

ONTARIO WHISTLE-BLOWER PROTECTIONS FOR REGULATED FINANCIAL SERVICES SECTOR NOW IN EFFECT

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On April 29, 2022 new protections for whistle-blowers under the *Financial Services Regulatory Authority of Ontario Act* (“**FSRA Act**”) came into effect.^[1] While the Ontario Securities Commission launched a whistle-blower program back in 2016, the non-securities financial services in Ontario did not previously have a specific whistle-blower protection program.^[2] The protections apply in sectors subject to the following acts (collectively the “**Regulated Sectors**”):

- *Credit Unions and Caisses Populaires Act, 2020*;
- *Financial Professionals Title Protections Act, 2019*;
- *Insurance Act*;
- *Loan and Trust Corporations Act*;
- *Mortgage Brokerages, Lenders and Administrators Act, 2006*;
- *Pension Benefits Act*; and
- *Pooled Registered Pension Plans Act, 2015*.

Under the new program, a person or an entity can disclose “an alleged or intended contravention” of a law governing the Regulated Sectors.^[3]

Two Key Protections for Whistle-Blowers

According to Ontario’s Financial Services Regulatory Authority (“**FSRA**”) the program is “designed to encourage individuals with important information about misconduct to come forward on a confidential basis without fear of reprisal.”^[4] Accordingly, the program creates two core protections for whistle-blowers: (1) it prohibits FSRA from disclosing the identity of whistle-blowers and (2) protects whistle-blowers from reprisals.

FSRA must keep the whistle-blower’s identity confidential and, even further, must not disclose any information that may reasonably be expected to reveal the identity of the whistle-blower.^[5] Identity may only be disclosed in two circumstances: if the whistle-blower consents or if the disclosure is made to a law enforcement agency in circumstances where FSRA has reasonable grounds to believe that the whistle-blower has committed an offence under the *Criminal Code* or the laws governing the Regulated Sectors.^[6] The whistle-blower’s identity

may also be subject to disclosure during a legal proceeding.^[7]

Whistle-blowers are also protected from reprisals.^[8] Reprisals include, but are not limited to: termination or threats of termination of employment; demotions, suspensions or discipline or threats thereof; withholding or threatening to withhold benefits or impose penalties; or intimidating or coercing a whistleblower in relation to their employment.^[9] If a reprisal is taken against a whistle-blower, there are a variety of remedies available to the whistle-blower including: reinstatement with the same seniority status; twice the amount of compensation that would have been paid between the reprisal date and the order, with interest; and payment “in the amount the arbitrator or court considers just”.^[10]

Unlike most whistle-blower legislation across Canada, which tends to apply to employees or public servants only, any “person or entity” may make a disclosure under FSRA’s program.^[11] Potential whistle-blowers should take heed however. The protections will only be granted to whistle-blowers that come forward in good faith, that request their identity be kept confidential, and if the whistle-blower has received an assurance of confidentiality from FSRA.^[12]

Offences and Penalties for Retaliating Against Whistle-Blowers under the FSRA Act

FSRA’s program creates an offence where a person or entity takes a reprisal against a whistle-blower.^[13] The offence is broad and covers any officer, director, or directing individuals who “directed, authorized, assented to, acquiesced in or participated in the commission of an act” and who “failed to take reasonable care to prevent the corporation from committing the offence”.^[14]

If convicted, the penalties are steep. Individuals are liable to a fine of up to \$100,000 or imprisonment for a term of up to one year, or both.^[15] Corporations are liable to a fine of up to \$1,000,000.^[16]

Protections among Strongest in Canada for Financial Services Sectors

The whistle-blower protections under the FSRA Act are among the strongest across Canada in respect of financial services. Only Quebec incorporates whistle-blower protections directly into the legislation governing its financial services regulator, the *Autorité des marchés financiers* (“**AMF**”). Under the *Act Respecting the Regulation of the Financial Sector*, whistle-blowers are protected from reprisals and the AMF must “take all the measures necessary to protect the identity of persons who make a disclosure.”^[17] It also imposes penalties on anyone who takes a reprisal against a whistle-blower. However, the penalties are less severe than Ontario’s penalties: individuals are liable to a fine of \$2,000 to \$20,000 and entities to a fine of \$10,000 to \$250,000.^[18]

