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Chair

Mr. Leon Benoit

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• (1110)

[English]

The Chair (Mr. Leon Benoit (Vegreville—Wainwright, CPC)):
Good morning, everyone.

We're here today, pursuant to the order of reference of Monday, October 18, 2004, to continue our hearings on Bill C-11, An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including protection of persons who disclose the wrongdoings.

Our witness today is Mr. James McVay, Principal Legal Advisor to the Special Counsel, from the U.S. Office of Special Counsel.

We very much appreciate, Mr. McVay, your coming today and taking part in these two meetings, a special meeting this morning and a regularly scheduled meeting this afternoon. I'll leave it to you to tell us a bit about yourself and about what your views are on this legislation. Of course, the information then will come from questioning. So we'll get straight to questioning after you make your presentation.

Please proceed.

Mr. James McVay (Principal Legal Advisor to the Special Counsel, U.S. Office of Special Counsel): Thank you, Mr. Chair, and members of the committee, for allowing me to speak here today. It's a real honour to come on behalf of the President of the United States to talk to you about whistle-blowers and how the United States Office of Special Counsel performs our duties under the Whistleblower Protection Act and the Civil Service Reform Act. Let me say that I believe our two countries share a venerable tradition of justice, individual rights, and respect for the underdog, which are the hallmarks of the Office of Special Counsel.

The Office of Special Counsel is a small independent agency of approximately 105 lawyers, investigators, and staff that are tasked with protecting whistle-blowers and prosecuting law violators within the federal workforce. This occurs when a federal employee, usually a manager, violates a law, rule, or regulation and/or commits gross waste of funds or gross mismanagement. It can also occur when the federal employee commits an act that is a substantial and specific danger to public health and safety.

Our mission is to protect those who bring these allegations to light for the betterment of the few or the betterment of the many.

Our agency is headed by the Honourable Scott J. Bloch, appointed by the President and confirmed by the United States Senate. I am James McVay, principal assistant to the Special Counsel. I served 22

years in the United States Marine Corps as an enlisted sergeant. I obtained my law degree in 1986, and I had an active trial practice until my recent appointment to the Office of Special Counsel.

If it pleases this body, today I would like to start with some preliminary remarks, and then I would be happy to answer questions about the Whistleblower Protection Act, the Civil Service Reform Act, and court interpretations of those acts. Ultimately, I am hopeful that you can learn from our past experiences.

I would like to start with a quote: "Every post is honorable in which a man can serve his country". So wrote George Washington in a letter written in 1775. Oddly enough, he wrote that to Benedict Arnold. I say to you that it is an honourable post to serve in a system with people who, like those here, dedicate themselves to rooting out waste, fraud, and abuse.

Now, I have felt that this is true, but as I reflect upon whistle-blowers themselves, they are sometimes thought to be traitors to those on whom they blow the whistle.

By way of an example is a whistle-blower—and that's the term I use when I speak about them—who had the misfortune, albeit to the public's benefit, to have walked into a room where her manager and several other supervisors and employees were horsing around with a semi-automatic rifle, a clear violation of federal workplace regulations. Ironically, her boss was the federal security manager at the airport where she worked.

She reported the violation to the Office of Inspector General, as she should have. Her boss got wind that she made the disclosure, and retaliated against her by proposing her removal from federal service under the false pretext that she was a poor employee. The Office of Special Counsel was able to intervene and prevent this abuse.

I use this example because many of her co-workers, and managers especially, felt that she was a traitor. I tend to think of her more akin to George Washington. In fact, she was the one who was serving the honourable post.

I would like to heighten our senses a little bit to what I mean when I use the word “whistle-blower”, and not just in the context of government. In the theoretical sense, I'm talking, in my mind, no less than good versus evil and right versus wrong. In its purist form, a whistle-blower is an individual who is willing to take on all odds, often in the face of danger and retaliation, to bring to the light of day a wrong that has been committed against our society. Their intention is no less than creating a better society in which to live and an ethical government that rules us all. In fact, I believe the American republic cannot long survive without disciplined government and a fair and honest corporate structure. Whistle-blowers serve that end.

As a glaring example, I doubt that we would have had the WorldCom, Enron, and several lesser corporate scandals if we'd had effective corporate whistle-blower protection laws before their accountants started cooking the books.

America has the finest tradition of whistle-blowers. Popular examples are Frank Serpico, who brought to light corruption in the New York police department and was later abandoned by his fellow officers when he was shot by a drug dealer. Another contemporary example is the “insider” who blew the whistle on the tobacco industry for making their product more addicting.

As an interesting aside, Serpico actually favours the term “lamplighter” over the use of the word “whistle-blower”. He likes to point out that Paul Revere, who made that midnight ride on April 18, 1775, was the first lamplighter. The lighted lamp warned the people of Massachusetts of the British invasion. He believes whistle-blowers are lamplighters who shed the light of truth and warn the citizenry of waste, fraud, and corruption. He believes they shed light on the path to be taken by all of those in places of power.

For a modern example of a lamplighter or a whistle-blower, and in the context of the federal worker, Ernie Fitzgerald brought to light billions of dollars in cost overruns in the construction of the military C-5 transport aircraft. It cost him his job when his managers retaliated against him. His case was one of the ground-breaking cases reviewed in the Leahy commission report, which later gave us the Civil Service Reform Act, an act I'm going to answer questions about today.

I believe this comes from the heart of who we are as a people. We're strong, independent individuals who have a true sense of right and wrong. We have in us an ingrained belief that there is good and evil, and that we want to be on the side of good. As we say in America, we want to do the right thing.

Now, are all whistle-blowers as pure as the wind-driven snow? And keep in mind that I'm going off the text here a little bit; I've been handling a lot of their cases over the years. Maybe they are that pure if we're talking about the wind-driven snow down Pennsylvania Avenue, up toward Washington, D.C. I know full well the realities of who many of these people are. I know that often their motives have nothing to do with ethical governance, or with doing the right thing. It often has everything to do with getting back at their boss, or with protecting themselves because they know they're marginal employees about to be fired.

Yes, there are a lot of “prophylactic whistle-blowers”, as we call them in our office. These are federal workers who know the system

and use it as a weapon instead of a shield. Frankly, that's something you should know.

I'm here to tell you today that they are all worth it. For every 100 whistle-blowers who are protecting themselves, there are a few Ernie Fitzgeralds waiting to tell their stories. It is not an easy task, but we must be forever diligent in searching for the next case that will light the lamp of truth on a wrong being committed by our government. We must not let those 100 deter us from sifting through the chaff to find the wheat.

Only with this backdrop can we truly discuss how the Office of Special Counsel protects whistle-blowers from retaliation, and bring to light the wrongs committed by government officials.

In conclusion, I would leave you with the words of John Adams, who in 1776 said, “Good government is an empire of laws”. We at the Office of Special Counsel believe in an empire of laws that creates good government and inspires integrity and public trust. While we must as Americans live with the idea of not trusting our government fully, we can also take pride in the fact that we among the nations of the world are a leader in protecting the lamplighters who shed the light of truth on government fraud, waste, and abuse.

It is indeed an honourable post to serve in the Office of Special Counsel, and for you to serve in your posts as guardians of public integrity and efficiency.

Thank you, Mr. Chair.

• (1115)

The Chair: Thank you very much, Mr. McVay, for your presentation. We too use the term “whistle-blower”, so we're comfortable with that.

You said in your comments that you hope we can learn from your experience. We're counting on that. We're counting on that maybe more than you would understand. I think it really says something about the relationship between our two countries that you would take the time to come and help us deal with an important issue that we're dealing with, and I thank you very much for that. I also appreciated your forthright and interesting presentation.

Let's go directly to the questions, starting with Mr. Preston, seven minutes.

Mr. Joe Preston (Elgin—Middlesex—London, CPC): Thank you, Mr. Chair.

Thank you for coming all this way to help us with our project on whistle-blowers.

I have to tell you right from the outset, I love the term “lamplighters”. I'd not heard it before. I think it's a much more positive expression for the person who's trying to make their workplace better. I may start using the term more often. We'll see if we can get it to catch on up here, too.

You talked about your office, and about it being a very small group of people. Is it independent?

