow the whistle on wrongdoing.[165]

4. Conclusion

The US judiciary has sent a clear message that a lawyer's scope to disclose client information in exchange for a monetary award is limited, particularly by the duty of confidentiality and the duty to avoid conflicts of interest. In light of this conclusion, it is worth asking: Is attempting to permit in-house counsel to receive whistleblower awards worth the risks? In considering this question, it should be observed that, as of 2015, a mere five cases had been brought forward in the US by in-house counsel under the *False Claims Act* since the regime was strengthened in 1986.[166] On a simple cost-benefit analysis, there is a compelling argument that it would be disproportionate to risk eroding the sanctity of the lawyer-client relationship in the hopes of encouraging a handful of in-house counsel to blow the whistle on alleged wrongdoing. Put differently, the benefits may not be worth the risks.

Having charted the lay of the land in the US, Part III turns to the situation in Canada. The analysis below will attempt to demonstrate that Canadian in-house counsel should be wary of the suggestion that they could make disclosure about their current or former employers and seek whistleblower awards without falling afoul of their ethical duties.

III. THE RELATIONSHIP BETWEEN IN-HOUSE COUNSEL'S ETHICAL DUTIES AND THEIR ELIGIBILITY FOR WHISTLEBLOWER AWARDS IN CANADA

A. The Duty of Confidentiality and the Duty to Avoid Conflicts of Interest

As is the case in the US, when it comes to in-house counsel's eligibility to make disclosure and collect a whistleblower award, two of the most consequential ethical duties in Canada are (1) the duty of confidentiality, and (2) the duty to avoid conflicts of interest. Again, the discussion of

165 See Schlabach, *supra* note 158.

166 Given that Canada has a population of around 36 million compared to the US's 321 million, and Canada's stock market capitalization of US$2 trillion is dwarfed by the US's US$18.6 trillion (representing over 50 percent of global market capitalization), we can reasonably expect that there would be even fewer cases brought forward by in-house counsel in Canada (see FindTheData, *Country Compare—United States and Canada*, online: <www.country-facts.findthedata.com>; Quandl, *Stock Market Capitalization by Country*, online: <www.quandl.com>).

these topics below will be limited to the bare essentials, and readers are encouraged to consult leading works[167] on the subject of lawyers' ethics to supplement the limited analysis below.

1. The Duty of Confidentiality

A client has a fundamental right to communicate with a legal advisor in all confidence, and a lawyer has a corresponding duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship.[168] The duty of confidentiality survives the professional relationship and continues indefinitely.[169] This duty to maintain confidentiality is an aspect of the fiduciary relationship between lawyer and client.

Although the duty of confidentiality is often mistakenly conflated with solicitor-client privilege,[170] the two concepts are distinct.[171] While confidentiality and privilege are each based on the principle that a lawyer owes a duty of loyalty to the client, the source, scope, and enforcement of the respective duties are separate. The differences are neatly captured by Canadian legal scholar Brent Cotter.[172] For present purposes, two points of distinction are particularly noteworthy. First, confidentiality is an ethical principle, whereas solicitor-client privilege is a legal duty.[173] Second, the duty of confidentiality is engaged with respect to *all* information acquired by the lawyer in the course of the professional relationship, whereas solicitor-client privilege is limited to private communications that take place between lawyer and client for the purpose of giving or receiving legal advice.[174]

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167 See e.g. Alice Woolley et al, *Lawyers' Ethics and Professional Regulation*, 3rd ed (Toronto: LexisNexis Canada, 2017) [Woolley et al]; Alice Woolley, *Understanding Lawyers' Ethics in Canada*, 2nd ed (Toronto: LexisNexis Canada, 2016); Adam M Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014); Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 2017) (loose-leaf, updated 2017, release 4).

168 See *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 at 875, 141 DLR (3d) 590 [*Descôteaux*].

169 See *FLSC Model Code*, *supra* note 2, r 3.2-3, commentary 1.

170 For a comprehensive analysis of solicitor-client privilege in Canada, see Dodek, *supra* note 167.

171 See Amy Salyzyn, "Indecent Proposal?: Whistleblowing and Putting a Price on Breaching the Rules of Professional Conduct" (12 August 2016), *Slaw* (blog), online: <www.slaw.ca> [Salyzyn, "Indecent Proposal?"].

172 Brent Cotter, "The Lawyer's Duty to Preserve Client Confidences" in Alice Woolley et al, eds, *Lawyers' Ethics and Professional Regulation*, 2nd ed (Markham: LexisNexis Canada, 2012) ch 4 [Cotter, "Lawyer's Duty"].

173 See *R v Gruenke*, [1991] 3 SCR 263 at 289, 130 NR 161 (describing solicitor-client privilege as "essential to the effective operation of the legal system").

