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Chair

Mr. Tom Lukiwski

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● (0845)

[*English*]

The Chair (Mr. Tom Lukiwski (Moose Jaw—Lake Centre—Lanigan, CPC)): Colleagues, ladies and gentlemen, I'm going to get going. Once again I want to welcome our witnesses back to our committee.

I think all of you know the procedure by now, so I won't go into any extensive detail about how the committee works.

Suffice it to say, welcome and thank you again for your appearances today on our ongoing study of the public service disclosure act and the protection of whistle-blowers.

Mr. Friday, I understand you have an opening statement, sir.

Mr. Joe Friday (Commissioner, Office of the Public Sector Integrity Commissioner of Canada): Thank you, Mr. Chair, for inviting me to appear once more to discuss the review of the PSDPA, as we refer to it. It's a pleasure for me to be here this morning and to continue the discussion we began last month.

I am pleased to have with me my general counsel Brian Radford, who I am going to invite to take an active part in the discussions today. Mr. Radford has a long history with the legislation, including being part of its initial government-wide implementation planning before the actual creation of our office. I'm sure he'll be able to provide useful background and context as our discussions continue.

[*Translation*]

I am very pleased to have tabled, on February 14, 16 concrete proposals for positive and progressive change to enhance Canada's federal public service whistleblowing regime.

[*English*]

Since my last appearance before this committee, Mr. Chair, my office has tabled two case reports on founded cases of wrongdoing, and we have published a research and discussion paper on the fear of reprisal, authored by Dr. Craig Dowden, copies of which I understand committee members received earlier this week. This is the first such paper produced by my office—and I believe in the country—and it is an important contribution to the ongoing discussion of whistle-blowing in Canada. I spoke about the need for cultural change when I was here last month, and I note that several witnesses before the committee have since raised that same important issue. This research paper addresses this as well, including making recommendations that will support the ongoing process of that change.

[*Translation*]

As I told you when I was last here, one of my goals as Commissioner is to normalize whistleblowing. I believe that the activities we conducted last month represent significant progress toward achieving that goal.

[*English*]

I have followed the committee's deliberations since my appearance last month, and I am heartened by the level of focused interest on the part of so many witnesses to make real and significant progress in advancing the whistle-blowing regime. While I don't necessarily agree with the view that the regime is a failure and the law must be redrafted from the start, I can say that I enthusiastically support what I believe to be a collective will to support effective whistle-blowing, recognizing that there's not one off-the-shelf model that exists and works for every country or regime. The goals of this evolutionary process are shared by all witnesses, from what I can tell, including me.

I note the depth and focus of discussion about the process for dealing with reprisals and the fact that it is daunting and even discouraging when someone has to first wait for an investigation to be completed by my office, only then to have to go through a formal tribunal hearing—a process not unlike a trial—in order to get a final ruling. I look forward to what I hope is a fulsome discussion on these issues, including the issue of more direct access to the tribunal, which is something I'd like to say I support.

[*Translation*]

This brings me to a very important point, and one that I did not have the opportunity to fully address when I was here last month, and that is our authority to conciliate and settle reprisal cases. To date, we have successfully conciliated nine cases, resulting in settlements that the complainant participated in and willingly agreed to. In five other cases, the Tribunal used mediation to settle the matter, or the parties reached an agreement themselves during the course of the Tribunal process.

[*English*]

My first job in my legal career was as a private practice litigator, and my last job at the Department of Justice was heading up the alternative dispute resolution program. I think you can see where my interests and beliefs lie in respect of providing people with access to justice and to meaningful involvement in the resolution of their own disputes, and in avoiding, when possible, unnecessary litigation and the high costs associated with it.

Yes, I'd say every case my office conciliates means one less case for the tribunal, one less public decision on a reprisal complaint, and one less precedent. These are all important, but it also means that one more reprisal victim is able to get restitution for what they went through; save time, money, and emotional turmoil; and move forward with their lives. This isn't a failure, in my view, of the reprisal protection regime that I administer under the act. I should also point out that every conciliated complaint is reviewed by my office and signed off by me to ensure that no one is coerced into a settlement or otherwise makes an uninformed or involuntary decision to settle.

I was initially going to end my remarks here this morning. However, following testimony that I heard earlier this week—and that you heard earlier this week—I felt it was important for me to clarify some key points from my perspective in the aim of ensuring a clearer understanding of some important issues that the act addresses, which in turn, I hope, can contextualize some of the legislative changes I put forward last month.

● (0850)

[*Translation*]

I will start by saying that the act is complex, and it is drafted in a way that makes it difficult to navigate and understand, and this is again from my personal experience.

I would like to touch on three issues that I think are relevant, given the discussions before this committee to date, and which concern the extent and the effectiveness of the protections and redress mechanisms for whistleblowers and other parties involved in our activities.

[*English*]

First, the act does not prohibit and, indeed, it expressly provides in section 51.2 for access to the Federal Court for any party involved in the disclosure or reprisal to have a decision of my office reviewed. Like any other administrative decision-making body, these decisions are subject to judicial review and under the Federal Courts Act, the powers of the court are considerable. Furthermore, nothing in the act precludes a public servant from exercising any other recourse that they may otherwise have in relation to the situation.

Second, the issue of contractors with the federal government is specifically addressed in the act. It is prohibited to terminate a contract or withhold payment because a contractor has come forward with a disclosure. Further, the contractor's disclosure cannot be taken into account in the awarding of future contracts. To do so would constitute a criminal offence.

Related to this is the fact that, if someone in the private sector provides information about a wrongdoing to my office, their employer commits a criminal offence if they reprise against them. These people also have access to the courts for any other appropriate remedy.

Third, section 51.1 of the act provides chief executives with the power to temporarily assign other duties, inside or outside the department they currently work in, to a public servant who is involved in a disclosure or a reprisal complaint with the consent of the whistle-blower or the complainant.

The committee may wish to review and strengthen these elements. I would be pleased to be part of that discussion, but I do want to address what I believe is a potential misunderstanding that the act is silent on these very important matters.

I would also like to take a brief opportunity to offer a technical briefing on the PSDPA by my legal team to any committee members who would be interested, if you think this would assist in your ongoing and in-depth review of this important legislation. Our shared goal is to have a responsive and complete whistle-blowing regime in the federal public service and anything I can do to support this, I'm happy to offer.

[*Translation*]

In closing, I would like to say that I remain confidently in support of the 16 proposals for legislative change that I tabled with you on February 14. I hope that committee members are able to support them as this review process draws to a close. I look forward to our discussions today.

[*English*]

The Chair: Thank you, Mr. Friday.

I can assure you that I will consult with the committee members to determine whether or not we wish to take you up on your offer of the technical briefing.

Madam Boyer, you have an opening statement, please.

Ms. Rachel Boyer (Executive Director, Public Servants Disclosure Protection Tribunal): It's very brief, like my last one.

[*Translation*]

Thank you, Mr. Chair.

Joining me this morning is François Choquette, senior legal counsel for the Tribunal.

The Tribunal's very existence serves as a safeguard for the integrity of the public service as it demonstrates the seriousness of the government's commitment to protecting public servants who make disclosures. The Tribunal is the ultimate safety net for public servants and it helps encourage the uncovering of wrongdoing.

[*English*]

As previously shared with the committee, under the current legislation reprisal complaints must first be received and investigated by the commissioner. If the commissioner deems that the reprisal complaint is justified, he submits an application to the tribunal to determine if reprisal occurred.

The jurisdiction of the tribunal and the number of cases it handles is really tributary to factors outside of its control.

[*Translation*]

Our experience in adjudicating disputes has been limited thus far, mainly due to the low number of cases the Tribunal has received.

[*English*]

Subsection 21(1) of the PSDPA states that "proceedings before the tribunal are to be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedures allow". The tribunal, like other quasi-judicial bodies, operates under the open court principle and is governed by its rules of proceedings that were established in 2011.

These rules can be liberally interpreted with the aim of ensuring informal and expeditious resolution. As such, as a matter of policy, the tribunal also offers a voluntary mediation process to attempt to resolve a complaint reprisal without a hearing. As mediation is voluntary, it cannot be imposed on the parties. This mechanism also allows the parties to reach a mutually agreeable resolution through the assistance of a neutral third party. Generally, mediation is less time consuming, less costly, and less adversarial than a judicial hearing. In fact, this has led to most of the tribunal cases being settled prior to a hearing.