Mr. James McVay: Yes, it is independent.

Before I touch on that, sir, perhaps you'll let me preface that with some remarks about the Special Counsel not being here in front of this body. I believe, and he does too, he should be here for this. He's very apologetic about not being able to speak to such an august body. However, his son has just returned from his second tour in Iraq, and he'd been in some of the heaviest fighting. We're very thankful that he came back. Yesterday he was home, and he'll be home only for the next three days.

If it weren't for that, I assure you the Special Counsel would be here. He sends his apologies. He wanted me to tell you that he really wishes he could have been here. His son was with the marine infantry, in a lot of places where we're thankful he's home from.

I'm sorry, Mr. Preston, but I wanted to add those remarks.

Is it an independent body? It's a very independent body. Prior to coming to the Office of Special Counsel a little over a year ago, I practised law for 17 years in private practice. When I came to the Office of Special Counsel, of course I read as much as I could about the office before the appointment. I noticed that it said "an independent prosecutorial body". But I noticed that my boss was appointed by the President. How could that be? Well, the statute makes it very clear that he is to be independent. He also has a five-year term, and he knows that going in. He cannot be removed, in essence, without some type of significant wrong.

We do not receive any pressure from the federal executive in the way we conduct our business. When we go after, if you will, a federal agency for wrongdoing, we've never felt any back-channel pressure of any kind by the federal executive to do anything that we did not think was appropriate.

So yes, I'm telling you today that it is very independent, and we are proud of that.

Mr. Joe Preston: I get from your words that this is an important piece to you. Are you suggesting that it's that important for the body where whistle-blowers or lamplighters would go, that the office be that independent?

• (1120)

Mr. James McVay: Absolutely. I'd like to expand on that, if I may, for a couple of reasons.

I'm confident that one of the reasons we get so many complaints from whistle-blowers and also complaints about retaliation for whistle-blowing is because of the public trust that people have to come to our office. If they did not believe we were independent, we would not receive those approximately 600 complaints of retaliation per year, or 400 complaints about just violations of a law, rule, or regulation, etc. And if we did not show our independence through the years, it would reflect on the federal workforce's complaints that they file with us. But instead of going backwards, in other words less complaints, every year we get more complaints.

So I believe it's very important for the public perception, I believe it's very important for the perception within the federal workforce, and I believe it's very important to make sure that, when we do get a complaint, to execute it properly, we are independent.

Mr. Joe Preston: From what you're saying, the growth of whistle-blowers or lamplighters coming forward to make complaints is a

positive. It's telling you that people are accepting you as the place to go and they feel safe in doing so. I accept your thoughts on that, that this is exactly right. If it were going the other way, you might be concerned that some whistle-blowing wasn't coming to your attention.

Mr. James McVay: I would agree with that.

Mr. Joe Preston: In terms of your relationship with the Special Counsel, you do most of the investigative piece to both the initial whistle-blowing, and/or if there's a reprisal reported, your side does most of the investigative work and the Special Counsel does most of the prosecution side of it? Would that be a simplification of the separation of the two?

Mr. James McVay: Actually, we are all one, in essence. We all work for the Special Counsel. But our agency does take the complaint as well as do an initial screening for whether it's meritorious or frivolous, whether it meets the elements of a claim under the law, and then decide whether we should investigate and prosecute, all within the same agency.

We have separated out within our agency several units that have different functions so that we can operate efficiently to ultimately protect the whistle-blower from retaliation and to bring whistle-blower allegations to light.

Mr. Joe Preston: You talked about the protection of whistle-blowers from retaliation and reprisals. You mentioned one case in here about a woman at an airport, and it was her boss, that type of thing.

It seems like it was a very small workplace. How were you able to remedy that?

Mr. James McVay: In this particular case—since it's over, I can bring it up here—all that happened was that we went and did an initial investigation, found out that it was true, and went to the head of the agency before we decided to prosecute. The head of the agency made it very clear that they were willing to discipline the manager. They put her in a place where she could not be harmed and cleaned up her OPF to where it didn't reflect any poor performance.

We got full corrective action, and plus we were able to discipline the manager.

Mr. Joe Preston: So the remedy is twofold. There's a discipline part to those who were committing the reprisal, but also the cleaning up of her record, if you will, and putting her in another place.

How about in the future; do you find that occasionally, say, other managers hear what she's done and become watchful and somehow punitive?

Mr. James McVay: In her case, no, but in other cases we're mindful that this can happen. It has happened in the past. The people at that point, though, are fairly well educated on their rights and protections, and on who to go to.

Also, we built our own relationship with this particular complainant, and know her individual veracity. We know that when she comes forward, if it does happen in the future, we'll definitely look into it to make sure...and not that we wouldn't for anybody else. But if we thought there was any retaliation, we would further protect her from it.

Has it happened in the past? Yes, it has.

Mr. Joe Preston: Okay.

You've talked about the independence needed. Is there a requirement in your system for lamplighters to report wrongdoing up the chain of command or just automatically to your agency, or is it an either/or?

Mr. James McVay: There is no requirement that they report a violation of a law, rule, or regulation, gross mismanagement—all of the elements of the claim—to anybody. They can report it outside of the chain of command, they can report it up the chain of command.

Now, I will tell you that one of the court cases that tried to limit the scope of the act said, well, unless they report it above their immediate supervisor, who was the wrongdoer, they may not have protections, because then they're not taking it to somebody who's likely to do anything about it. But outside of that one court case—

• (1125)

Mr. Joe Preston: Where is that court case now, and how has it been resolved?

Mr. James McVay: That's a court case that actually the Congress has looked at, and are trying to fix it with legislative language. As a matter of fact, there's a bill currently pending that addresses that exception to the protected disclosure law that we have.

The courts have not really built up other decisions around that one, because other courts have thought, well, people should take it to their chain of command first. It should not prevent a whistle-blower from receiving protections just because they took it to the wrongdoer.

When you think about it, what it means is that the court initially thought, well, the wrongdoer is of such low character that they would not self-report or correct their actions. So we believe that opinion should be narrowly construed. We have asked the Congress to change it and make it specific within the statute that they can do that and still receive protections.

Mr. Joe Preston: So you're suggesting, as we carry on with the legislation we're working on, that it's an either/or situation. It's not that you must do one or you must do the other.

Mr. James McVay: I believe that's correct. One of the things you touched on before is that some people are going to be fearful of retaliation, either because of something that happened in the past or just the magnitude of what they're reporting. Therefore, you want them to be comfortable with going around the chain of command, but you also want them to be able to work with their chain of command.

Again, I don't want to make the assumption that the chain of command will not correct their own activities. You want to think of them as people of character enough to correct their own activities.

Mr. Joe Preston: You'd like to think you could simply solve some problems without having to go through the whole process.

Mr. James McVay: Absolutely.

Mr. Joe Preston: What about the media? What if someone reports the wrongdoing or is a lamplighter to the media? Does that somehow preclude them from your legislation, or does it lead them back in at some point?

Mr. James McVay: That is somewhat of an open question. We have had it work both ways. I will tell you that in one of the more media-driven cases we've had recently, the initial disclosures were in fact to the media, to the *Washington Post*. We were treating that as any source, any disclosure; that's what the statute said. So we didn't care who it was. We investigated, and we're going to prosecute.

I will tell you, however, that a disclosure, the way the courts have interpreted it under this statute, has to be a disclosure of information. That means they lay something out there bare for everybody. It can't be something that's already well known within the public domain, to be a disclosure. If the media already has this information, then they're not disclosing anything. That's one of the things we had to look at in that case, that some of this information was already well known.

But no, we believe any disclosure means any disclosure. Therefore, a media disclosure is fine.

Mr. Joe Preston: What about—

The Chair: Thank you, Mr. Preston. Sorry, but your time is up.

Mr. Joe Preston: No problem. Thank you.

The Chair: I would like to inform members that we're going to allow ten minutes each for the first round and give you a little more time to develop your questioning.

Monsieur Sauvageau, ten minutes.

[*Translation*]

Mr. Benoît Sauvageau (Repentigny, BQ): Good morning and welcome to the committee. I want to thank you for coming here to speak to us about the corresponding legislation in the United States.