174 See *Descôteaux*, *supra* note 168. See also *FLSC Model Code*, *supra* note 2, r 3.3-1, commentary 2 ("[t]he duty to maintain confidentiality] must be distinguished from the evidentiary rule

Despite their differences, solicitor-client privilege and the duty of confidentiality both serve a shared purpose. The policy rationale is that a client must be able to communicate with his or her lawyer fully and frankly, without reservation, if the lawyer is to render effective service, and to this end, the client must be assured the lawyer will hold all information in strict confidence. In short, the client who is assured of complete secrecy is more likely to provide counsel with all information pertaining to their legal issues, which in turn enables counsel to better serve the client and protect the client's legal rights.[175] In addition, these duties recognize the autonomy and dignity of the client by protecting the client's privacy.[176]

Rule 3.3-1 of the FLSC Model Code stipulates the following:

> A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
> (a) expressly or impliedly authorized by the client;
> (b) required by law or a court to do so;
> (c) required to deliver the information to the Law Society; or
> (d) otherwise permitted by this rule.[177]

Grounded in the fiduciary relationship between lawyer and client, Rule 3.3-2 states, "A lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client."[178] The commentary to Rule 3.3-2 goes on to note that, in the absence of informed consent, "[t]he fiduciary relationship between a lawyer and a client forbids the lawyer…from benefiting from the lawyer's use of a client's confidential information."[179]

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of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge").

175 See Cotter, "Lawyer's Duty", *supra* note 172.

176 See *ibid*.

177 *FLSC Model Code*, *supra* note 2, r 3.3-1.

178 *Ibid*, r 3.3-2.

179 *Ibid*, r 3.3-2, commentary 1. On its face, this ethical duty calls into question the notion that a lawyer could seek and receive a whistleblower award, as in most circumstances that would arguably involve the lawyer's deriving a "benefit" by disclosing the client's confidential information. On the other hand, we might question whether the receipt of a whistleblower award results in an overall "benefit" for the lawyer, to the extent that whistleblower awards may

Although the ABA's Model Code recognizes a "financial harm" exception, the same cannot be said of most professional codes in Canada. With the exception of the Law Society of New Brunswick,[180] law societies in Canada have so far opted not to follow the US model of allowing exceptions to the duty of confidentiality based on property interests.[181] In 2010, the Advisory Committee on the Future Harm Exception recommended that the FLSC Model Code be amended to include permitted disclosure based on imminent risk of "substantial financial injury."[182] Following consultation with the law societies, however, it was agreed that further discussion was needed, and we have yet to see decisive action on the matter.[183] At present, the disclosure of confidential information by most Canadian lawyers is permitted only in very limited circumstances, such as "when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm."[184] Such circumstances will rarely, if ever, be present in matters of securities law.

As is the case in the US, Canadian counsel employed or retained by an organization are singled out in codes of ethics. Rule 3.2-8 of the FLSC Model Code stipulates that a lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act dishonestly, fraudulently, criminally, or illegally *must* report the misconduct "up the ladder"—first to counsel's supervisor and the chief legal officer, or the chief legal officer and the chief executive officer, then (if the misconduct is not stopped) to the next highest persons or groups, including, ultimately, the board of directors. If the misconduct persists, in-house counsel *must* withdraw in a manner that accords with the withdrawal procedures set out in the rules of professional conduct.[185] As Canadian legal scholar Amy Salyzyn points out, according to these procedural requirements, a lawyer acting for an organization who has reported "up the ladder" only to have

be viewed as compensatory awards designed to offset, to an imperfect extent, the lawyer's financial, personal, and professional losses incurred as a result of blowing the whistle.

180 See Law Society of New Brunswick, *Code of Professional Conduct*, 2017, r 3.3-3B [*New Brunswick Code of Conduct*] (which provides that "[a] lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of substantial financial injury to an individual caused by an unlawful act that is likely to be committed, and disclosure is necessary to prevent the injury").

181 Sobowale, *supra* note 12 at 26.

182 *Ibid*.

183 *Ibid*.

184 See *FLSC Model Code*, *supra* note 2, r 3.3-3.

185 *Ibid*, r 3.3-8.

been met with an inadequate response must *silently* withdraw,[186] which in practice often means resigning from one's post entirely.[187] With respect to the "silence" component of this equation, the commentary to Rule 3.3 of the Law Society of Ontario's *Rules of Professional Conduct* specifies that although a lawyer should not encourage or participate in any wrongdoing, "it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct."[188] The key takeaway here is this: quite apart from the issue of awards, in-house counsel practising in Canada are generally prohibited from disclosing to authorities confidential information relating to financial harm in the first place.