● (0855)

[*Translation*]

The Tribunal's role is to adjudicate complaints and determine whether or not reprisal has taken place, and to apply the law enacted by Parliament to the facts before it. Should Parliament decide that added powers be vested in the Tribunal, or that legal rules regarding its mandate be modified, those powers and rules will be applied in the same spirit of fairness and justice that has characterized the work of the Tribunal thus far.

[*English*]

Mr. Chair, this concludes my statement. I would be pleased to answer any questions the committee may have.

The Chair: Thank you, Madam Boyer.

We will start our first intervention with Mr. Peterson, for seven minutes.

Mr. Kyle Peterson (Newmarket—Aurora, Lib.): Thank you, Mr. Chair, and thank you everyone for appearing once again before us.

Mr. Friday, I want to talk about some specific cases. First, I want to thank you for bringing those technical sections to light with the committee, and how they deal with contractors and private actors.

We had a contractor before us the other day, as you know, Mr. Garrett. There seem to be protections available in the legislation for him, but for whatever reason, it's fair to say he doesn't feel like those protections were provided, or he obviously is in a difficult situation. I spoke with him after the event. It will come as no surprise that he, in hindsight, probably never would have said anything based on how things have come out with the investigation, and how his life has literally changed.

How do we address this? You can look at Ms. Therrien and Ms. Gualtieri who appeared before us. Are these just people who have slipped through the cracks of an otherwise good act? These people are suffering real issues. Their lives have been changed forever, and I'm hearing that the act ought to protect them. What went wrong?

Mr. Joe Friday: The three cases you mention offer some interesting contrasts. For example, Ms. Gualtieri never went through the whistle-blowing system. She went through the court system, which is always an option for anyone. That may be because she didn't feel she had confidence in the system, I'm not sure, but I respect her decision in any regard.

What it actually demonstrates is the depth of complexity of a whistle-blowing system. When I speak to colleagues in the provinces and territories, and in other countries, we have many overlapping concerns, many different concerns that come from different models of whistle-blowing legislation. It's all based on a recognition, certainly on my part personally, of the difficulty in coming forward.

What we have tried to do with our 16 proposals is address those to a significant extent. One that I'd like to underscore and may come back to many times is the reverse onus before the tribunal, which has a sort of cascading effect that will do wonders. I don't want to overstate it and be too exaggerated, but it will mean very significant progress. It's a reverse onus at the tribunal, but it has other effects that address some of the issues that perhaps these people and others may have come forward with.

One of the goals is, as Madam Boyer said and I referred to the proceedings before the tribunal, having to be under law, expeditious and informal. My proceedings are bound by that same legislative requirement.

At this point, it's easy to say that I have the obligation. It's a little harder in a formalized and increasingly litigious process to ensure informality and expeditious proceedings. One of our goals is to take some of that formality away, if at all possible, without putting whistle-blowers in a more precarious position.

It's an ongoing balancing act that is reflected significantly in my proposals, but there are other ways as well.

Mr. Kyle Peterson: We did appreciate your proposals.

I come from a civil litigation background myself and practised in Ontario. We're always struggling in the courts in Ontario with how to make things less formal, make litigants able to access the system better than they can, and make it easier to access the system. It seems to me there are similar problems in this process.

Do you have any internal sort of procedures that you follow, or is everything based on the statute?

● (0900)

Mr. Joe Friday: We do have internal procedures. We have, for example, investigative steps and procedures, and a manual, which is an evergreen document, that's currently being redrafted on the issue of what we were just talking about now, essentially easier access to the tribunal. Mr. Radford and I are actually discussing whether there are steps we can take procedurally without having to change the legislation to make that procedure more informal, recognizing, of course, that when the courts review our work, they often tell us to become more formal in order to protect procedural fairness and natural justice, so there's this trade-off.

My commitment certainly, as commissioner, is to make whatever changes we can through policy. We've put a few of our policies in the briefing book that we provided for you. We have an ongoing list of issues that arise under the act that we feel we can address through a policy as opposed to a legislative change. One of those would be, for example, the discretion I have to extend the 60-day deadline to make a reprisal, and I can tell you that with that policy in place, this fiscal year we've had only two cases that have actually been closed because of that.

I think those procedures and policies are an essential part of what we're doing, and we're publishing those. They're not just internal; they are all on our website.

Mr. Kyle Peterson: We have access to them then.

Mr. Joe Friday: Absolutely, and I can—

Mr. Kyle Peterson: I was going to ask you to provide that, but if it's on the website—

Mr. Joe Friday: In tab 6 of the initial briefing book that I provided to the committee, there are three of our policies, the three we completed after a consultation.

Mr. Kyle Peterson: That wasn't exhaustive, but is the exhaustive list available publicly?

Mr. Joe Friday: The process continues. Those are the three we have now, but we have others that are in the process of being completed. This is an initiative I started last year.

Mr. Kyle Peterson: Okay, thank you for that.

Just quickly, on the mediation, as a civil litigator, I'm all for mediation. Obviously both of the parties have to be willing, and that's the key.

Mr. Joe Friday: Yes.

Mr. Kyle Peterson: Sometimes, because things are mediated, when we look at the statistics, they might be lower than we would expect them to be. How many of these end up in mediation or in other informal processes?

Maybe Madam Boyer could talk to that.

Ms. Rachel Boyer: As I shared with you at the last meeting, we've had seven cases since the law came into force. Within those, we have not had one full hearing or a decision on merit yet. We have a hearing coming up in April.

One was scheduled for trial. After two days in the hearing, they requested mediation or an internal settlement, and the other three were settled through mediation. We often get requests from the parties to mediate as well.

The Chair: Thank you very much.

Mr. McCauley, go ahead for seven minutes, please.

Mr. Kelly McCauley (Edmonton West, CPC): Welcome back. It's a pleasure to have you with us.

Mr. Friday, you mentioned that the act is difficult to navigate, and I accept that. Do you think it can be helped with just amendments as opposed to blowing it up and starting afresh as has been recommended by one of our experts?

Mr. Joe Friday: Mr. Chair, perhaps it's a question of the degree of amendment required. I think the act does reflect some key important concepts in terms of a complete whistle-blowing regime, but I think we're at the point now where, with the number of years of experience we have, we can make some changes. Of all of the ones I have submitted, I would propose that some are quite extensive. I've been asked if my proposals are actually a rewrite of the act. I suppose any proposal is, but I do think it's able to be reconfigured in a way to reflect some essential elements, one of them again—sorry to go back to this—being the reverse onus.

Mr. Kelly McCauley: Perfect.

Last time we met, you mentioned having some difficulty with resources. Can you just walk us through, quickly, what resources you have? You mentioned you have 30 people in your office.

Mr. Joe Friday: I have approximately 30 people. The focus of our resources is the operational front. We're a micro agency so, for example, I don't have my own IM/IT or HR. We buy those services from the Human Rights Commission and Public Works.

Mr. Kelly McCauley: Don't mention Shared Services.

Mr. Joe Friday: Like any other—

Mr. Kelly McCauley: Are some of your resources being drawn away to do work that maybe should be handled by others, and is that affecting your operation?

Mr. Joe Friday: I will say that the resources we have now, with our approximately $5 million budget, appear to be sufficient to allow us to do our work. We'll be lapsing a little bit of money this year. We set some aside for contingencies. For example, you may know that we had a case report that we tabled in Parliament, and the department in question, the RCMP, sought to set that aside, and that cost us about $200,000 in legal fees, for example, so we're balancing those contingencies at all times.

We also currently dedicate two people to working full-time on communications and parliamentary affairs. We think that outreach and communication are extremely important parts of our regime.

I know I am the external decision-making body, but, for example, on our website, we produced an animated video to demonstrate how the system works—not just our office but how all aspects of it work.

● (0905)

Mr. Kelly McCauley: Every government department has probably a larger resource for whistle-blower protection than your individual department does. Should the departments not be doing this themselves?

We've heard from some departments that they've had two issues over a five-year period, but we've also seen reports that a huge majority of the staff have stated they're afraid to come forward. Are the other departments maybe dropping the ball on explaining the process or...?

Mr. Joe Friday: I would point out, Mr. Chair, that the act, in section 4, specifically assigns to Treasury Board or the office of the chief human resources officer the obligation to:

> promote ethical practices in the public sector and a positive environment for disclosing wrongdoings by disseminating knowledge of this Act and information about its purposes and processes

Mr. Kelly McCauley: We'll get to them this afternoon on that question.