I would first like to talk to you about the independence of the Honourable Scott J. Bloch, who was appointed by the President and confirmed by the Senate. The incumbent of the position is appointed by the President for a five-year term, at the start of his mandate. I'm curious as to whether the two houses are consulted in advance of the appointment. How does the President go about finding a suitable candidate for this position? With whom does he consult prior to appointing the candidate to a five-year term of office? Moreover, this is equivalent to his own term in office.

[English]

Mr. James McVay: Thank you for that question.

First of all, Scott Bloch was appointed because the statute in which the President has authority to appoint the Special Counsel makes it very clear that in this position it should be an attorney, and somebody who has practised in the area of employment law, and someone with enough experience to handle this particular job. Therefore, it is filled by appointing a lawyer with that background to the position.

It is a position that the United States Senate has to confirm and consent to. Mr. Bloch went through a very lengthy process with the Senate committee. He answered questions for, I believe, several days about how he would run the office. Then there was a vote on whether or not he was an appropriate individual to be the Special Counsel.

Let me also make one point clear that I didn't before, which I should apologize for. When I say he has it for five years, it's not at the beginning of the President's term; it could fall in the middle of the President's term. As you know, the President is only elected for four years, so there are times when it comes up in the middle of a term. There have been many special counsels who have served at a time when there was a party in the presidency, in the federal executive, that was a different party from the counsel's.

• (1130)

[Translation]

Mr. Benoît Sauvageau: Thank you very much for that clarification. In your statement, you noted the following, and I quote: I am here to tell you that they are all worth it. For every 100 whistleblowers that are protecting themselves, there are a few Ernie Fitzgeralds waiting to tell their story.

I find that quite disturbing. You stated that last year, there were 600 separate disclosures made. Are we really talking about 600 actual reports of wrongdoings, or in reality of four disclosures of wrongdoings coupled with 594 complaints made by individuals, either for vexatious or petty reasons, or to avoid being fired?

[English]

Mr. James McVay: One of the reasons I brought that up in front of this body, that's to be drafting legislation, is that I think it's important to get a full view of the law as well as the reality of what happens.

The truth is that there are a lot of whistle-blowers who are truly doing the right thing by the public to come forward with a violation of a law, rule, or regulation by their management. However, there also is not an insignificant number of people who come forward and allege that they should have protections because, frankly, they're about to be disciplined, and they see the handwriting on the wall.

They come forward and try to use the whistle-blower protection laws, as I said, as a weapon. That does happen, and it is something we see at the Office of Special Counsel. Because we have seen so many cases of both, we get, I think, verily adept at picking between the two and finding the right cases.

So yes, it does happen, but at the same time, if you look at the resources saved by the whistle-blowers who have a meritorious claim, it's very clear to everybody concerned that this is a necessary part of the statute. Again, you're going to get more of those cases the more well known these protections are. At the same time you're receiving a lot more that may not have merit, it really does tell you that you're reaching places within the federal executive workforce such that these people feel confident to come forward, and you're going to root out the waste and abuse that you're trying to root out.

[Translation]

Mr. Benoît Sauvageau: You received 600 complaints last year. Were all of them deemed well founded?

Are the persons who make false complaints subject to sanctions or reprisals? Are those who use the act as a weapon, rather than as a shield, eventually liable to sanctions?

[English]

Mr. James McVay: First, are all of the complaints meritorious? Obviously not. During my special project work last year, where we were taking a view.... Since it was the Special Counsel's first year, he wanted me to look at the various kinds of cases that the agency prosecuted and investigated. He wanted his own assistant to do a lot of it. Well, we stood up a special projects unit that worked all the different kinds of cases.

During that process where I worked the actual cases, we had approximately 20% that we believed were meritorious that were then referred on for further investigation and for prosecution, for prohibited personnel practices. I would assume that this percentage was probably close to the same for those whistle-blower retaliation cases as well.

Are there measures that can be taken against a complainant who files a frivolous claim? The answer is yes. Under federal law, making a false statement can be prosecuted, even criminally. This is something that is stated very clearly on the claim forms themselves. What generally happens is not that they made a false statement; it's just that their claim does not meet the elements of a prosecutable claim.

For example, one of the things under the whistle-blower retaliation statute is the protected disclosure, that it has to be before the agency started taking actions to discipline the employee. In other words, the discipline had to come about because of the disclosure. What we often find out is that the discipline actually started before the employee came forward and made the alleged protected disclosure. So it wasn't a matter that they were being dishonest, it just was a matter that they, not being lawyers, were actually getting their allegations to where they could not be defended under the law.

• (1135)

[Translation]

Mr. Benoît Sauvageau: I'll turn the floor over to Ms. Thibault, if you have no objections, Mr. Chairman.

Ms. Louise Thibault (Rimouski-Neigette—Témiscouata—Les Basques, BQ): Thank you very much for coming to meet with us, Mr. McVay.

There are different types of disclosures, which is not to say that some are more important than others. Disclosures can be made in the area of human resources management just as they can be made in the case of very reprehensible acts that impact the use of public funds and so forth.

Without quoting actual figures, can you give us an idea of the nature of the disclosures that are made? What kinds of situations or problems prompt people to make a disclosure?

My second question concerns the obligation to disclose. What are the advantages and drawbacks associated with the obligation by public servants to disclose wrongdoings? Are public servants the only ones obligated, or should this obligation extend to anyone, a subcontractor, for instance, or a member of the public who might be aware of what's happening through business connections or some such thing? Should persons other than public servants have an obligation to disclose wrongdoings and what would be the advantage to that obligation?

Thirdly, I'd like you to tell us a little more about the reward systems. Some witnesses—and I wouldn't say the majority of them—suggested to this committee that whistleblowers should be rewarded. One can question the motivation of whistleblowers, because in some instances, although not as a matter of course, disclosure can have rather significant financial benefits.

I'd like to hear your views on these three points. Thank you.

[English]

Mr. James McVay: Yes, ma'am, I'd be glad to.

I think your first question was more to give you an idea of the percentages or the numbers among the types of whistle-blower protection allegations, the disclosures themselves. I don't have any precise figures, but I've written it down, and I think I can get that information.

You were curious to know, I believe, the percentages of disclosures that involved questions of human resources—for example, whether or not a manager was not treating their employees right versus a manager wasting the public funds. At this point, I don't have anything specific. It would be only an estimate on my part, but I would estimate they're close to 50:50. Again, I don't have anything specific on that, because we've never broken ours down that way.

We looked at retaliation in the human resources field as just as important as the others, because the cost to the federal government in maintaining a well-trained and educated workforce and making sure that people are hired, retained, or promoted because of merit instead of for other reasons is just as important as the other tax questions for outlays. Just paying our employees is a huge expenditure. So ensuring that we have the right employees, and that we promote the right employees, would—

• (1140)

[Translation]

Ms. Louise Thibault: If I could interrupt, I wasn't implying that certain disclosures were more important or had more value than others. I was simply asking, giving your experience, whether you saw a general trend emerging, based on the data you have, regarding disclosures.

[English]

Mr. James McVay: No, and I apologize, but I don't have that information. I'll try to get that for the committee.

The next question is about the protections afforded to people who are not federal executive employees. For example, you used the potential for contractors, and whether or not they should be included in this. Was that your question?

Ms. Louise Thibault: Yes.

Mr. James McVay: The law that we have, the law that the office I work for prosecutes, does not cover those people. However, there are other whistle-blower protection laws that allow those people to have coverage within the agency they're subcontracting for and allow them to go to the federal district court with their own attorney to, if you will, protect their rights if they're retaliated against for whistle-blowing. But it's not something that the agency I work for handles, so I wouldn't be able to give you any true details on that, other than there are laws that protect those individuals.

On the question about compensating whistle-blowers, I know it comes up, and I believe even in another context, but in the office I work for, and the statutes we prosecute under, there is no additional compensation for whistle-blowing. The only compensation there may be is to make a person whole for what they lost because their manager demoted them. There isn't any additional compensation.

You gave the example, I think, of what if they came forward with a disclosure that said their agency was wasting \$1 million; would they get a percentage of that? Under the statutes that the office I work for prosecutes under, there is no authority for that. And they don't. These people do it simply because they're either retaliated against and they want protection or they come forward simply out of a belief of public service.