2. The Duty to Avoid Conflicts of Interest

Again arising from the fiduciary relationship between lawyer and client, a lawyer has a duty to avoid conflicts of interest. This duty need only be discussed briefly. Rule 3.4-1 stipulates that "[a] lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code."[189] The definition of "conflict of interest" provided in Rule 1.1-1 clarifies that "a 'conflict of interest' means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person."[190] The commentary to Rule 3.4-1 adds that "[e]ffective representation may be threatened where a lawyer is tempted to prefer other interests over those of his or her own client [such as] the lawyer's own interests."[191] Lawyers must, therefore, shun conflicts arising out of their personal interests, whether pecuniary or non-pecuniary. The duty to avoid conflicts of interest applies vis-à-vis both current and former clients.[192]

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186 Amy Salyzyn, "Should Lawyers Be Paid to Snitch on Their Clients? (Spoiler! No.)" (22 January 2016), *Slaw* (blog), online: <www.slaw.ca/2016/01/22/should-lawyers-be-paid-to-snitch-on-their-clients-spoiler-no/> [emphasis in original].

187 See *FLSC Model Code*, *supra* note 2, r 3.2-8, commentary 5 (acknowledging that "[i]n some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter").

188 Law Society of Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2014, r 3.3, commentary 5.1 [*LSO Rules of Professional Conduct*].

189 *FLSC Model Code*, *supra* note 2, r 3.4-1.

190 *Ibid*, r 1.1-1.

191 *Ibid*, r 3.4-1, commentary 3.

192 See e.g. Law Society of British Columbia, *Code of Professional Conduct*, Law Society of British Columbia, 2013, r 3.4-1, commentary 3.

B. In-House Counsel's Eligibility for Whistleblower Awards under the OSC Whistleblower Policy

Serious breaches of securities laws cause significant harm to investors, public confidence in capital markets, the fair and efficient operation of capital markets, and the Canadian economy as a whole.[193] Sensibly, the OSC Whistleblower Policy seeks to tap those closest to potential wrongdoing to avoid the devastating consequences wrought by securities misconduct. The underlying policy rationale animating the Policy is that by providing financial incentives to prospective whistleblowers, individuals with information essential to preventing or sanctioning securities-related misconduct will be more inclined to bring forward that information. This will in turn contribute to more effective regulation and better policy outcomes, advancing the public interest.

Not everyone is invited to seek whistleblower awards under the Policy. To be eligible, whistleblowers and the information they submit must meet specific criteria. One requirement is that the information submitted be "original information," which, as defined, excludes information the whistleblower obtained "through a communication that was subject to solicitor-client privilege."[194] Accordingly, the Policy is unequivocal on the issue of privileged information: if the information is privileged, then it cannot be the subject of a whistleblower award. This stricture does not, however, deny in-house counsel's ability to seek whistleblower awards outright, since in-house counsel are privy not only to privileged information, but also to confidential information that does not attract privilege. Thus, it does not amount to a blanket prohibition excluding in-house counsel from award eligibility.

Despite the absence of a blanket prohibition, the Policy contains provisions restricting in-house counsel's ability to seek awards. Section 15(1)(d) provides:

> 15.(1) …whistleblowers in one or more of the following categories will generally be considered ineligible for a whistleblower award:
>
> …

193 See *FLSC Model Code*, *supra* note 2, r 3.2-8, commentary 1 (recognizing that "the misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large").

194 OSC Whistleblower Policy, *supra* note 8, s 1(b)(i).

> (d) those who obtained information in connection with providing legal services to, or conducting the legal representation of, an employer that is, or that employs, the subject of the whistleblower submission, unless disclosure of that information would otherwise be permitted by a lawyer under applicable provincial or territorial bar or law society rules…[195]

It is probable that "providing legal services" would capture both privileged information as well as confidential information that is not privileged. Since privileged information is already excluded from the definition of "original information," the principal effect of this provision is to remove the submission of confidential (but not privileged) information from the scope of award-eligible tips, unless such disclosure would otherwise be permitted by applicable provincial or territorial bar or law society rules.

Although this provision appears to preclude disclosures that run afoul of provincial and territorial codes of conduct, what the Policy takes with one hand, it gives with the other. Section 15(2) of the Policy provides that a whistleblower referenced in section 15(1)(d) (*i.e.*, an individual submitting information obtained by the individual in connection with providing legal services to an employer), as well as certain other whistleblowers such as auditors, may nonetheless be eligible for a whistleblower award if:

> (a) the whistleblower has a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the subject of the whistleblower submission from engaging in conduct that is likely to cause or continue to cause substantial injury to the financial interest or property of the entity or investors;
> (b) the whistleblower has a reasonable basis to believe the subject of the whistleblower submission is engaging in conduct that will impede an investigation of the misconduct; or
> (c) at least 120 days have elapsed since the whistleblower provided the information to the relevant entity's audit committee, chief legal officer, CCO (or their respective functional equivalents) or the individual's supervisor, or, at least 120 days have elapsed since the whistleblower received the information, if in the circumstances the whistleblower received the information, the whistleblower became aware that one or more of those individuals were already aware of the information.[196]

195 *Ibid*, s 15(1)(d).
196 *Ibid*, s 15(2).