Mr. Joe Friday: Yes.

I do want to say that there is a specific statutory duty that's assigned to Treasury Board there. I try to supplement that by.... I don't speak on behalf of Treasury Board, but I do speak about them in terms of their role—

Mr. Kelly McCauley: For the sake of argument, let's say someone in department A brings up an issue and it's kept within the department. Is any of that reported over to your department? Is there any way to follow up?

Again, I'll use Health Canada as an example, because they've appeared before us. Someone has an issue, and they go to the whistle-blower. Does any of that go over to you so that you're aware of that process that's been started?

Mr. Joe Friday: No. That would be reported.... Under the legislation, that would be gathered by Treasury Board, which is responsible for the internal whistle-blowing regime. I would get a copy of that report, as anybody else would, but since I have no jurisdiction over the internal regime, I stay external and therefore preserve my independence, which is very important to me. I don't see it at the time, but I do see it when the rest of the world sees it.

Mr. Kelly McCauley: Okay.

One of the issues that came up was about anonymous disclosures. Several other countries similar to us have that. Others, like us, do not. Do you think it would promote confidence for staff to come forward under an anonymous process?

Mr. Joe Friday: I would like to say that the case report that I tabled on February 16 was based on an anonymous disclosure. Our act is silent with respect to anonymous disclosures. Treasury Board is of the view that an anonymous disclosure is not a protected disclosure.

I am of the view that if I get enough precise, reliable information to proceed with an anonymous disclosure, I will, and the February 16 case report involving the Public Health Agency of Canada was the first case report flowing from an anonymous disclosure. Treasury Board and I disagree on that, but I do accept anonymous disclosures as the external whistle-blowing—

Mr. Kelly McCauley: I think that's important considering the high lack of confidence our public servants have in terms of protection. We've seen some horrific cases of the government going out of its way to destroy people's lives. I can certainly see a need for that.

Mr. Joe Friday: It becomes somewhat of a two-edged sword. To encourage anonymous disclosures is not necessarily in line with fulfilling the aims of an act. I think that as you work toward a system in which people have more confidence and they see it working, they would be less likely to make an anonymous disclosure, but at this time I don't think I have the moral authority to reject one.

Mr. Kelly McCauley: Yes. I'm mostly sharing your view on that.

I want to get back to what Mr. Peterson was—

● (0910)

The Chair: Mr. McCauley, I think we're going to have to cut you off there, because I'm sure your question would take longer than the time we have left.

We'll go to Mr. Weir, please, for seven minutes.

Mr. Erin Weir (Regina—Lewvan, NDP): Thanks very much to our witnesses for appearing again before the committee.

One of the things our committee has heard is that the practice of the Public Sector Integrity Commissioner over the past decade has been to reject complaints of reprisal as being out of jurisdiction if the whistle-blower has pursued a workplace grievance process, has gone to the Privacy Commissioner, or has taken another avenue.

Is that in fact your practice? If it is, how do you justify it?

Mr. Joe Friday: Subsection 19.3(2) provides that if there is a grievance in place, I don't have discretion. I'm prohibited from acting on something if the subject matter of a reprisal is the subject matter of the grievance. I have the discretion to not deal with a reprisal case if I am of the view that there is another process that could more adequately deal with that process.

Mr. Radford may wish to clarify, if that would be of help.

Mr. Erin Weir: It would if we could maybe get some numbers about how many complaints have been turned down on that basis.

Mr. Brian Radford (General Counsel, Office of the Public Sector Integrity Commissioner of Canada): Absolutely. Specifically on the issue of jurisdiction, when another body is already dealing with the same subject matter of the reprisal complaint, we have rejected 12% of reprisal complaints on that basis.

Mr. Joe Friday: Could I just interrupt to say that we provided to the committee reasons and statistics to all the heads for closing files, but we're more than happy to review them as carefully as you wish us to.

Mr. Brian Radford: The majority of reprisal complaints that have not been investigated were for reasons that they were outside of the jurisdiction of the public sector, and concerned an entity not within the definition of the public sector. In other instances, the subject matter simply did not correspond to a measure that adversely affects the working or employment conditions of a public servant.

Another jurisdictional issue is when a person has not made a disclosure, and we apply a very liberal definition of disclosure. If a person has had a discussion with their supervisor about something that could relate to a wrongdoing, we give the benefit of the doubt to the person that they have made a protected disclosure.

However, there are cases where it is plain and obvious that the person has simply not made a protected disclosure. Therefore, they may have a legitimate labour relations issue that they wish to have dealt with, but we are not the proper office for that. That represents 50% of cases that are not investigated when it comes to reprisal complaints.

Mr. Erin Weir: As you know, the Federal Court of Appeal recently looked at this area. It basically determined that the Public Sector Integrity Commissioner's actions "violated the appellant's right to procedural fairness rights", and were "incompatible with the intent and purpose of the Public Service Disclosure Protection Act." This is, of course, from the Therrien decision earlier this year.

We're going to be hearing from Ms. Therrien later today, so I just wanted to get your response to that judgment.

Mr. Brian Radford: The case of Madam Therrien decided by the Federal Court of Appeal cited two issues and two problems with the commissioner's work in that regard.

We had determined that because Madam Therrien had filed grievances, and those grievances were before Public Service Labour Relations and Employment Board, indeed the restriction under subsection 19.3.(2) of the act applied to us. We had accepted some of her allegations for investigation; we had refused others. It is on the allegations that were not accepted for investigation that there was a judicial review.

The Federal Court supported the commissioner's interpretation that indeed she had filed grievances, and that they were on the same subject matter. The Federal Court of Appeal set aside the Federal Court's decision, noting that because the employer was challenging the very jurisdiction of the PSLREB to air her grievances, how could we say that the PSLREB was, in fact, dealing with the same subject matter? We will be following the directions of the court, and we will be awaiting developments before the PSLREB in the case of Madam Desjardins.

● (0915)

Mr. Joe Friday: If I could intervene just on that point, and we fully accept and respect, of course, the Federal Court of Appeal's decision. The result of that, from a practical perspective, is that we have had to put our investigation in abeyance until the grievances were dealt with, so we're not really able to even continue until the other process is finished, which to me raises an issue that we've all been concerned about, which is the speed of the process by our office.

Mr. Erin Weir: For sure, you've said that you accept the Federal Court's ruling, and I guess in a sense you have to, but I guess what I'm trying to really just flesh out is that your intention is really to change your practice, and the practice of your office in response to it.

Mr. Joe Friday: Yes, and again to go back to the proposals that we tabled in February, the reverse onus provision to me would provide our office with the ability to be much more flexible and much less...I don't want to say thorough, but perhaps less formal in the work we do. I would hope that if we set the parameters for that work in the presence of a reverse onus, the Federal Court of Appeal would not be looking at the fullness of an investigation, because we would be doing more of a screening in order to get that person to the tribunal much faster than they are now.

Mr. Erin Weir: If someone goes through a grievance process and then it's completed, is the commissioner able to look at it after that?

Mr. Brian Radford: Yes, we can. That falls under the discretion of the commissioner. The commissioner can determine whether it has been adequately dealt with by the other body. We can obtain a copy of the decision; we can have discussions with the complainant.

It falls under the discretion of the commissioner in those types of situations.

Mr. Joe Friday: That's where we have the Therrien case in abeyance.

We'll wait for that decision to see if there is any action we are able to take following the adjudication of her grievance.

The Chair: Thank you.

Mr. Whalen, for seven minutes.

Mr. Nick Whalen (St. John's East, Lib.): Thank you again for coming back to the committee. Obviously, the testimony we've heard this week shines a new light on the usefulness of the current legislation and on international best practices.

We received a very interesting document from Global Watchdog. It lists a number of international best practices, and maybe it comes down to whether the act really starts from the right starting point.

The first is the view that it's free expression rights that are what need to be protected. It's a human right that a worker should not have to work in a place where wrongdoing is occurring, or that they merely have a reasonable suspicion that wrongdoing is occurring and not be given the right to freely express their concerns about the wrongdoing.

How do any of your suggestions for a change in the act protect the free expression right of employees to voice their concerns in whatever way they choose about wrongdoing that is occurring, or to even explore with their colleagues and co-workers that they may suspect wrongdoing is occurring?

Mr. Joe Friday: One of the changes we proposed, for example, was to actually break down that structure of who you can speak to. Right now the act says that you come to your manager, your senior officer, or you come to me.