[Translation]

Ms. Louise Thibault: Thank you.

[English]

The Chair: Merci, Madame Thibault. You'll get a chance later, of course.

Just before we go to Monsieur Godbout for ten minutes, in the answer you just gave to the question about compensation, you're saying that under the act you are dealing with, there can be no compensation...or not compensation, pardon me. The individual we had a couple of weeks back, Louis Clark, said that whistle-blowers can get a percentage of the money saved as a result of the whistle-blowing. You're saying that this isn't under the legislation you are responsible for and working under?

Mr. James McVay: That's correct, Mr. Chair. What I wanted to make clear, however, is that there are other statutes that allow these individuals to go to the district court, if they're retaliated against, if they're a subcontractor, and there are also other statutes that private attorneys can pursue for them, to get percentages. But for the statutes that we work under...

To be honest with you, in all of the whistle-blower cases I've looked at, I have never had a single whistle-blower ever bring up the issue of whether or not they should be compensated for money that they saved the agency.

The Chair: Okay. Thank you very much.

Monsieur Godbout, ten minutes.

Mr. Marc Godbout (Ottawa—Orléans, Lib.): Thank you for being here, Mr. McVay. Make sure to extend our thanks to your government for making this possible.

Obviously you have quite a bit of experience in this specific field, and I hope you're at liberty to comment. When you analyze your present legislation, I'm wondering how you would advise this committee, this government, in terms of, well, we have this legislation, but this is an area where we would seek improvement, or don't go in this specific area.

If you had the power to maybe better your own legislation, in what areas would you recommend your government go?

Now, I don't want to put you in a situation where you're....

• (1145)

Mr. James McVay: Well, if I were king for a day, there are a couple of things I would change. I don't mind telling you that, because they're actually the thoughts of the Special Counsel himself, not me.

They are really wrapped up in the current legislation before the Congress of the United States. There have been a couple of court exceptions that limit an individual's protections if they do not follow certain "legal gymnastics", as I call them, in making disclosures. I've already pointed out one today, but there are others.

One, for example, is where the court found that if it is part of your normal duties in your federal job to disclose this information, then you're not making a disclosure somehow, and therefore you don't have these protections. We want to do away with that also. Again, those are the Special Counsel's thoughts on it.

There is also legislation to expand protections. We would simply like to make sure that the intent of Congress is carried out by the courts—I guess this is probably the best way I can put it—and that is to ensure that any person making a disclosure is protected, and that they should not have to go through any particular legal gymnastics to get protections. We want to make sure they are confident that they're going to be protected, and these types of court decisions do not engender that kind of confidence.

I hope I've answered your question fully.

Mr. Marc Godbout: I think it's very helpful.

Your mandate, your scope, is much larger than ours. You handle discrimination cases, I believe, and harassment cases. Do you think

it's too large? Would you have preferred it to be a bit narrower? Or are there any aspects that are *not* covered?

Mr. James McVay: This could be a long answer, but I probably should give you an overview of what the agency does.

There are 12 prohibited personnel practices in the federal government that we prosecute cases under to get recompensation for the injured employee or the wronged employee. We also use those to prosecute a federal manager and even potentially debar them from federal service for making violations under those.

One of those 12 prohibited personnel practices is retaliation for whistle-blowing. We have another unit altogether that handles just taking whistle-blower disclosures where there has been no retaliation, and keep the confidences of that whistle-blower secret. Then we have that case investigated without going forward with their name. So that's another unit. That unit gets approximately 400 to 500 claims a year.

We have another unit in our office that prosecutes the federal Hatch Act, which prevents civil service employees from participating in partisan political activity on the job. We prosecute those claims.

We prosecute claims against federal managers who discriminate against returning veterans. They're supposed to get their job benefits back when they come back. We prosecute claims against federal managers who don't do that.

We do a lot of things that are diverse and don't really touch upon each other—more than just whistle-blower protection and bringing to light whistle-blower allegations. We have different units working those.

So it's not that we need to be smaller. We just need to make sure that those units that work within our agency have the personnel and are separated enough to maintain their expertise and their independence from each other. I don't think we need to be smaller. I think we just need to make sure that we have the appropriate staff and the unit designations to ensure they do their jobs.

Mr. Marc Godbout: What would be, if you can disclose this, the budget of your agency?

• (1150)

Mr. James McVay: You know, I didn't think I would be asked that question. I don't have a clue.

Mr. Marc Godbout: Usually it's Mr. Preston who asks those questions.

Mr. James McVay: I have to apologize, because I really don't know. I have not dealt with the budget process other than to draft language that tells the Congress where we are and where we'd like to go. That hasn't involved how much money we get.

I'm sorry, I can't give you that answer.

Mr. Marc Godbout: Maybe you could get back to our clerk on that. It would be interesting to know.

Your counsel investigates and prosecutes. Do you find it a problem that it's the same agency that does both? They're probably different units, and there might be a firewall there, but we were told that some people might have problems here with the same agency doing both.

Mr. James McVay: In the criminal setting, where obviously we're talking about far worse punishment other than just debarment from federal service, I think there is a clear reason as to why you have the investigative branches and then you have the justice department or the local prosecutors. In this particular situation with our agency, having investigators as well as prosecutors in one works well, because we're doing a couple of different things. We're prosecuting the potential manager for violating a prohibited personnel practice, but we're also getting the employee some compensation, almost in a civil law sense. So there's kind of a mixture of both.

To be honest with you, since I've been there, and in all of the things I've read over the years about what has happened in the past, all the reports to Congress, all of the things that have been written about the agency by scholars, I have not read anything that questions our independence or whether or not there's a conflict in having prosecutors in the same office as our investigators. It's something I have spent many hours doing, and this morning is the first time I've really heard that this may be a problem.

Conceptually, I agree with why you bring that up—that is, generally speaking, what you have is the FBI investigating for the Department of Justice, and the local law enforcement investigating for the local prosecutors, and they're different offices. So I understand why you bring it up, but it's not been a problem, and it's not been something that the courts have had to address.

Mr. Marc Godbout: Thank you.

The Chair: Thank you, Mr. Godbout.

Mr. Lauzon.

Mr. Guy Lauzon (Stormont—Dundas—South Glengarry, CPC): Thank you very much, Mr. Chair.

Welcome, Mr. McVay. It's a real pleasure to have you here answering our queries so candidly. As a former public servant myself, this is a very important piece of legislation to me and to many of my former colleagues.

I'd like to talk about your feeling that it's critical that your office, and any office that deals with whistle-blowers, basically should be independent. The reason it's very close to my heart is that we've heard probably 12 or 15 witnesses since we started this process, and all but one of them agreed that it should be independent—I'm an advocate of that independence—to the point where some of them have said that if it wasn't going to be independent, you might just as well not have the office.

What do you think of that statement?

Mr. James McVay: All I can tell you is that, in my view, independence is very important, not only to have the public's trust but to have the trust of those who you want to come forward and shed light on a wrongdoing. Unless they believe you're independent and can independently investigate and potentially prosecute, I don't think you're going to get to the people you want to serve.

Mr. Guy Lauzon: I'm not sure how many, but probably five or six of our witnesses were actually whistle-blowers...or as Mr. Preston would like them termed, "lamplighters". I think that's a very nice term, because obviously the whistle-blower sheds light on the issue.

In every case, these were people who had been with the government for a number of years, some of them 25, 28, 30 years, and lost their job over what they revealed. If my memory is right, in every case they didn't think they were whistle-blowing, they just thought they were doing their job, that, you know, it would be their job, if they saw money being wasted or a scandal happening, and their responsibility to bring it to their superiors or to whoever.

You alluded to that in your presentation, that most people just think it's part of their job to identify wrongdoing. Has that been your experience?

•(1155)

Mr. James McVay: Yes. I would agree, and again, because our statute doesn't talk about, as I would call it, "rewarding" a whistle-blower for coming forward with additional compensation other than what they may be entitled to because of a personnel action, that may be why I haven't heard about it very much.