As will be developed below, the three exceptions in section 15(2) reproduced above are potentially problematic, and they risk encouraging well-meaning in-house counsel to inadvertently breach their ethical duties.

C. Opposition to In-House's Eligibility for Whistleblower Awards under the OSC Whistleblower Policy

1. Apparent Inconsistencies

The provisions outlined above appear to be inconsistent with lawyers' ethical duties as expressed in provincial and territorial codes of conduct. It is as if section 15(2) of the Policy were intended to pre-empt Canadian codes of conduct, much like how the SEC has purported to pre-empt state bar rules through Part 205.6(c) of its SOX regulations. Unlike the SEC's pre-emption clause, however, the OSC's attempt at pre-emption was never authorized through legislation. I see no reason to think the OSC, as a securities regulator, can promulgate standards of lawyers' ethics that displace those promulgated by law societies (or, for that matter, the courts). With respect, it may be that section 15(2) represents a well-intentioned but unsustainable attempt to broaden the exceptions to in-house counsel's duty of confidentiality.

It will not have escaped the reader that the first of the three exceptions contained in section 15(2) bears a close resemblance to the "financial harm" exception to the duty of confidentiality operative in many US states. The problem, however, is that provincial and territorial codes of conduct, unlike many of their state counterparts in the US, generally do not provide for a "financial harm" exception. Whether or not one subscribes to the view that lawyers *should* be permitted to disclose confidential information in the face of potential financial harm to their corporate employers or to investors—and I make no attempt to engage in that normative debate here—the fact of the matter is that such an exception has not generally been recognized in codes of conduct (or, for that matter, by courts) in Canada.

With respect, the Policy appears to try to force an exception without the proper foundation. The problem arises from the importation of US standards without proper regard to contextual differences. One cannot simply transplant award eligibility rules contained in US whistleblower programs into Canadian whistleblower programs, as the ethical rules permitting disclosure in the US differ from those in Canada. The financial harm exception is a prime example. It is entirely logical that the Dodd-Frank

Whistleblower Program permits in-house counsel to disclose confidential information where necessary to avoid financial harm and to receive a whistleblower award for doing so, since such disclosure is already authorized under the SEC's Part 205 Rules and many state bar rules. Yet, this state of affairs does not map onto the Canadian context. Because there is no recognized exception in most provincial and territorial codes of conduct permitting lawyers to disclose confidential information in order to avoid substantial injury to financial interests or property, the attempt to provide for such an exception only creates confusion and inconsistency, and surely invites future litigation. Unless and until Canadian law societies generally adopt a financial harm exception, Canadian courts render a decision opening up such an exception, or law societies carve out a specific exception for in-house counsel engaging in whistleblowing,[197] any attempt by securities regulators to encourage in-house counsel to blow the whistle externally on the basis of financial harm should be avoided.

The second and third exceptions in section 15(2) of the Policy are also potentially problematic. As discussed above, in Canada, in-house counsel who know that their employer "has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally" have an ethical duty to report the misconduct "up the ladder" and, if the misconduct persists, to withdrawal silently.[198] As Amy Salyzyn points out, the exception allowing for award eligibility in section 15(2)(c) is at odds with the procedure set out in provincial and territorial codes of conduct, as it expressly contemplates disclosure after counsel has exhausted internal reporting mechanisms, rather than *silent* withdrawal.[199] A similar analysis applies to the exception contained in section 15(2)(b). "[I]mped[ing] an investigation of the misconduct" is itself dishonest, criminal, or illegal action. Therefore, in that situation, in-house counsel would still be obliged by the applicable code of conduct to report the misconduct (*i.e.*, the attempt to impede the investigation) "up the ladder" and, if necessary, to make a silent withdrawal. Although it seems obvious that in-house counsel's efforts in such a scenario would be futile, this course of action is mandated by codes of conduct. Although securities regulators may wish for a different ethical

197 Canadian law societies have already created exceptions aimed at protecting the public interest (*e.g.*, criminal defence counsel's duty to report to law enforcement imminent and credible threats to public safety and bodily harm). It would presumably be open to law societies to create a specific exception for whistleblowing under programs such as the OSC's.

198 *FLSC Model Code*, *supra* note 2, rr 3.2-8, 3.7.

199 Salyzyn, "Indecent Proposal?", *supra* note 171.

framework, they cannot bring about that framework unilaterally. In Canada, it falls to law societies, not securities regulators, to set the baseline standards governing lawyers' conduct.