Our first proposal is that you can make a disclosure to anybody in the chain of command, all the way up to the chief executive.

Mr. Nick Whalen: What about colleagues? We've heard from people who say that it's not really about making disclosures to a particular person; you should eliminate the criteria altogether.

Your suggestion regarding expanding the definition of supervisor is against international best practice.

Mr. Joe Friday: I think the principle that a whistle-blower has as many options as possible is an important one. I also think having access to someone with authority to address the issue is part of the structure.

I would point out that in our—

Mr. Nick Whalen: Sorry, Mr. Friday, when someone only has a reasonable apprehension that wrongdoing has occurred, how can they safely explore the issues without being able to go to somebody who's not necessarily a supervisor? Then it ceases to be a protected disclosure, and that could be where the reprisals start to happen, because, "Oh, this person is digging. We have to cut them off at the knees."

Your act does not protect it, and none of your recommendations address that point.

● (0920)

Mr. Joe Friday: I don't know if a piece of legislation could actually address that fully.

When we are talking about cultural change, for example, the paper we just produced on the fear of reprisal I think highlights some of those very issues.

Mr. Nick Whalen: Sure, and in that paper I note that you start at the second step. The premise of the paper is that there are three options for the potential whistle-blowers—to do nothing, stay silent, or whistle-blow—when in fact that's not where the analysis begins.

The whole point of international best practice is recognizing that it's when there's a reasonable apprehension that there's wrongdoing occurring that the worker needs to start exploring those options and investigating and discussing. That's when harmful disclosures to them are occurring. Your suggestions don't address it.

Let me move on to the next point about good faith. Can we go farther than just removing good faith? Can we expand the protected disclosures to the notion that if someone has an honestly held belief that there's wrongdoing, that would be sufficient to protect their free speech?

This is your third suggestion.

Mr. Joe Friday: Yes.

I feel very strongly about the removal of the good faith requirement.

Mr. Nick Whalen: Yes, and I'm saying that it doesn't go far enough. It doesn't meet the international best practice.

Mr. Joe Friday: I'm not sure what that international best practice looks like in terms of how it would appear in legislation.

Are you talking about the change to the legislation, or does this go broader, to the organizational culture?

Mr. Nick Whalen: We're speaking today about the fact of whether we need to start fresh in this act or whether we can use this act. It seems to me that your suggestions don't bring us to the level that the international best practices would suggest. If they don't, then that's the suggestion to me that we do, in fact, need to start again.

Let me go to a next point on the burden of proof.

We heard from the member from Australia who said this notion of trying to prove reprisal is ridiculous; it's almost impossible. What we need is to provide a duty on employers to protect and support employees who are investigating whether a wrongdoing has occurred. It may not even have been wrongdoing; they may be punished because they just looked into what the rules were. Why is that not one of your suggestions? That's very clearly international best practice. That reprisal protection is useless if there's no duty to protect and support whistle-blowers.

Mr. Joe Friday: The current act does speak in terms of statutory prohibition on reprisal. It's both a criminal offence as well as a—

Mr. Nick Whalen: But this is the point, that reprisal is already a step too far. How can you have not spoken in any of your recommendations about the need for duty to protect and support people who voice—and I can't use the word whistle-blower, because our definition of "whistle-blower" doesn't go far enough—their concerns when they have an honestly held belief that there is wrongdoing?

Why aren't we actually providing a duty to protect and support employees, not simply protect them against retaliation?

Mr. Joe Friday: The act is based on a responsive model.

Mr. Nick Whalen: Are you saying that our act does need to be replaced?

Mr. Joe Friday: I think it needs to be reviewed and amended, certainly.

Mr. Nick Whalen: When we move on to reliable confidentiality protection, I note that you have put some things in here. I think at least in that respect, your suggested changes to the act do marry up with international best practices on the confidentiality side.

On shielding whistle-blower rights from gag orders, when I look at what the international best practice says about this, they're really looking at the dichotomy between the employer and the employee. Something I don't see happening with any of the documents is the public interest. I'd like to know who the third person is at the table representing the public interest. We're talking about public bodies and whether there is wrongdoing occurring. I have a lot of apprehension about closed-door settlement in mediation. I feel it does need to go to tribunal, and we do need to have a public review. I don't feel comfortable in the context where there are three sides—the employer, the employee, and the public interest of the institutions—being secure and honest and performing to the best of their ability having these closed-door settlements. I don't think it's an appropriate mechanism for mediation. Maybe you can speak to that.

The Chair: We're going to have to get you to speak to that at a later intervention, perhaps with one of Mr. Whalen's colleagues or perhaps the next time Mr. Whalen has a direct question for you. We have to move on, unfortunately.

We'll go to Mr. Clarke, for five minutes.

● (0925)

Mr. Alupa Clarke (Beauport—Limoilou, CPC): Nick, if you want to continue, go ahead.

Mr. Nick Whalen: I'll just repeat the question.

Mr. Joe Friday: We're not bound by gag orders. If someone has signed an agreement in which they agree to keep confidential the details of whatever the dispute or the issue was, they can still make a disclosure to us. You can't—

Mr. Nick Whalen: I'm sorry, in the context of the public interest then, I would like to know the details of all the allegations associated with the wrongdoing that you've mediated, and I'd want to see through any confidentiality provisions.

Mr. Joe Friday: We do not mediate wrongdoing.

Mr. Nick Whalen: Sorry, I mean retaliation, which is a form of wrongdoing.

Mr. Joe Friday: All reprisal issues are labour relations issues, although not all labour relations issues are reprisals.

That's like a settlement of a grievance, for example—

Mr. Nick Whalen: I would tend to think that reprisal is a level of wrongdoing that speaks to a systemic failure of the human resources relationship within an organization. It speaks more broadly to the culture. I think it's interesting, when we're trying to review this legislation, to learn that the very interesting cases that we might have access to in order to see some of the nuanced approaches are shielded from us because of confidential settlement agreements that your office has negotiated.

Mr. Joe Friday: Our office doesn't negotiate them. We don't act as the mediator, we actually—

Mr. Nick Whalen: I thought you said you do act as the mediator.

Mr. Joe Friday: No, we pay for the process and we hire a third party neutral who is agreed to by the parties. We mediate or conciliate a reprisal case only if the parties, including the complainant, agree to it. In very many cases, the complainant asks for that confidential process, because they don't want their—

Mr. Nick Whalen: At what stage does the public interest consent to the process? You're the gatekeeper on that. You exercise your authority at some stage to say, "I'm sorry, this is too important. This needs to go to a tribunal, and this can't remain confidential. This type of retaliation goes beyond the dispute. This isn't just a labour grievance, because if it was, it wouldn't be before my office anyway, if there's a public interest. It's not a labour matter."

Mr. Joe Friday: Conciliation is something that we agree to, that we propose, so we do that. Every time we've had a conciliation, there is a written analysis put forward as to whether or not this is the right stage for conciliation, and whether or not the parties are in agreement. There's a legal analysis.

Mr. Nick Whalen: I will note that's only about a fifth of the cases. In the other 80% of the cases, we're still seeing that a lot of reprisal cases aren't getting heard.

Mr. Clarke, thank you. You can continue.

The Chair: Mr. Clarke, you have about two and a half minutes left.

Mr. Alupa Clarke: Okay, thank you, Mr. Chair.

[*Translation*]

Mr. Friday, on Monday evening or Tuesday morning, a witness led us to believe that your office is not setting an example. According to this witness, both you and the former commissioner should have disclosed certain wrongdoings.

I would like to hear your response to that.

Mr. Joe Friday: Pardon me?

[*English*]

Mr. Alupa Clarke: There was a witness on Monday night or Tuesday morning who expressed the fact that, according to him, there was some wrongdoing in your office, and that no commissioner, neither you nor the one before you, has been whistle-blowing on the fact. What would you answer to this?

Mr. Joe Friday: With respect to the first commissioner and the Auditor General's findings against her?

Mr. Alupa Clarke: I don't know what he was talking about, but—

Mr. Joe Friday: I think that's what...yes, if that's what he's talking about, I can say that as a member of the office at that time, I was interviewed. I fully participated, and I shared all of my experiences and observations, positive and negative—as everyone in the office did—respecting that. I would remark that, in that situation in 2010, it was extremely divisive. I'm almost reminded of the post-election situation in the United States. I think people had very different observations and very different personal experiences with the first commissioner, and the Auditor General made a decision, which we accepted. For example, the two people, who I found out only after they came public, were the people who came forward to the Auditor General. They were people I had never even worked with and have never met to this day. It was a difficult situation. The first commissioner resigned as a result.