So no, in the hundreds of cases I've seen over the last year or so, people come forward with a sense of duty. They believe it is their responsibility to come forward. Don't get me wrong; as I've talked about before, there are some who may have other motives. We've had cases where the whistle-blower had mixed motives. They really did come forward with an allegation that was truly a violation of a law, rule, or regulation, but the real truth was that they were doing it because they also wanted to protect themselves because they really were a marginal employee. I can give examples of that also.

What we did in those cases is very interesting. We hammered the manager for going after the whistle-blower, but we also made sure that the federal agency was treated properly and that the individual was still disciplined for poor performance.

Mr. Guy Lauzon: Could you tell me what the most significant revelation was in your time, whether in numbers of dollars or whatever? What was the most significant whistle-blowing that came to light?

Mr. James McVay: I can't answer that question for security reasons. However, if it's okay, I can give you an answer aside from that.

We had a whistle-blower who came forward with problems of air traffic control at a major airport. We were able to fix that and make sure that the appropriate funds that were supposed to be used to train on equipment were finally used in the tower so that airplanes weren't about to run into each other every day.

Mr. Guy Lauzon: So you could have saved a lot of lives.

Mr. James McVay: A lot of lives.

We had a case where the catapult systems for a couple of aircraft carriers were not being maintained properly, even under the navy regulations, and planes were about to start getting launched into the sea. Luckily, one of the welders came forward and said, this is what's going wrong and this is why it's wrong. It was very difficult to understand, because of the expertise involved, but once we found out it was true, they went and did x-rays of all the welds, for example, on the system, and found that within days it was going to start launching the planes into the sea, killing people.

So there's some significance.

Mr. Guy Lauzon: Yes.

In your experience, can you think of any organization within the American government that should be excluded from whistle-blowing legislation?

Mr. James McVay: Currently our statute exempts intelligence organizations that are listed by the President as being outside of the parameters of title 5 whistle-blower protections. That's what the statute says. Obviously, we are advocates for whistle-blowers. We may be a little overzealous, I don't know; I don't think we have been. There's always a desire to protect everybody in the federal workforce, but at the same time, there are certainly arguments on the other side that are carrying the day, and that's the way the law is.

Mr. Guy Lauzon: If you could make one change, if you had the chance to amend your legislation significantly, what would it be? What's your biggest flaw, or what's your biggest challenge, with your current legislation?

Mr. James McVay: Again, of all the things I prepared for—reading our prosecution manuals of both units, and going over it again, and all the cases and stuff—I didn't anticipate that question. I have no idea why.

The only thing I can say is that currently, we're on the path of legislation to make whistle-blowers feel more confident, when they come forward, that they're making a protected disclosure, one that we can protect them for. It's been because of some court decisions, founded in what the court believed was correct; I'm not arguing about that, I'm just telling you that there is now legislation to address that directly. Obviously, if they put it in the right language, that's how the court will have to interpret that statute, and we're glad for that.

• (1200)

Mr. Guy Lauzon: What would you say would be the percentage of legitimate whistle-blowing cases that have been brought forward? What would be the percentage of reprisals? Ballpark figure, of course.

Mr. James McVay: Where people allege reprisal or where there truly is reprisal?

Mr. Guy Lauzon: Let's deal with the real facts, where real whistle-blowers get some real reprisals, or where you feel.... Is it one in five that is reprisal against?

Mr. James McVay: I would say probably—again, a thumbnail only, an estimate—that based on what we refer for investigation and prosecution, it's about 20%, during my process. I know in some years it has actually been lower than that. We're working very hard to lower that bar.

One of the things I've done in the last year, and the current Special Counsel has worked very hard and says that he wants this done, is to raise the number of referrals for investigation and prosecution. That's something we're working hard to do. We'd like to get the number higher.

Mr. Guy Lauzon: Probably as you deal with the reprisals, and people realize that if they do take action against the whistle-blower they'll get themselves in trouble, it would quell some of the reprisals that would take place.

Mr. James McVay: Oh, absolutely. A well-published decision, with a press release, works very well to educate the managers in the federal workforce.

Mr. Guy Lauzon: Now, I think you said, in answer to a question, that 20% of the alleged wrongdoings are meritorious. Did I hear right?

Mr. James McVay: Yes, in a sense, in that for the unit I run, which took the cases from when they filed them all the way up to investigation and prosecution, that was what our referral rate was for further investigation and prosecution. In other words, they had enough in the complaint that they allege a prima facie case of a protected disclosure and retaliation for it.

Let me make sure you understand that. Most retaliations for whistle-blowing involve almost crawling in the head of the manager and reading his mind. Therefore, it is very difficult to be able to prove on the part of the whistle-blower. What we want to do is make sure that the statute doesn't put any inappropriate obstacles in the way to prevent that. So that's what the current legislation is attempting to do.

We have a test about, shortly after a disclosure is made, the stronger the case is, if there is reprisal.... If a person gets, for the first time, an evaluation at work that marks them down as being a poor employee, and it just so happens to be a month and a half after he made a protected disclosure, and the manager knew about it, that's a pretty good case. Those are the kinds of cases we're looking for. But generally speaking, it's six months later, or it's not the kind of disclosure that a manager would normally be upset about because it really didn't shed light on that manager's wrongdoing. Then you have to show, well, he had a close relationship with the manager who did do the wrongdoing.

So they are very nuanced and they are difficult to prove, and we have to meet specific elements to protect the whistle-blower. That can sometimes be difficult. And here is why: we're not just talking about giving rights to the whistle-blower; we're also talking about potentially prosecuting and debarring a federal manager. When you wrap the whole case together, it cannot be only about protecting whistle-blowers. It has to rise to a due process level, where we're not debarring and disciplining managers without proper process.

Mr. Guy Lauzon: I'm probably over my time here, but how many of these whistle-blowing cases result in criminal charges, for example? You mentioned that earlier.

• (1205)

Mr. James McVay: We do not do criminal prosecution in our agency. If there's criminal involvement, we call in the Federal Bureau of Investigation and the Department of Justice.

Mr. Guy Lauzon: And a certain percentage would result in....

Mr. James McVay: For a very small percentage, when we get close to that line where it shows, one, large numbers of dollars, etc., and where it looks like there is intent, *mens rea*, criminal intent, that's when we look at it and make the determination that we need to call in the people who do criminal law.

Mr. Guy Lauzon: So 2%, 5%...?

Mr. James McVay: Less than that, probably. It's very rare.

The Chair: Thank you, Mr. Lauzon.

Just for clarification, in reply to the question that Mr. Lauzon asked, you said 20% are referred, but earlier you had said that you deal with a lot of them on your own, and they're completely dealt with. Is that included in the 20%?

Mr. James McVay: I know this is difficult, so I'll try to make it clear. Let me start over from the beginning.

The unit I ran was the special projects unit. It took the cases from beginning to end, up to the point where they were going to another unit to be investigated and prosecuted. They asked about meritorious cases. I was only giving you the figure of the cases that were meritorious enough to warrant further investigation and prosecution.

Now, once they went to the investigation and prosecution division, many of them were settled—some of them were prosecuted, and some of them were found not to have merit. I can only give you the percentage that I had as it went up.

I will tell you, as an agency, the actual number per year is less than the 20%. My instructions from the Special Counsel were to try to increase and find ways to lower the bar, if you will, so that we can get more cases, more investigation, and potentially more prosecutions.

The Chair: Thanks very much for the clarification.

Madam Marleau, ten minutes.

Hon. Diane Marleau (Sudbury, Lib.): How many of your cases are human resource based?

Mr. James McVay: A prohibited personnel practice is where somebody takes a personnel action against somebody. I was talking about the 12 prohibited personnel practices. We get approximately 1,700 to 1,900 claims a year.

Now, keep in mind, in that 1,700, the largest percentage involves cases of whistle-blower retaliation. That's somewhere around 400 to 500. I know it's been even higher.

There is another unit that simply takes whistle-blower disclosures where there hasn't been retaliation by a manager—usually because the manager doesn't know that there's been a disclosure. Or I shouldn't say “usually because”; I can just tell you that there were cases where there was no allegation of retaliation.

We then review that complaint. If it's substantially likely to be true, we then have it investigated by the agency. Then our authority is to go to the President and their oversight committee if the agency did not investigate it properly.