Section 16(1) of the Policy, when applied to in-house counsel, exacerbates the tensions explored above:

> The Commission encourages whistleblowers who are employees to report potential violations of Ontario securities law in the workplace through an internal compliance and reporting mechanism in accordance with their employer's internal compliance and reporting protocols. However, *the Commission does not require whistleblowers to do so*, recognizing that there may be circumstances in which a whistleblower may appropriately wish not to report to an internal compliance and reporting mechanism.[200]

Yet, Rule 3.2-8 of the FLSC Model Code is unequivocal: when in-house counsel knows that the organization has acted, is acting, or intends to act dishonestly, fraudulently, criminally, or illegally, the lawyer "must" advise the person from whom the lawyer takes instructions and the chief legal officer and, if that fails, progressively the next highest persons or groups, including, ultimately, the board of directors.[201] Thus, insofar as section 16(1) of the Policy applies to in-house counsel, there is an apparent inconsistency between the course of action suggested in the Policy and that required by Rule 3.2-8 of the FLSC Model Code. To be clear, insofar as section 16(1) of the Policy applies to individuals who are not in-house counsel, it is not problematic *per se*. But insofar as it applies to in-house counsel, it creates an inconsistency. One must ask: what are the circumstances in which in-house counsel might "appropriately wish not to report to an internal compliance and reporting mechanism" and instead go external? As will be developed below, practically speaking, such circumstances are unlikely to arise with any real frequency. Accordingly, section 16(1) should be revised to clarify that it does not apply to in-house counsel.

There is a normative argument that in-house counsel should be permitted (and even encouraged) to blow the whistle externally when the organizational culture is so "rotten" that internal whistleblowing will surely be ineffectual. Yet, whatever the merits of this position, the simple response is that provincial and territorial codes of conduct do not allow for this course of action. An in-house lawyer who raises concerns internally

200 OSC Whistleblower Policy, *supra* note 8, s 16(1) [emphasis added].
201 *FLSC Model Code*, *supra* note 2, 3.2-8.

only to be met with silence (or worse) is obliged to withdraw *silently*. Consequently, if in-house counsel in Canada are to be rewarded for blowing the whistle externally after having exhausted internal reporting mechanisms, codes of conduct in Canada would first have to be amended so as to allow for a "noisy withdrawal." Only then could in-house counsel blow the whistle and, in turn, seek an award without breaching their ethical duties.

These are not the only critiques that can be made of the Policy's award eligibility provisions. Calls to reconsider in-house counsel's award eligibility arose shortly after the OSC floated the proposal. On October 28, 2015, the OSC released a draft policy and solicited feedback from the public on the following question: "Do you agree with in-house counsel being eligible for a whistleblower award?"[202] Lawyers, academics, and law societies stepped forward to voice their concerns.

In January 2016, a group of leading Canadian law professors and practitioners active in legal ethics penned a letter to the OSC voicing their opinion that in-house counsel should not be eligible for whistleblower awards under any circumstances.[203] The letter highlights how the OSC's eligibility Policy generates confusion around lawyers' ethical duties, leaving counsel in doubt about what they can and cannot do. In particular, the letter lists four key concerns, which I paraphrase below:

1. One possible interpretation of the exclusions contained in the definition of "original information" in the Policy is that they exclude in-house counsel from award eligibility entirely. Yet, the Policy goes on in a later section to state that in-house counsel *could*, provided they act in accordance with applicable rules of professional conduct, be eligible for an award. This inconsistency creates confusion.
2. To the extent that in-house counsel are not excluded from eligibility under the definition of "original information," the Policy conflicts with a lawyer's ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship.
3. To the extent that the Policy provides for financial awards for disclosure, the Policy creates a conflict with the lawyer's duty of commitment to the client's cause, which was recognized as a principle of

202 Ontario Securities Commission, "OSC Notice and Request for Comment: Proposed OSC Policy 15-601 - Whistleblower Program" (28 October 2015), online: <www.osc.gov.on.ca>.

203 Letter from Brent Cotter et al to the Ontario Securities Commission (12 January 2016), online: <www.osc.gov.on.ca> [Letter from Brent Cotter et al].

fundamental justice in *Canada (Attorney General) v Federation of Law Societies of Canada*.[204] The Policy also places lawyers in a conflict of interest vis-à-vis the client, contrary to a lawyer's fiduciary duties.