The Chair: Mr. Clarke, you're down to less than 30 seconds.

Mr. Alupa Clarke: One of our colleagues, Mr. Ayoub, also mentioned this week that whistle-blowers are important for democracy and for identifying wrongdoings in society. It's for the good of public interest. As soon as a whistle-blower identifies a wrongdoing, why don't we have a system that takes the responsibility off his shoulders and have the state look at everything on behalf of the person?

● (0930)

Mr. Joe Friday: When a whistle-blower comes forward—and our act specifically says the whistle-blower has to bring as much information as possible—we then take it from that person on behalf of the public interest. If the whistle-blower wants to disappear, they can, and many do. They say, "Here's the problem. Deal with it." Then it becomes mine. We never negotiate away a wrongdoing. We never mediate a wrongdoing. We take that and act with it.

Mr. Alupa Clarke: That's fine, thank you.

[*Translation*]

Mr. Joe Friday: It shows that the independence of my office is important.

Mr. Alupa Clarke: That is good.

[*English*]

The Chair: Thank you, sir.

I think it's the first time we've had an intervention from a parliamentary secretary. Madam Murray, you have five minutes, please.

Ms. Joyce Murray (Vancouver Quadra, Lib.): Thank you very much.

Commissioner, the committee heard from a witness that the internal mechanisms of disclosure within departments should be scrapped. That was over concerns of potential conflict of interest, the lack of objectivity or independence. However, as we know, the mechanism of internal disclosure is being used even though the employees have the choice of using your office or internal mechanism. I understand that in an interview, you offered a potential solution that would maintain the internal system but provide more independence in the case of potential conflict of interest. You recommended that independent third party investigations could be a standard practice when complaints are lodged. One quote is that this could go"a long way to demonstrating commitment on the part of senior management that they're committed to resolving an issue and resolving it in a way that supports objectivity and neutrality". I note that doesn't appear in your set of recommendations with respect to supporting whistle-blowing. I wanted to ask you to comment more about it and provide us with your view. How might that process work, and would that help provide the independence from a potential conflict of interest?

Mr. Joe Friday: My remarks were in specific respect to recommendations I had made in a case report that I tabled with Parliament. That involved allegations of harassment in which I found that a deputy minister and a senior official had essentially gone around the existing procedures. That was the nature of the wrongdoing, so my recommendation for corrective action was that when harassment cases are brought against a senior official, departments should consider not dealing with that internally. That was to deal with the specific case of harassment, not necessarily all wrongdoing.

With respect to the internal and external options, I do think it's important that whistle-blowers have a choice. In the previous iteration of this legislation, whistle-blowers were required to exhaust internal options before coming to my office. Now they have the choice. I think the goal then becomes to ensure that whistle-blowers are able to make an informed choice about exercising their options. For example, if a whistle-blower does not go internally because he or she doesn't trust the department's internal system, that whistle-blower has the option to come to me.

I do have some concerns about shutting off options that are open to whistle-blowers. I'll note that according to my reading of Professor Brown's testimony, he was also in favour of maintaining the internal system to provide those options. I think it would be very useful to support the internal system to be clear as to what happens when someone goes internally and have some consistency perhaps among departments with respect to how they treat these whistle-blowers. I also note in our research paper the issue of having options is perceived as a positive thing as well.

Ms. Joyce Murray: Okay, so that could be in policy and procedure as opposed to being anything in the legislation.

Mr. Joe Friday: The act currently identifies who you can go to. As I said earlier, one of my proposals is to broaden that, giving express flexibility to a whistle-blower, given that the types of cases that people come forward with and the types of people who come forward are so varied and so different. Sometimes people are coming forward to have something confirmed, to have a suspicion confirmed. Sometimes someone comes forward with 13 boxes full of detailed documentation. I think more flexibility to respond to the needs and interests of an individual whistle-blower ultimately supports whistle-blowing within the federal public sector.

● (0935)

Ms. Joyce Murray: Okay, so a whistle-blower-centred process is what you're talking about.

Mr. Joe Friday: Yes, I think it's about respecting the choice of the whistle-blower. That goes to, for example, as we were just talking about, conciliation with reprisal victims on the reprisal side of the ledger. If a reprisal victim or a reprisal complainant is making an informed decision to settle, that it is the right thing for them at this time, I question that choice, but I respect it after I question it.

Ms. Joyce Murray: Okay. I—

The Chair: We're out of time.

Mr. McCauley, I understand that you will be starting but Mr. Clarke will be splitting time with you. You have five minutes, please.

Mr. Kelly McCauley: Ms. Murray, how long is your question? You can continue for a minute or so, if you want.

Ms. Joyce Murray: Okay.

Mr. Joe Friday: Sorry for the length of my response.

Mr. Kelly McCauley: It's okay. I wanted to hear it.

Ms. Joyce Murray: Well, this is a second matter. I want to ask a bit about the good faith requirement.

Mr. Kelly McCauley: We have another round for another hour, so go ahead.

Ms. Joyce Murray: We've heard from other witnesses that the good faith requirement should be eliminated, and you mentioned that yourself. I would like your comment on the concept of there being a reverse onus, in effect, on good faith so that there is a presumption of good faith—

Mr. Joe Friday: Yes, at law.

Ms. Joyce Murray: —until such time as it's demonstrated otherwise, and if it should be demonstrated otherwise, then there is an off-ramp to the process. Would that address the concern you have?

Mr. Joe Friday: If we remain focused on a whistle-blower-centred model that says, if that person has reasonable belief in the truth of what he or she is coming forward with.... They can be mistaken, as we all make mistakes and we can all be wrong, but if they have reasonable belief in the truth of what they're coming forward with, to me that settles it. I think that takes us away from the concept of intention and motivation.

For example, if someone blows the whistle on me, they may hate me and want me to be fired or die a painful death, or whatever. That has nothing to do with the fact that, if they come forward with facts about me misspending or abusing public funds, the motivation that they want to harm me is irrelevant. The only thing that is relevant is whether I abused those funds. If they have reasonable belief that I did, then I think we simplify matters by pushing motivation completely away.

An earlier version of our legislation actually had the ability of the commissioner to reject something if it was frivolous and vexatious. Parliament then replaced that with the good faith requirement. I think the next step is to get rid of the good faith requirement completely and start with the presumption that people are coming forward with reasonable belief.

If there's evidence to prove that someone did not have reasonable belief in what they came forward with, it would no longer be a protected disclosure. So I think it works itself out.

Ms. Joyce Murray: Thank you very much.

Thank you, Mr. McCauley.

The Chair: Mr. McCauley, you have a little over two minutes left.

Mr. Kelly McCauley: Mr. Friday I know is fighting a cold and losing his voice; we'll give him a break.

How many issues or complaints are you dealing with per year?

Ms. Rachel Boyer: Per year? We've received seven.

Mr. Kelly McCauley: Walk us through how long it takes.

Ms. Rachel Boyer: We've received seven—

Mr. Kelly McCauley: A year or since the beginning?

Ms. Rachel Boyer: Since the beginning of the legislation.

Mr. Kelly McCauley: I wanted to confirm that because I saw that in our analyst's notes. That's about one per year.

Ms. Rachel Boyer: It's about one per year.

Mr. Kelly McCauley: Do you find it odd that it's so low? We've heard some horror stories.

Are people just that afraid or are they just getting blocked from coming to you, in your opinion?

Ms. Rachel Boyer: It's a difficult question for the tribunal to be able to answer. As you know, we tend to remain neutral as to what comes to our office. Our members deal with the cases that are brought before them.

Mr. Kelly McCauley: Are you dealing with them in a timely fashion?

Ms. Rachel Boyer: I believe so.

We have rules of procedure that establish the disclosure. Once we receive the application from the commissioner, within a couple of days the notice goes out to all of the parties with a disclosure schedule. François may have more specifics but in past cases...again, in the principle of fairness, we often get requests to extend time from one or another party for the disclosure process. Being an open court, everybody has to agree. Motions are put before us sometimes to extend the timeline, which I think all but once was allocated.

● (0940)

Mr. Joe Friday: For the record, never by the commissioner's office.

Ms. Rachel Boyer: No. It's usually the party.