Hon. Diane Marleau: When you say the “agency”, do you mean your agency or the agency where the complaint occurred?

Mr. James McVay: The agency where the complaint occurred.

Now, for personnel actions where there's retaliation, our agency, the Office of Special Counsel, does the investigation and prosecution.

Hon. Diane Marleau: I'm still a little mixed up there. In our system here, what we're trying to do is create a safe haven so that a whistle-blower need not be known. I mean, we want a person who finds out, or who thinks, there's something wrong going on to feel comfortable enough that they can go outside of where they were, make the complaint, and be protected. This is what we're trying to establish. Now, we know that in some areas, the shop is so small it'll be next to impossible for the boss not to know who ratted him out.

But that's what I'm trying to get to: how does that work with your system?

Mr. James McVay: What you just described to me was what we call the disclosure unit. At this point, there hasn't been any retaliation. It's a secure channel for people who come forward with a violation of law, rule, regulation, gross mismanagement, abuse of authority, gross waste of funds, or a specific and substantial danger to public health and safety.

Actually, I think that's the actual language of the statute. I've said it enough, I think I can do it verbatim. So that's the language.

If they come forward with one of those, it's a secure channel. We have a statutory obligation to keep their name secret. Then what we do is we look at the information they bring us and review it. Sometimes there's a lot of technical data.

For example, we had a case where one of the military organizations was doing something to engine mounts on a very expensive plane that was against manufacturer specifications. According to the manufacturer, the engine could fall off. Well, we thought that was pretty serious. We took that and had to do a technical review. Then it was, okay, it really is true; she knows what she's talking about; she has the education, training, and experience. We looked at the whole case and sent it back to the agency without telling them who the complainant was.

We make the report to the agency and say, this is what we found, and you have 60 days to report to us by law. The agency does their investigation. They report back to us. The law then says, once we receive that report, we check it for reasonableness on seven counts—the kind of investigation, the kind of discipline. There are seven things to look at to see if it's reasonable. If it is not reasonable, we have the authority to go to the President and that agency's oversight committee in Congress, and write a report that indicates that they did not do an appropriate investigation, and they have not done something appropriate.

I assure you, the head of the agency does not want the Office of Special Counsel to write that report. In every case we've had where we've questioned the investigation, they were very happy to go back and basically say, “Okay, how do you want us to do it? Where do you think we're wrong?” They will work to get the investigation right.

Now, have they always agreed? Has it always come back substantiated? No. Usually there's a reason for it, and we will accept it.

Again, the authority to go to the President, that agency's head boss, who can fire them at will, and the oversight committee, who's going to pay them their budget the next year, makes them very willing to make sure that their investigations are thorough, with appropriate recommendations for discipline.

• (1210)

Hon. Diane Marleau: What happens if you have someone come forward under false pretences? Do you have any penalties? Do you have any way of discouraging that?

Mr. James McVay: Yes. It's called the Federal Bureau of Investigation. They seem to have a lot of authority in that field.

It's true that there's a general federal law that prohibits making false statements and filing false claims. Again, most of it is so nuanced, it's not a matter that they did it intentionally, it's a matter that they're not lawyers, and don't know the specific elements. Those people are not going to be prosecuted. Does it happen that it's intentional? Yes, and it will be referred for investigation by the Federal Bureau of Investigation.

Hon. Diane Marleau: In every organization, no matter where you are, and especially in big ones, you have these chronic disaffected complainants. How do you deal with those?

Mr. James McVay: I've heard the term—not that we use it in our agency—that these are “serial filers”. Again, I've just heard that.

You have to take them on an individual basis, and you have to be very careful that you do. You make sure that they don't all go to one person among those who do the intake. You make sure that different people take turns with the cases so that you can look at each independently.

I will tell you, that happens, and you have to make sure that you still do the right thing. Even somebody who cries wolf may actually see a wolf the fourth or fifth time.

Hon. Diane Marleau: It's just very difficult, because you're trying to protect the whistle-blower and not use the identity, and on the other hand, you also have to be responsible and ensure that the whistle-blower is blowing the whistle on something that's real and not just a perceived injustice.

As well, how do you deal with very small organizations, when it's impossible to protect the person? Say you've got five people in an office; the odds are that the boss is going to know right away who did what.

Mr. James McVay: In other words, how do you protect the identify of a whistle-blower in a small organization when that particular whistle-blower is the only one who even had information about that particular disclosure, and you know, as soon as you start investigating, the boss is going to know? Is that your question?

Hon. Diane Marleau: That's right.

Mr. James McVay: You make it very clear to the whistle-blower that their identity we can keep secret, but there are going to be times during even the agency's own investigation, or if there's retaliation during our investigation, where simply the context will tell the managers who that individual is. Then they have to make a decision.

The interesting part for us is that Office of Special Counsel is there to protect the merit system, not just an aggrieved complainant. So

then we're stuck on the horns of a dilemma: do we proceed, knowing that we need to punish that manager to protect the merit system from abuse, when a complainant may really decide, at that point, “You know, if they're going to find out about it, I don't want to do it”?

We haven't had to cross that line, to face that, or not that I have seen. But conceptually, that could happen.

• (1215)

Hon. Diane Marleau: I asked some witness, at one point, do you think that when someone makes a complaint or blows the whistle in a small shop like this, it would be a better thing to change them to another department, or to move them to another spot?

I was told, well, yes, but if you do that in certain departments, then you are penalized for being the whistle-blower, because you're no longer working at what you're good at, and you're sort of out of the chain of promotion, so to speak.

How do you balance that out?

Mr. James McVay: That's a good question, because that's a very real problem. It is not uncommon that we do seek to place them in a different place, where their managers aren't, and where the co-employees are not adversaries. I will tell you, oftentimes even co-employees are upset about a whistle-blower, even when the whistle-blower was meritorious in shedding light on a wrong. So it is a very real concern.

The United States federal workforce is a lot larger, and we have a few more options in placing people than maybe here in Canada. We haven't had to face that. I will tell you, when you have more than 2 million federal executive employees versus, as I think I heard, the 230,000 or something that you have here, yes, you're going to have a lot of small units here. We don't have that problem as much, and moving them to another place and putting them on a federal system is not as difficult.

Hon. Diane Marleau: But in essence, no system is perfect, in the end. Some of the recriminations are very subtle and very mean.

Mr. James McVay: Very subtle, very mean, and hard to prove.

Hon. Diane Marleau: Hard to prove, yes.

Mr. James McVay: If some manager, for example, knows that this person is a real home dad, then the first thing he can do, and look perfectly legitimate doing, is to detail him and say, “For 90 days, you're going to go here, and in another 90 days you're going to go to that other place”.

So yes, it can be very nuanced. You have to try to put the whole case together to get whether or not there has been retaliation.

The Chair: Thank you, Madam Marleau.

Mr. Preston, for five to seven minutes.

Mr. Joe Preston: Thank you. I see you're cutting down my time now, Mr. Chair.

The Chair: It's the second round.

Mr. Joe Preston: I'll stay for a moment on what Madam Marleau was just saying. What is the burden of proof? What is the level of the burden of proof—first, for a wrongdoing, and second, for a reprisal? Is it the same?

Mr. James McVay: Let me just go through the elements. It might help you.

In whistle-blower protection law, the burden of proof is by a preponderance of the evidence, what is more likely true than not true, for them to prove a case of retaliation. Once they have done that, the law is that the agency has the right to come back and prove, by clear and convincing evidence, that they would have taken the personnel action regardless of the disclosure.

That is, as you know, a higher standard. Clear and convincing evidence is a higher standard. That, in essence, protects the whistle-blower. If there truly was retaliation, and the personnel action was taken really as retaliation, then the agency wouldn't be able to prove that they would have taken that action anyway, by any standard.

We do put a higher standard on the agency once that prima facie case of whistle-blowing and retaliation has been made.

Mr. Joe Preston: Okay.

In terms of remedial results, you obviously have to do investigations. In some cases, it may even go to a criminal proceeding. We certainly have heard that in both our countries the wheels of justice turn slowly. Is there some piece in your legislation that makes for speedy trials, or makes the resolution quicker?