4. The Policy's attempt to prohibit disclosures that are impermissible under lawyers' ethical duties is inadequate. A lawyer's ethical obligations are defined not only by provincial and territorial codes of conduct, but also by common-law rules articulated by the courts. In addition, the Policy conflicts with a lawyer's ethical duties to "report up" in the face of a client acting or intending to act dishonestly, fraudulently, criminally, or illegally because provincial and territorial codes of conduct require "silent" as opposed to "noisy" withdrawal.[205]

These scholars and practitioners raise a compelling concern that has not yet been discussed in this article: the lawyer's duty of commitment to the client's cause. At first blush, one struggles to reconcile the notion that in-house counsel could seek whistleblower awards as contemplated by the OSC with the lawyer's duty of commitment to the client's cause, which, as noted above, the Supreme Court of Canada recognized as a principle of fundamental justice in *Canada (Attorney General) v Federation of Law Societies of Canada*.[206] There, Justice Cromwell stated that "[a] client must be able to place 'unrestricted and unbounded confidence' in his or her lawyer; that confidence which is at the core of the solicitor-client relationship is a part of the legal system itself, not merely ancillary to it."[207] Further, he described the duty of commitment to the client's cause, which is a distinct element of the broader common law duty of loyalty,[208] as being "essential to maintaining public confidence in the administration of justice."[209] We might reasonably ask: might a reasonable and informed person, thinking the matter through, have a legitimate concern over the lawyer's commitment to his or her cause in the face of financial incentives that encourage the disclosure of confidential and sensitive client information? Further, might this concern erode the public's faith in the sanctity

204 *FLSC*, *supra* note 3.

205 Letter from Brent Cotter et al, *supra* note 203.

206 *FLSC*, *supra* note 3 at para 84.

207 *Ibid* at para 83, citing *Smith v Jones*, [1999] 1 SCR 455 at para 45, 169 DLR (4th) 385. See also *FLSC*, *supra* note 3 at para 103 (noting that the "duty of commitment to the client's cause ensures that 'divided loyalty does not cause the lawyer to "soft peddle" his or her [representation]' and prevents the solicitor-client relationship from being undermined").

208 *FLSC*, *supra* note 3 at para 91.

209 *Ibid* at para 97. See also *FLSC*, *supra* note 3 para 96 (describing the duty as an "enduring principle that is essential to the integrity of the administration of justice").

of the lawyer-client relationship and, in turn, the integrity of the administration of justice? Still further, to what extent are we willing to risk such an erosion?

The counterargument is that a lawyer has no duty of commitment to a cause that is unlawful or illegitimate. As Justice Cromwell wrote in *FLSC*, the duty of commitment to the client's cause "does not countenance a lawyer's involvement in, or facilitation of, a client's illegal activities."[210] Moreover, "[c]lients—and the broader public—must justifiably feel confident that lawyers are committed to serving their clients' *legitimate* interests free of other obligations that might interfere with that duty."[211] A client's interest in ensuring violations of securities law are not publicly brought to light surely cannot be viewed as "legitimate." At least to that extent, there is arguably no conflict between the notion of whistleblowing and the duty of commitment to the client's cause.

In any event, *FLSC* emphasizes a key overarching principle in Canadian law: the sanctity of the lawyer-client relationship is fundamental and must not be diminished. The elevation of the duty of commitment to the client's cause to the status of a principle of fundamental justice demonstrates the Canadian judiciary's firm commitment to protecting against interference with lawyers' loyalty to their clients. Given the Court's strong statements about the importance of a lawyer's complete commitment to the client's cause, one might at least question whether a policy encouraging lawyers to disclose confidential and sensitive information about a former or current client/employer, and thereby receive a financial reward, would be well received by the Canadian judiciary. One might also question whether such a policy would be good for the Canadian justice system and for Canada as a whole.

The duty of commitment to the client's cause was also a subject of concern raised in a letter written by Janet Minor, former treasurer of the Law Society of Ontario (LSO), to the OSC on behalf of the LSO (which was then known as the Law Society of Upper Canada).[212] The Law Society opposed in-house counsel's eligibility for whistleblower awards on the grounds that it would "create uncertainty for lawyers in fulfilling their duties to maintain confidentiality of client information and protect

210 *FLSC*, *supra* note 3 at para 93.

211 *Ibid* at para 96 [emphasis added].

212 Letter from Janet E Minor, Treasurer of the Law Society of Upper Canada, to Josée Turcotte, Secretary of the Ontario Securities Commission (15 January 2016), online: <www.osc.gov.on.ca>.

privileged information, and may offend the lawyer's duty of commitment to the client's cause."[213] More specifically, the LSO letter raised three principal concerns, which I paraphrase below, about the proposed award eligibility for in-house counsel, some of which echo the concerns expressed in the letter sent by Canadian academics and practitioners discussed above:

- First, it is hard to conceive of when applicable confidentiality rules would permit disclosure of confidential client information in a whistleblowing context. The same can be said of privileged information. Hence, the reference to situations in which disclosure would be permitted under provincial bar or law society rules creates confusion. Relatedly, the Law Society rules direct in-house counsel to go "up the ladder" when he or she knows the organization has acted, is acting, or intends to act dishonestly, fraudulently, criminally, or illegally (which may include securities law violations). The rules do not ordinarily permit or require disclosure of confidential information to third parties, such as securities regulators, in such circumstances.
- Second, making in-house counsel eligible for awards may create a conflict between the lawyer's self-interest and the lawyer's commitment to the client's cause.
- Third, the definition of "original information," which speaks only to the exclusion of information subject to solicitor-client privilege, does not go far enough. If lawyers are to be included within the ambit of eligibility, whistleblowing in breach of other types of privilege, such as litigation privilege or "solicitor's brief" privilege, should also be made expressly ineligible. The lack of explicit exclusions related to these other forms of privilege risks weakening their force.[214]

These concerns have been echoed by practitioners. In its letter to the OSC, the law firm Davies Ward Phillips & Vineberg LLP expressed its concern over lawyers' eligibility for whistleblower awards in the following terms:

> We assume that the exclusion of information that is subject to solicitor-client privilege is intended to exclude lawyers from being eligible to receive an award. In this regard, we believe that a broader exclusion for any information obtained by lawyers in connection with their representation of a client would be appropriate, similar to the OSC's proposed

213 *Ibid* at 1.
214 *Ibid*.

> exclusion for information obtained by auditors in the performance of their services. This approach would be consistent with the rules of professional conduct which generally do not permit lawyers to blow the whistle on their clients.[215]

2. The OSC's Reply

Despite these calls for reform, the OSC's final Policy retains the language making in-house counsel eligible for whistleblower awards, and the OSC has defended its eligibility Policy.[216] In an interview with the *Law Times*, Kelly Gorman, former head of the OSC's whistleblower office, stated, "[n]obody is obligating anybody to come forward as part of our program. We're just simply not barring them from reporting if they can get themselves comfortable with the conditions and the exceptions as outlined in our policy."[217]

With that reply in mind, we should ask: are there conditions in which Canadian in-house counsel might be free to submit a tip *without* breaching their ethical duties? Practically speaking, the answer is that such situations are unlikely to arise with any real frequency. It is hard to imagine a situation in which, for example, the employer expressly or impliedly authorized the submission of the tip to the OSC,[218] though that is arguably one circumstance in which in-house counsel would not be in breach of their ethical duties. It would be a rare and unusual case in which in-house counsel's employer would not prefer that the matter be dealt with internally. Equally, one struggles to imagine a situation in which an imminent risk of death or serious bodily harm would arise in the context of a potential securities law violation—the scenario starts to look a bit like an outlandish fact pattern on a law school exam. Although in-house counsel would be permitted to blow the whistle externally in this situation, though only to the extent strictly necessary to avoid the risk, the reality is that

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215 Letter from Davies Ward Phillips & Vineberg LLP to the Ontario Securities Commission (6 May 2015) at 2, online: <www.dwpv.com>.

216 However, on January 18, 2018, the OSC announced a proposed change to the Policy that would clarify that in-house counsel who report information in breach of applicable bar or law society rules will not be eligible for a whistleblower award (see Ontario Securities Commission, News Release, "OSC Notice and Request for Comment: Proposed Change to OSC Policy 15-601 Whistleblower Program" (18 January 2018), online: <www.osc.gov.on.ca>).

217 Quoted in Robinson, "OSC Moves Ahead", *supra* note 11.

218 See Clark & Moore, *supra* note 21 at 1749 ("it is unlikely that a client would consent to permitting its lawyer to be a...whistleblower").

such circumstances will not arise in practice.[219] The same goes for situations in which in-house counsel would be under a legal duty to disclose confidential information that is the subject of the tip, which would in theory be permitted under Rule 3.3-1(b).[220] Finally, while in-house counsel might arguably be permitted to seek a whistleblower award in some circumstances where the individual performs a separate, non-legal function within the organization, the practical reality is that in-house counsel are generally performing legal functions and in that capacity are bound by unique ethical standards to which other employees are not subject. Therefore, in actual practice, the idea that in-house counsel could properly submit a tip without breaching their ethical duties is largely a fiction. This leaves the author wondering: why create this somewhat confusing and misleading situation when the practical reality is that in-house counsel's disclosure would not generally be permitted under Canadian common law and codes of ethics?

3. The Consequences

For in-house counsel, the consequence of the discord between the rules of professional conduct and the Policy is two-fold.[221] First, though one hopes this will not be the result, some in-house counsel may be tempted to simply abandon their ethical duties in exchange for a sizable whistleblower award. It is hard to imagine this being a regular occurrence, but it is a scenario that is not inconceivable. Second, well-meaning counsel who have thought the matter through and reached the erroneous conclusion that they can safely submit a tip without breaching their ethical duties may find themselves before a law society.