Mr. Kelly McCauley: I want to put it on the record that it is the commissioner's office.

The Chair: There is very little time left.

Mr. Kelly McCauley: I'll ask you in the next round.

Thanks very much.

The Chair: On another extraneous comment, Madam Boyer, I hope your remuneration is not based on a per case basis if you've only had seven over time?

Ms. Rachel Boyer: No. It isn't.

Our office is quite small and I actually manage two tribunals.

The Chair: Mr. Picard, thank you for being here.

Welcome to our committee.

You have five minutes.

Mr. Michel Picard (Montarville, Lib.): Thank you.

I will split my time with my colleague because I have one particular question.

[*Translation*]

I would like to go back to the issue of grievances.

My understanding is that grievances and whistleblower complaints are handled differently.

Please explain what would happen in the following scenario. Let's say that an employer decides to transfer a whistleblower to another location—this is easier to do in certain departments—and there are suspicions that this is a way to punish the employee. For example, say that the employee worked in Montreal and he or she was transferred to the Northwest Territories without a reason being given. In terms of the union or labour standards, this may not seem unreasonable. However, experience clearly shows, or at least gives cause to believe, that this is a way to punish a whistleblower. In this case, there would be no grounds for a grievance and you would not be able to intervene. It could not be proven that the transfer was a punishment; it might even seem like a promotion.

What would be your position in such a situation? Could you look into this case on the basis that a disclosure was made that warranted examination?

[*English*]

Mr. Joe Friday: Mr. Radford.

[*Translation*]

Mr. Brian Radford: Yes, I can answer the question.

In very general terms, reprisals include all measures that adversely affect an individual's job or working conditions. This could be excluding an individual from certain meetings, which is considered a subtle reprisal; a transfer; or the employer's questionable decision to conduct an internal investigation.

The person absolutely has the right to file a reprisal complaint with the Office of the Public Sector Integrity Commissioner of Canada. First, we must determine whether the individual made a protected disclosure to the Office or to another authority in accordance with the act. As I indicated earlier, we have a liberal interpretation of what constitutes a protected disclosure. We ask the individual whether he or she has discussed a potential wrongdoing with anyone. They do not have to provide proof or establish that this is the case. If they have discussed it, we ask who they discussed it with. When an individual sounds the alarm about potential wrongdoing, he or she is protected and they can file a reprisal complaint with the Office of the Public Sector Integrity Commissioner of Canada, even when this situation could have also resulted in a grievance.

Mr. Michel Picard: You used the term “protected” and that is important. It comes back to what my colleague said about more general and international measures. There must be some sort of unofficial procedure before an individual decides to make what is known as an official disclosure.

Let us suppose that I talk to a colleague about my concerns, and that someone gets wind of the conversation before I can make my official disclosure. I could find myself promoted to a job on Mars, when that is not what I had expected.

Mr. Brian Radford: We want to be very clear about this. We do not require the individual to follow the internal procedures. If that individual does not use the departmental disclosure form, but discussed the matter, we will accept their complaint. However, according to the current act, the discussion had to have taken place in the presence of a supervisor. We give this criterion a liberal interpretation. The person could be part of the chain of command and does not have to be the individual's immediate supervisor. The Commissioner is proposing that this concept be expanded. No matter, we opt for a liberal interpretation. A conversation or an email is all that is required.

● (0945)

Mr. Michel Picard: Thank you.

[*English*]

Ms. Yasmin Ratansi (Don Valley East, Lib.): I'll pass my time.

The Chair: Thank you very much.

We will have Mr. Weir for three minutes and that will complete our first round; and we will then go back to the second round, which will start with seven-minute interventions.

Mr. Erin Weir: I think we've had some really good discussion about the interplay between grievance processes at the departmental or agency level and the more centralized process that you administer. Where we left off was Mr. Radford making the point that the commissioner does have the discretion to look at cases that have already been through the grievance process. I'm wondering if you could tell the committee how many cases the commissioner has actually looked at after that grievance process has been completed.

Mr. Brian Radford: I can tell you that we've applied that discretion in 10% of all our reprisal complaints over the years. Within that 10%, there may be instances where the commissioner decided that the matter could more appropriately be dealt with by another process. So, the person has not exercised an existing recourse, but we tell the person, “Look, your matter resembles a privacy complaint and perhaps you should go through the Privacy Commissioner.”

Mr. Erin Weir: But I'm talking about someone who has already been through, let's say, the grievance process or the Privacy Commissioner process. They've been through it; they're not satisfied. They come to the commissioner. How often does the commissioner actually take that up?

Mr. Joe Friday: I think one thing that has to be underscored is that we don't have an appeal right. We don't review the decisions of another body. What we would do is look at the decision to see if there's anything that has not been dealt with that is just residual, that could trigger our jurisdiction to ensure that the issue is properly dealt with. I don't have a number on those files with me this morning.

Mr. Erin Weir: But there are specific cases where you've done that. The person has been through the grievance process. He or she comes to the commissioner, and the commissioner says, “Yes we will look at this. Yes we will go through our process now.”

Mr. Brian Radford: There have been some. The 10% includes both “adequately dealt with” and “could more appropriately be dealt with”. What we do not have is a breakdown between those two differences.

Mr. Erin Weir: Okay. If it's possible to provide that, it would be of interest.

Mr. Brian Radford: We can try.

Mr. Joe Friday: We can certainly do our very best given the nature of the files. I could also point out that we have also had cases in which some reprisal complainant, who has an active grievance, has withdrawn the grievance, leaving us in a situation where we no longer have to face that prohibition. Again, on the basis of respecting the choice of an individual, if someone chooses to go to a grievance instead of coming to me, that is his or her right, and I respect that. If someone has a grievance and says, “I'd rather come to you. I'm going to withdraw my grievance”, I respect that choice as well within the confines of the law. This has only happened in maybe one or two cases.

The Chair: Thank you very much.

We'll now start our second round of seven minutes.

Madam Ratansi.

Ms. Yasmin Ratansi: Thank you all for being here, and thank you for sitting for an hour and being grilled.

You must have read the blues from the past two days on the two meetings we've had. Throughout, the common theme was that the act protects the disclosure rather than the whistle-blower. We were even told that the act is more of a paper shield than a metal shield.

One of the whistle-blowers came to us, and talked about his experience. He was not given enough information about asbestos when he was contracted out, and I'm sure you have heard about Mr. Garrett. Despite his attempt to protect the public from exposure, and despite the fact that his employees have been exposed to asbestos, he has gone through a wringer, and he has not been protected.

You were the deputy commissioner, and then he came before you as a Public Service Integrity Commissioner. Could you explain why we are hounding a whistle-blower who's trying to protect the interests of the public?

Mr. Joe Friday: I'll do my best.

I was not the decision-maker for Mr. Garrett's file when the decision was made. I certainly understand that Mr. Garrett has endured a difficult situation, a situation from my understanding that has multiple components. There were contract issues as well as occupational health and safety concerns that both fall under the Canada Labour Code and provincial legislation, and the B.C. Workers Compensation Act.

My understanding, from those who have worked directly on the file when it was being decided by the previous commissioner, and from my own involvement, was that Mr. Garrett pursued various recourses to deal with these issues, one of which was a disclosure to our office.

We analyzed it, we carried out an investigation, and the results of our investigation were that the allegation of wrongdoing as presented was unfounded. Those findings were consistent with the findings of a provincial body called WorkSafeBC, and also consistent with an investigation that was carried out under the Canada Labour Code.

These issues had been looked at by other bodies, and that was part of the evidence in our investigation.

● (0950)

Ms. Yasmin Ratansi: I'm not here acting as a prosecutor, but I am really trying to understand that if a whistle-blower comes, and claims that very important information was withheld—because the information about asbestos was withheld from him—and that if he had known that information, he would never have taken the contract.

So here is this person, an ordinary Canadian, who is trying to do a job. He gets a contract, and then you tell him that this law applied and that law applied. The poor man has no idea what to do, and now the Justice Department is after his blood.

How do we ensure that this culture of intimidation...There was one very interesting phrase utilized by one of the whistle-blowers, and that was that the big guns come to extinguish you, you the small person. I want to ensure, that in the public interest, we are letting the public know that they can report wrongdoing without being persecuted, and how do we do that?

Mr. Joe Friday: That, I assure you, is my goal and my role as commissioner. Whether or not we can do that through one piece of legislation, whether we do that through larger cultural change, whether or not we do that through increased communication, information, awareness, sensitivity training, a different organizational culture, it's a very daunting challenge, but one that we have certainly identified as recently as this week with our research paper.