Mr. James McVay: For specifically what we're talking about today, whistle-blower retaliation cases, under our statute the complainant has the right, after 140 days, to force us to make a decision on whether or not we are going to pursue the case in front of the Merit Systems Protection Board and prosecute, either for corrective action for them or corrective action and/or discipline of the manager.

After 140 days, the complainant can demand that we give them what's called an individual right of appeal letter, and then they can go out and get their own attorney and go directly to the same board themselves, and seek their justice that way.

• (1220)

Mr. Joe Preston: So they're going to the same board themselves. Is there a period of time on that next piece?

Mr. James McVay: What's good about the Merit Systems Protection Board, frankly, is that once you file that, you're going to be in trial within six months.

Mr. Joe Preston: This sounds like a very adequate piece that we need to put into our legislation.

Would your legislation be as valuable to you if that 140-day hurry-up point wasn't there?

Mr. James McVay: Again, that's just for us to complete our investigation and find out whether or not there has been a prohibited personnel practice—in other words, retaliation. I will tell you, about the 140 days, it's just up to the complainant. The complainant—

Mr. Joe Preston: Can also just carry on and let it be investigated.

Mr. James McVay: Yes. Oftentimes we'll have to say, look, because of certain reasons, we weren't able to finish our investigation and our prosecution recommendation, so we need to continue. More often than not, the complainant is going to say, go ahead and finish. And they can give us an arbitrary date, which is fine.

Mr. Joe Preston: Any date past the 140, they can then pull the plug and go on.

Mr. James McVay: Yes. They can even say, "I'm going to tell you now that you have an indefinite time", or they can say, "You've got one month".

Mr. Joe Preston: That sounds like an excellent piece for the legislation. I think it certainly sounds like something we should do.

In terms of brown-paper whistle-blowing, where the person is anonymous, does your department still investigate the agency? If you found a brown envelope shoved under the door one morning, and it said, "This is happening in an agency where I work, and I don't want to tell you who I am", does an investigation still take place? Or do you wait until an actual person comes forward?

Mr. James McVay: The Special Counsel actually has the discretion to do both. We would obviously look at that and use our judgment on whether or not we wanted to move forward, just ourselves, to protect the merit system.

I will tell you that, generally speaking, with anonymous complaints, we do take into consideration that they're anonymous and we therefore aren't able to get more information to fill in the elements, so it might be harder to investigate and prosecute. It might be more difficult to find a substantial likelihood that it's true in the other case, where we send it to the agency for its own investigation.

But yes, people can file anonymously, and we do take action.

Mr. Joe Preston: Great.

When you're investigating a department, is the secretary of that department—in our case, the deputy minister—informed immediately that an investigation is happening, or can it happen behind the scenes?

Mr. James McVay: Let's separate it out. In a case where there has been retaliation and the employee is asking for, basically, his job back, or for his OPF to be cleaned up to show that he's not a bad employee, in the case of retaliation where you're trying to get the employee back in the position they would have been in had they not been retaliated against, oftentimes the actual head of the agency isn't going to know about that until we draft our prohibited personnel practice letter to them, if it can't be settled with their general counsel's office.

But yes, before we file with the Merit Systems Protection Board to prosecute, the statute requires us to write a letter to the head of the agency and say, "Here's what we found. This is why we think there has been a prohibited personnel practice, and this is what type of remedy we want for the complainant, as well as discipline on the manager".

If they do not act, then we can go to the Merit Systems Protection Board and prosecute the case.

Mr. Joe Preston: If they don't act, they have to tell you they're not acting?

Mr. James McVay: I don't think the statute says they have to. It just says it has to be a reasonable time before we file with the board. We usually get a very immediate response one way or another.

Mr. Joe Preston: Certainly.

Mr. James McVay: We have found that a lot of times the head of the agency does not know about it. Keep in mind that some of these agencies have hundreds of thousands of people in them.

Mr. Joe Preston: Sure.

Mr. James McVay: The other situation we were talking about today, where it's a secret disclosure, or a law or rule violation, that we find substantially likely to be true, we then send that directly to the head of the agency. Usually that is the first time. And I won't say it always is, because sometimes it's the head of the agency that is alleged to have violated the law.

Mr. Joe Preston: Agreed. So that may be the problem too.

The Chair: Thank you, Mr. Preston. We can come back to you, if you would like, after Mr. Boshcoff.

• (1225)

Mr. Ken Boshcoff (Thunder Bay—Rainy River, Lib.): I'm sorry I was late.

When we talk about the offices that deal with this, our goal here, and I'm hoping there's some measure of consensus, is for one office, one system, to deal with it from start to finish. You have at least three offices, and possibly more once you deal with those found guilty of committing wrongdoings.

Is it your feeling that this number of operations is working well?

Mr. James McVay: I think it's working well, yes. However, we have to make a clear distinction between the units within the agency. Could it be done in different agencies? Yes, it could be. However, it's not the way that Congress decided to draft the legislation. It's not the way that Congress subsequently then added additional responsibilities to the Office of Special Counsel.

For example, recently the Congress passed a law that gave us more authority to prosecute federal managers under the Uniformed Services Employment and Reemployment Rights Act. That meant we had to staff up and start prosecuting in a new area of the law.

So it's hard for me to answer the question. I think it works fine other than there needs to be distinctions between the units, obviously.

Mr. Ken Boshcoff: Over the course of the history of the office, have there been attempts to consolidate into one unit or into one-stop-type legislation by Congressmen?

Mr. James McVay: I think the history of this legislation was that it was with the civil service commission, where it would just handle in-house all of the human resources questions and allegations about appeals and prohibited personnel actions. Then it was moved, when they passed the Civil Service Reform Act, I believe, to the Office of Special Counsel to be an independent prosecutor outside of that executive, so an executive agency.

I think you've already touched on that potential view of a conflict, but as long as we keep them separate, I believe they can function well.

Mr. Ken Boshcoff: When you talked about this civil service organization that had dealt with them previously, the reason was to distance it for more independence and more security of the employees?

Mr. James McVay: As I recall from reading about that, from what I understand, there was a view that we needed more independence, and to give employees the level of comfort that the agencies weren't just watching themselves in making these personnel decisions. There would be somebody independent to look at them.

Mr. Ken Boshcoff: These operations as separate entities—does that lead to bureaucratic expansion, or does it keep them small and functional?

Mr. James McVay: I'm not sure I've ever heard of "bureaucratic expansion"....

I'm just kidding, of course.

Mr. Ken Boshcoff: I didn't want to present this totally new concept to you.

Mr. James McVay: I was in private practice for 17 years. I think I heard it there, maybe.

Mr. Ken Boshcoff: You'd just mentioned that you'd added another function, which created, or which necessitated—

• (1230)

Mr. James McVay: The only expansion I've seen, in looking at the history of the agency—and I was a student of that before I came on board and since—has come about because of the explosion of claims. For example, after 9/11, claims came in under the whistleblower act where there wasn't retaliation. People were just making allegations of, for example, federal security managers not screening baggage right, or that people weren't following regulations at airports, and all of those things. There was an explosion of those.

Frankly, because people are educated on how to use the system, I don't see that the numbers are going to go down to pre-9/11 numbers. Therefore, yes, it requires some expansion. The federal Hatch Act was changed in 1994 to allow federal employees more discretion to work in campaigns...not on federal property or in federal buildings, etc. Some federal employees kind of tested the limits of that and found that they could do more; well, a lot of them went over the line. So the number of complaints against that type of activity kept going up and up. Again, it has not gone back to pre-1994 standards.

So I don't see it as bureaucratic incrementalism, which I think I heard it called in political science in college. What I really have seen is just more added responsibilities and duties.

Now, if you ask me about other federal agencies, I don't know that I could give you the same answer.

Mr. Ken Boshcoff: Okay.

Does the silo aspect—and I just use that term loosely as opposed to disparagingly—lead to competition or turf protection or overlap? Or are the roles of each of those agencies so clearly defined that this doesn't happen?

Mr. James McVay: Do you mean the units within our agency?

Mr. Ken Boshcoff: No, the three separate offices, between merit systems, inspector general, and special agencies.

Mr. James McVay: I see what you're saying.