Quite apart from the more "technical" critiques noted above, we might also question, from a policy perspective, whether making in-house counsel eligible for whistleblower awards would have the effect of better protecting investors and enhancing market confidence. The implicit assumption made by the OSC in allowing for in-house counsel's eligibility is that it would have this effect, but the reality is not so clear.

In the American context, the SEC solicited and responded to feedback from the public after releasing a draft of its proposed whistleblower program and made several important observations. The SEC stated that

219 See *FLSC Model Code*, *supra* note 2, r 3.3-3, commentary 1 (noting that the situations in which the "future harm/public safety exception" will apply will be "extremely rare")

220 *Ibid*, r 3.3-1(b).

221 See Salyzyn, "Indecent Proposal?", *supra* note 171.

"compliance with the federal securities laws is promoted when individuals, corporate officers, and others consult with counsel about possible violations, and the attorney-client privilege furthers such consultation."[222] Solicitor-client privilege—and, I would add, the duty of confidentiality—encourages full and frank discussion between lawyers and their clients, which in turn promotes observance of legal rules, including securities laws. In-house counsel serve an essential role in ensuring clients understand and comply with the law, as well as encouraging the company to "do the right thing."[223] There is therefore a compelling argument that excluding in-house counsel from award eligibility will in fact *enhance* public confidence in capital markets, rather than undermine it, because it will provide greater assurance to clients that their confidential information will remain protected and thereby promote their ability to consult with counsel and comply with the law. While it is tempting to reason that the exclusion of in-house counsel from award eligibility might result in crucial information about securities law violations falling through the cracks, the more persuasive argument, grounded in a realistic and practical assessment of how legal advice is sought and followed, is that excluding in-house counsel from award eligibility would better prevent legal violations from occurring in the first place. In sum, we should be wary of policies that may foreseeably erode confidence in lawyers' ability to serve their clients, and it is not necessarily the case that the public interest will suffer as a result of excluding in-house counsel from award eligibility.

IV. CONCLUSION

It has been said that "[w]hen dealing with ethical principles, we cannot paint with broad strokes. The lines are fine and must be marked."[224] Unfortunately, in-house counsel in Canada are left facing a jumbled set of lines that do not clearly delineate what is permissible and what is not when it comes to seeking whistleblower awards. In-house counsel are subject to an array of strict ethical duties that severely restrict their ability to

222 SEC, Final Rules Commentary, *supra* note 102 at 34314.

223 See *FLSC Model Code, supra* note 2, r3.2-8, commentary 6 (noting that "lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organization's and the public's interest that organizations do not violate the law. ... [L]awyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable and consistent with the organization's responsibilities to its constituents and to the public").

224 *Fund of Funds, Ltd v Arthur Andersen & Co*, 567 F (2d) 225 at 227 (2d Cir 1977).

seek and receive whistleblower awards without breaching their duties. Yet, the suggestion by the OSC that in-house counsel in Canada may pursue whistleblower awards has muddied the waters. With respect, the OSC's position, while motivated by the best of intentions, poses a risk to the preservation of the integrity of the lawyer-client relationship, a pillar of the justice system that has been fortified by the courts time and time again.

Respectfully, it is difficult to square the OSC's position with the ethical standards bearing on in-house counsel. As securities lawyer Jim Boyle has observed, "The lawyer's ethical standards are much higher than the regulatory standard, and the lawyer's rules of professional conduct are pretty clear."[225] There is a persuasive argument that the Policy's eligibility provisions pertaining to in-house counsel represent a well-intentioned but unsustainable attempt to import US confidentiality exceptions into Canada without due regard to the differences between Canadian and US ethical standards. The policy of encouraging in-house counsel to blow the whistle externally risks encouraging in-house counsel, knowingly or not, to breach their ethical duties to their clients—most notably, the duty to maintain confidentiality and the duty to avoid conflicts of interest. As such, I conclude that, given the current landscape of ethical rules in Canada, the OSC should simply take award eligibility off the table entirely for in-house counsel.

Finally, the trend is undeniable: securities regulators in Canada and the US are increasingly willing to test the boundaries of in-house counsel's duties to their clients in the name of investor protection. It has yet to be seen whether in-house counsel will be equally willing to test these boundaries. Given modern government's increasing reliance on whistleblowers to combat hard-to-detect forms of wrongdoing, greater dialogue is needed on the issue of in-house counsel's eligibility for whistleblower awards, taking into account the very important policy objectives at stake and critically assessing whether the OSC's Policy, provincial and territorial codes of conduct, and other policies and regulations are meeting the needs of the Canadian public. For now, however, in-house counsel who seek whistleblower awards potentially do so at their peril.

225 Alex Robinson, "New Awards Policy for Whistleblowers Under Fire", *Law Times* (11 July 2016), online: <www.lawtimesnews.com>.