Getting our legislation as sharply focused as possible is one important contribution to that, but it's a larger organizational or cultural issue that we are facing with this legislation being an important focal point of that.

Ms. Yasmin Ratansi: The other whistle-blower came to us, and said there's gag order on her. Where does the gag order come from?

Mr. Brian Radford: We're not bound by gag orders, so if there is a matter that is ongoing within a department and the deputy minister —

Ms. Yasmin Ratansi: Why is she subjected to a gag order, not you?

She's a whistle-blower who was told she could not say anything and therefore she came before our committee. She was not supposed to report anything.

Mr. Joe Friday: She could come to us.

Ms. Yasmin Ratansi: I think she did, but maybe to the previous commissioner.

Mr. Joe Friday: She did not come to us, ever.

Ms. Yasmin Ratansi: She never did?

Mr. Joe Friday: No, she chose the courts instead.

I don't think when Ms. Gualtieri made her...that our office even existed at that time.

Mr. Brian Radford: No.

Ms. Yasmin Ratansi: Okay, fair enough.

Let's go to this next stage then. Some of the suggestions were that we have to educate the public, that if they see wrongdoing they should be able to talk about it.

Mr. Joe Friday: Absolutely.

Ms. Yasmin Ratansi: How do we do that? Have you started any education process?

Mr. Joe Friday: We have from my office. I don't want to sound overly defensive, but as a micro-organization with 30 people, I have three full-time employees working on education, as well as parliamentary relations, to try to get those messages out.

I mentioned the video, for example, and I mentioned that the Treasury Board has the statutory obligation to disseminate information and create a more positive climate, so I would be interested to hear this afternoon's testimony. However, we've provided, under tab 3 of the binder that was originally provided to the committee, a list of the activities that we currently undertake.

This is something that we continue to do. I think if you look at, for example, the OECD report on whistle-blowing in which Canada's system is described, they identify communication as one of the overall best practices. This is not something you do once; communication is a daily challenge for us.

People don't want to get up in the morning and the first thing they think of is, “Gee, where's the whistle-blowing commissioner?” It's more like we use the fire station analogy. If they see something wrong, automatically they should know who to call: us or their senior officer, who know about the regime.

● (0955)

The Chair: Thank you very much.

[*Translation*]

Mr. Joe Friday: That's an ongoing challenge for us.

[*English*]

The Chair: Mr. McCauley, seven minutes, please.

Mr. Kelly McCauley: Mr. Friday, I will come back to you to follow up a bit more with what Mr. Peterson started with on the contractors.

I'm wondering—and this is maybe more an opinion going forward—how we can best protect the contractors. The government is obviously the largest customer in this country for pretty much everything, and not necessarily the issue that Ms. Ratansi was talking about, but also including that. How do we protect whistle-blowers? How do we also protect their staff, from not just an asbestos safety issue, but bad government practices? How do we protect their companies from being blacklisted from other work? It had been suggested that maybe it would be the procurement ombudsman, but I'd like to get your opinion on how we can properly protect outside the public service as well.

Mr. Joe Friday: I was going to mention the existence of a procurement ombudsman.

I can't speak on behalf of that office, but my understanding is that office was specifically put in place to add a layer of protection and a faster way of resolving procurement disputes, conflicts, questions, problems.

Mr. Kelly McCauley: I've read the report. There is almost nothing regarding whistle-blowing, if there is anything, period.

Mr. Joe Friday: I think the provisions in our act with respect to contractors are probably not well known even by many contractors. This goes back to the question about ongoing communication and education. It didn't come up with other witnesses as far as I can see, that those provisions actually exist in the law. That's why I wanted to raise them in my opening remarks this morning.

The act does touch on a number of important things, such as protection of contractors. Now, under the current system, a contractor would have to come forward and seek their remedies through the criminal justice system.

Mr. Kelly McCauley: I'm not just thinking of the contractor, but of people working for the contractor, whether it's exposing waste, corruption, whatever it might be, with the contractor they're working for or dealing with the government itself.

Mr. Joe Friday: This also—

Mr. Kelly McCauley: I'm looking for suggestions and thoughts about going forward on how we can build it in, because obviously we're going to have some major changes.

Mr. Joe Friday: The act currently does allow any member of the public, not only a public servant, to come forward, which I think is a really compelling and important part of our act. Any member of, for example, that contracting company, any employee, could come forward with an allegation of wrongdoing.

Mr. Kelly McCauley: I'm just worried because, again, we've seen the government go after people and destroy their lives, destroy their companies. I'm just looking for an opinion and I'm not making judgment, but how do we go forward and say we're going to protect these people and ensure that the government continues to deal with the company without trying to destroy them for exposing wrong-doing?

Mr. Joe Friday: One possibility that comes to mind as we're discussing this point—

Mr. Kelly McCauley: The reason I'm bringing this up is that any contractor sitting at home watching this on CPAC is going to look and see how we've destroyed lives and say, there's no way in the world I'm going to....

Mr. Joe Friday: A contractor wouldn't have access to the tribunal for reprisal under the current system. Maybe access to the tribunal would be a means of addressing that.

Mr. Kelly McCauley: Okay.

Mr. Joe Friday: Regarding access to the tribunal, with its attendant issues, for some people when we did our focus group testing—the results of which we've shared with you—one thing that came out loud and clear was that when they saw that after an investigation we bring them to the front door of a tribunal with the associated formalities, even though every honest and good effort is made to keep things as informal and as expeditious as possible, the very fact of being brought to the front door of an adjudicative process can be very intimidating. We got direct feedback on that.

● (1000)

Mr. Kelly McCauley: I can imagine.

Mr. Joe Friday: On the issue of the tribunal, it's wonderful that we have an adjudicative body to deal with something as important as reprisal. However, from my perspective, and it goes to my reverse onus provision, how do we simplify the front-end process, which is my office, so that people have easier access or even direct access to the tribunal?

I think that's an issue that bears a lot of interesting discussion—

Mr. Kelly McCauley: Okay.

Mr. Joe Friday: —because we have wonderful people at the tribunal waiting for a file.

Mr. Kelly McCauley: Thank you.

Continuing on with the procurement ombudsman, do you reach out to them, or do they reach out to you for advice or instructions, and say, let's get this information out to people, or are they in their silo and you're in your silo?

Mr. Joe Friday: As an independent agent of Parliament, I don't share any responsibility with anybody else. I have sat as an outsider, for example, on the previous procurement ombudsman's initiative to do an internal audit. If someone calls us or makes a disclosure that we feel is properly, or more properly, dealt with by the procurement ombudsman, we would advise that person in writing of our decision to not do something; or we'll do it.

Many contracting issues can be looked at under our legislation, under gross mismanagement, for example, or an abuse of public funds or the breach of an act, or the serious breach of a code of conduct.

Mr. Kelly McCauley: Good.

The Chair: You have one more minute.

Mr. Kelly McCauley: I just want to check quickly about your investigators. How many do you have? Are they contracted out?

Mr. Joe Friday: We have the ability to contract out, and I'll be very frank that our experience—

Mr. Kelly McCauley: How many do you have, and what training do they go through?

Mr. Joe Friday: I'd be happy to share the job description with the committee, if you'd like to see it. All our investigators are required to come to us with significant and recent experience in administrative investigation.

As of Monday of next week, I believe we will have eight, or possibly nine, investigators on board.

Mr. Kelly McCauley: I'm hearing from outside sources that they are very highly thought of. What training process do they go through once they come on board with you?

The Chair: We have limited time, so perhaps the job description would suffice. If you could support that by giving it to our clerk, I'll share that with the committee.

Mr. Joe Friday: Sure.

They come to us trained and we try to keep training. For example, two days ago in our office, we had all-day training on difficult conversations and dealing with difficult people.

Mr. Kelly McCauley: That's what I'm looking for. Thank you.

The Chair: Thank you very much.

Mr. Weir, you have seven minutes, please.

Mr. Erin Weir: I would like to return to the Sylvie Therrien case. Previously I mentioned this damning judgment from the Federal Court of Appeal, but I would also like to touch on the current status of her case. My understanding is that the labour relations board has not yet ruled on whether it has jurisdiction to consider her case. As I think you mentioned, your office has taken the position that you can't deal with it because she's engaged in this other process. It seems that Ms. Therrien has really been left in limbo and I wonder what the solution is.