The Merit Systems Protection Board is the board we try our cases in front of. They're really kind of the judicial arm of this administrative organization. There really isn't any competition there, because they are who we try our cases in front of and that's it.

In terms of the offices of inspectors general, there is a lot of competition, but it is good competition. Also, what they do is they take care of a lot of the smaller-type complaints. They really serve a worthy function within their agency.

Let me give you the example of time and attendance complaints: my boss didn't come back from work, and I think he went to play golf; or I saw employee so-and-so spit tobacco in the drinking fountain, which is a violation of a law, rule, or regulation. Okay, but that's something the Inspector General handles, in a *de minimis* nature.

There really has not been, that I have seen, any competition or turf wars at all. We really kind of complement each other in that respect.

Mr. Ken Boshcoff: What kind of numbers are we dealing with in those three separate offices in terms of staffing full-time equivalents?

Mr. James McVay: Keep in mind that each agency has their own Attorney General, who investigates wrongdoing, fraud, waste, and abuse within that agency.

So I wouldn't know, for each agency. For example, the Department of Defence's Inspector General's office I'm sure has hundreds of people in it—it's probably bigger than our office—just to do the investigation on the contracts of those that are awarded within the Department of Defence. But some of the IG offices, in very small agencies like the United States aid organization, have only two or three people in that office. So they run the gamut.

I gave you the numbers for our office. I would estimate the Merit Systems Protection Board to be somewhere around 100, because again, they're the court for these prohibited personnel practices.

Mr. Ken Boshcoff: Thank you very much.

The Chair: Thank you, Mr. Boshcoff.

During the Conservative time, we'll have Mr. Lauzon first, followed by Mr. Preston—if he leaves you any time.

Mr. Guy Lauzon: Thank you very much.

How many employees are involved with your office?

Mr. James McVay: We have approximately 105 when you count staff, investigators, and lawyers. The staff is somewhere around 10 or 12. It's significantly less now. With the IT capability we have individually now, we don't need the transcription pool that we used to have, for example. So it might surprise you that we only have around 10 or so staff. The rest of them are investigators and attorneys.

Mr. Guy Lauzon: And they're located around the country?

Mr. James McVay: Our largest office is in Washington. We also have a field office in Detroit, we have a field office in Dallas, and we

have a field office in San Francisco. It closely mirrors the Merit Systems Protection Board courts that are dispersed throughout the country.

Mr. Guy Lauzon: You're providing service for how many public servants across the country?

Mr. James McVay: I think somewhere around 2.6 million people make up the federal executive workforce. And that's not including military.

Mr. Guy Lauzon: Are you responsible for the military as well?

Mr. James McVay: The answer is no. As you can imagine, there are some organizations where civilians are working for a military officer as a manager. It in essence touches on that. However, we cannot discipline that manager as a military officer. The only thing we can do is report the findings to the President.

• (1235)

Mr. Guy Lauzon: This might be an unfair question, but from start to finish on whistle-blowing, can you give me just a ballpark figure? You've got 2.6 million public servants who have to be serviced from a whistle-blower perspective. From start to finish, how many people, how many FTEs, would you say would be involved in the delivery of that service? Just a guess, roughly.

Mr. James McVay: You mean for our agency?

Mr. Guy Lauzon: No, for all agencies involved with whistle-blowing.

Mr. James McVay: That handle their own whistle-blower claims and within their agency as well as our agency? I could give you an educated guess.

Mr. Guy Lauzon: Would it be 1,000 employees, 2,000...? I'm not going to hold you to the numbers.

Mr. James McVay: Let me think about it for just a second. I'm trying to think of the agencies that have their own whistle-blower offices within their office of inspectors general.

Mr. Guy Lauzon: You mentioned that some of them have maybe a hundred and others only have two.

Mr. James McVay: And that's just employees, not dedicated just to whistle-blowers.

I would say it would be clearly less than 1,000.

Mr. Guy Lauzon: Really.

Thank you very much.

I left you some time.

Mr. Joe Preston: Thank you very much.

We've talked about some government agencies that are excluded—intelligence branches and those types of things. I'm going to put you on the spot and ask you, they must handle whistle-blowing independently, so how are they doing at it? How would their whistle-blowers say they're doing?

Mr. James McVay: I can only answer for myself, if that's okay. I don't want to have to crawl into the heads of lamplighters.

Mr. Joe Preston: Sure.

Mr. James McVay: They're doing a great job. Oftentimes we don't get a clear view, because the people can still make the allegation to us and we can still tell them, look, we cannot handle this, you have to do this in-house.

Mr. Joe Preston: And you have to say that.

Mr. James McVay: Yes.

Mr. Joe Preston: You're forced to say that under your legislation. If anybody walks in from the FBI, a clerk in an office in Wichita, you have to tell them, sorry, that's an internal matter.

Mr. James McVay: We have to refer them to the FBI and we have no jurisdiction, yes. We don't really get enough information....

In other words, let's say 30 people a year came in from the FBI on the same type of activity. I think I could then say, well, they could do better at that activity. But we don't get that. It's very rare.

Mr. Joe Preston: Let me give you our scenario. We're faced with writing legislation, and at the moment are saying the same thing: our intelligence agencies, CSIS and the RCMP, would be excluded from our legislation, as would our armed forces. We're suggesting, or many people sitting in chairs where you are have suggested to us, that perhaps we should include them in the legislation and exclude the secrets part, the intelligence part.

If we're talking about normal wrongdoing—for instance, I saw a manager go golfing on Thursday, or I saw a waste of \$10,000, or I saw a waste of \$100,000—those types of cases then would be handled as all whistle-blowing would. There's no intelligence involved in that, no state secrets involved in money being wasted. Would you see us being in better shape writing legislation that way or your way?

I told you I was going to put you on the spot.

Mr. James McVay: Yes, and you did.

I would have to say that this would be an answer the Special Counsel would have to give you. I don't have permission to answer that question. It is contrary to our statute, and I don't know his position on it. I wish he were here to answer that question. I think so far I've been able to answer because I know what he's said in the past and what our wishes have been.

Could I write that down? I'd like to have it specifically.

Mr. Joe Preston: Yes. We're looking at whether we should write the legislation and not exclude departments, not exclude our intelligence department and our armed forces, in the sense that ordinary whistle-blowers, if there is such a thing, could come forward to us with their disclosures, or come forward to the independent agency with their disclosures. If it was a matter of intelligence matters, then that agency would have to say, that's a

matter of intelligence, and you'll have to go through your own channels.

I guess what we've heard from a couple of witnesses is that there's a bit of an esprit de corps in those types of agencies that makes whistle-blowing perhaps even more dangerous to the lamplighter than it would in the standard public workforce. I don't know if that's true or not, but I think that's certainly something we should look at as we're writing this legislation.

● (1240)

Mr. James McVay: The only thing I can say that gives a hint of that is it's pretty rare, very rare, that we get anybody who comes to us and says, I work for so-and-so. It doesn't happen very often, and we rarely have to say we don't have jurisdiction, you have to go to your own agency.

Mr. Joe Preston: Okay.

How is your legislation written around legal representation as someone comes forward? Would someone attend to your office under a first-complaint situation with their lawyer or with their union representative, or are they allowed to? And if so, who pays for it? Or is it sometimes later that they can acquire representation, if they feel they need it?

Mr. James McVay: You know that people in America walk in with their lawyer.

No, I'm only kidding. They have every right to have a lawyer at every stage of the way, and they have every right to write that lawyer a cheque for his representation. I'll just tell you that it's rare that it happens. At least initially, what happens is that they file their complaint with us and they are not represented. As a matter of fact, the vast majority of time they're not represented, not even by their union stewards, for example.

It happens, yes, but generally speaking, it's just an individual who comes forward and says, this is what I said, this is what we did wrong, two months later this happened to me, and I believe it's because I made a disclosure.

The Chair: Thank you, Mr. Preston.

We want to break now so that we have time for lunch before question period. We will reconvene in room 237 of Centre Block at 3:30.

Mr. Boshcoff, you'll be first on the list then.

Everyone's welcome to come for lunch, which is in the Centre Block parliamentary restaurant, in an alcove off the general area.

Meeting adjourned.

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