Starting in December 2022, British Columbia’s Financial Services Authority will become subject to the province’s *Public Interest Disclosure Act* (“**BC PIDA**”).^[19] Unlike FSRA’s program, the protections under the BC PIDA are only provided to government employees.^[20] Under the BC PIDA, it is prohibited to take a reprisal

against a whistle-blower, and a whistle-blower's personal information must not be disclosed.^[21] The penalties under the BC PIDA are less severe than FSRA's program. Persons who commit a first offence are liable to a \$25,000 fine and, for any subsequent offences, are liable to a \$100,000 fine.^[22]

Generally, across the remaining provinces and territories, the relevant financial services regulator is subject to that jurisdiction's public interest disclosure legislation. For instance, New Brunswick's Financial and Consumer Services Commission is subject to New Brunswick's *Public Interest Disclosure Act*^[23] and Saskatchewan's Financial and Consumer Affairs Authority is subject to *Saskatchewan's Public Interest Disclosure Act*.^[24] These pieces of legislation tend to provide varying degrees of protection for whistle-blowers and to impose penalties of varying degrees of severity.

Conclusion

The degree of protection afforded under FSRA's new whistle-blower program indicates that Ontario is taking a strong stance against misconduct in its financial services sectors in furtherance of its statutory objectives of protecting the rights and interests of consumers and fostering a strong and sustainable financial services sector.^[25]

[1] SO 2016, c. 37, Sched. 8, s. 20.5-20.12 [FSRA Act].

[2] Under Part IV of the *Public Service of Ontario Act, 2006* (SO 2006, c. 35, Sched. A) current or former public servants, including those employed by FSRA, that blow the whistle have some protections (s. 108-145). For instance, Part VI prohibits reprisals against public servants for making a disclosure under such Act (s. 139). However, the protections are narrower. For instance, the protections only apply to current and former public servants and there is no requirement to keep the identity of the whistle-blower confidential (see s. 112(b)).

[3] FSRA Act, s. 20.5(a).

[4] Financial Services Regulatory Authority of Ontario, "[Introducing FSRA's new Whistle-blower Program to help identify misconduct in the non-securities financial services and pension sectors.](#)" Announcements, April 29, 2022.

[5] FSRA Act, s. 20.8(1).

[6] FSRA Act, s. 20.8(2).

[7] FSRA Act, s. 20.8(3).

[8] FSRA Act, s. 20.6.

[9] FSRA Act, s. 20.6(1).

[10] FSRA Act, s. 20.6(5).

[11] While whistle-blowers tend to be current or former employees or other insiders that come forward with non-public information, FSRA's new protections cast the net wider, ensuring that any one that comes forward with valuable and timely information can be protected. See, FSRA, [Whistle-blower Guidance](#), No. GR0015APP,

April 29, 2022, p. 6-7.

[12] FSRA Act, s. 20.5.

[13] FSRA Act, s. 20.10(1).

[14] FSRA Act, s. 20.10(2) and (3).

[15] FSRA Act, s. 20.11(1).

[16] FSRA Act, s. 20.11(2).

[17] [Chapter E-6.1, Title I, Chapter III](#), s. 17.0.4 and 17.0.2.

[18] *Act Respecting the Regulation of the Financial Sector*, [Chapter E-6.1, Title I, Chapter III](#), s. 19.

[19] [SBC 2018, c. 22](#). See also British Columbia Ministry of Attorney General, [Province expands whistleblower protections to public sector](#), 29 July 2021.

[20] BC PIDA, s. 1 and 31.

[21] BC PIDA, s. 31 and 6(3).

[22] BC PIDA, s. 41.

[23] [RSNB 2012](#), c. 112.

[24] [SS 2011, c P-38.1](#).

[25] FSRA Act, s. 3(2).

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A Cautionary Note

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