Mr. Joe Friday: Brian, you may have something to say.

I would also say in prefacing any observations my general counsel makes that this generally underscores—and I'll go back to my opening remarks and my own background and my own professional training—one of the great disadvantages of any adjudicative process, and that is time and backlogs and money—and the costs, which are both emotional and financial.

Mr. Brian Radford: As the Federal Court of Appeal set aside the former commissioner's decision rejecting some of the allegations, currently all of Madame Therrien's allegations are with us.

The investigation into some allegations and the analysis of the other allegations is currently in abeyance as we await the disposition of her matters before the PSLREB.

Mr. Erin Weir: Do you think she's proceeding in the correct way by going to the labour relations board, or do you think she should have done something differently, such as coming to your office?

● (1005)

Mr. Brian Radford: I cannot comment on that; I'm sorry. We will assess the case.

Mr. Joe Friday: I think that the way Madame Therrien came forward did not limit her options. It was the processes that respond to those options, if I can be that unclear.

Mr. Erin Weir: I appreciate that, and I appreciate that you may not be in a position to give advice to her, but that raises a more general question. Given that there are all these different processes and all these different avenues, should there be some kind of entity that can actually advise whistle-blowers about what route to take?

Mr. Joe Friday: We make every effort in our initial case analysis process to have conversations with people who come forward about their options, so that they're making informed decisions. This is very important to us at our intake and case analysis level.

I would also make the point that when our office was created, we were put in an already very crowded landscape, and we are operating in that crowded landscape. One risk that we want to manage and avoid is having more than one process dealing with the same case at the same time, from the perspective of duplication of resources, duplication of time and effort on the part of the complainant, and the possibility of conflicting outcomes. Here, the discretion to act and some of the prohibitions either to act or not to act are an attempt to address this crowded landscape.

To speak to the heart of your question, in the absence of an official body providing that information we try our very best to do it, which goes to some of the training I just mentioned, on communication.

There are outside entities that we see being very active in other countries as well, such as Public Concern at Work in the United Kingdom, which is always discussed when we're talking about whistle-blowing. Public Concern at Work is a registered charity; it's not a government body.

Mr. Erin Weir: Right.

Mr. Joe Friday: We have non-governmental organizations that I know whistle-blowers go to for information as well.

Mr. Erin Weir: At our last meeting, Duff Conacher from Democracy Watch suggested some kind of entity to provide advice about what processes to pursue, particularly for people in the private sector who, as you acknowledge, may not even be aware of some of the provisions in the federal legislation.

Mr. Joe Friday: The legislation does not purport to provide a private-sector whistle-blowing regime. It does extend in certain cases to the private sector, yes.

Mr. Erin Weir: Yes, but do you think that this proposal from Democracy Watch is a good one, as a way of trying to extend whistle-blower protection into the private sector?

Mr. Joe Friday: I can say that I know federal unions are very active in supporting their members, some more than others, but I think it's an opportunity for unions. I can point to the Association of Canadian Financial Officers, ACFO, who I think are exemplary in the way they deal with educating and supporting their members with respect to our regime. The general counsel from ACFO was actually a witness before this committee.

I think, then, that the role of federal unions is important and the role of non-governmental organizations in civil society is very important in this regard.

We recognize that as the independent, neutral, objective, investigative decision-making body, we may not be perceived as necessarily the right body to provide advice. I thus make the distinction between advice and information, which I think is an extraordinarily important one. We provide information on a daily basis.

Mr. Erin Weir: Certainly, I agree with you about the important role of unions and non-governmental organizations, but is there a place for a governmental organization to provide that kind of advice?

Mr. Joe Friday: Again, I might make the distinction between advice and information. Certainly, as we know from section 4 of our act, Treasury Board has the statutory duty to create that environment within which whistle-blowing can occur and to disseminate information, so there's one important possibility that's already addressed in the act.

The role of the employer in the federal public service is an extraordinarily important one. I know I'm stating the obvious, but I think it's important for the employer to be seen by all public servants as supporting whistle-blowing. It's one thing to see the commissioner's office playing that role, and the tribunal, even, playing that role, but the employer I think has to be seen as actively supporting the act of whistle-blowing in order to help move along this cultural change that we're speaking of.

● (1010)

The Chair: Thank you very much.

We have Mr. Peterson for seven minutes, please.

Mr. Kyle Peterson: Thank you, Mr. Chair.

I'll follow up a bit on the theme here. I want to go back, I think, to maybe the first principles here and the purpose of the act. The way I see it, the act is a public interest act. I think without doubt we can all agree on that.

Mr. Joe Friday: I would agree with you.

Mr. Kyle Peterson: In a way, we're almost deputizing employees to help root out any wrongdoing in the public sector, the public service. But we seem to be empowering them without giving them the proper protections that they may need to do their jobs. I think everyone's hitting on it. I think the fundamental role of this act should be to protect the discloser, the whistle-blower, and not necessarily the information that they're providing . I think that's even a shortcoming in the title of the act. You can go as far back as the title. It's protecting the disclosure and not the discloser. Conceptually, I think that's wrong.

I think we all agree, and when I say “we” I mean my fellow committee colleagues here, that the whistle-blower needs the utmost protection. Whether it's the act that fails or the processes that have been generated from the act, or whatever reason, that seems to be a shortcoming of the act. I think even all the witnesses here agree that those shortcomings are unacceptable, and we're all looking to how we can get rid of those shortcomings and improve it.

With those first principles in mind....

Sorry, did you have something to say?

Mr. Joe Friday: I was just going to say that I'm in full agreement. The heart and soul of a whistle-blowing regime is the reprisal regime, the reprisal protection. Certainly, we want people to come forward with wrongdoing and we—as I did in the last two weeks—published two case reports of wrong-founded wrongdoing, which got significant discussion and coverage. That's a very important part of normalizing the act of whistle-blowing. But the heart of a whistle-blowing regime is the person who's coming forward. I fully agree.

Mr. Kyle Peterson: And we want them to come forward because, frankly, I think they're doing a service to Canada when they do come forward, and they should be afforded all opportunity to do so. This can go back to the basic provision of legal fees. I think anyone who's ever practised law in this province knows that $1,500 gets you a first meeting with any competent lawyer.

Mr. Joe Friday: You'll note that I have made a proposal to not only provide increased amounts for initial legal advice, but also to give the tribunal the express capacity to award legal fees, which it needs and it doesn't have. I would say the heart of my recommendations are those that focus on the reprisal regime, from reverse onus through to legal fees through to interim remedies, which I think is an extraordinarily important proposal on our part.

Mr. Kyle Peterson: Yes, and I think the act obviously acknowledges that reprisals are a significant hurdle preventing a whistle-blower from coming forward.

I would also suggest that just the process itself may be an obstacle to whistle-blowers coming forward. Again, I go back to, “Why should I?” If I'm that person, I have to ask myself this. I have a family to support. I have a good job. I like my job. I like my co-workers. All this is potentially at risk just by my coming forward, even without any reprisal. You're labelled; you're thought of differently.

Then you have to subject yourself to, I think, an onerous process, procedurally speaking. Just navigating this, you would need legal advice just to figure out where to go, who to talk to, who to air your grievance with. Should I go to the union? Should I go to my harassment officer? Do I go internally? Do I go to your office, Mr. Friday? What happens if I do that? What are the consequences? All this analysis needs to be done, frankly, without the skills to do the analysis, because no person would necessarily be appreciative of all the consequences of these big decisions.

I understand the reprisals need to be addressed, but how can we make it easier for someone who sees wrongdoing to just come forward and know that's okay and that should be a natural part of the job, and we're grateful you're coming forward? How can we get to that point?

● (1015)

Mr. Joe Friday: I don't want to sound like I'm being evasive by saying it goes to the issue of a larger cultural change. I can point to some of the recommendations in the research paper we just released, which I support. They go to changing styles of leadership, styles of communication, creating a different sense of what loyalty means. The preamble of our act specifically says that this act attempts to balance the constitutionally protected right of freedom of expression with the duty of loyalty to the employer, as has been expressed by the Supreme Court in several cases.

The system we have not only for whistle-blowing but also for any disputes or conflicts—and I know this from my own alternative dispute resolution practice—is plugged into a formal system, and the more formal, the longer, the more expensive the system is, the more we see an increased trend toward litigiousness.

One of the ironies, perhaps one of the sad ironies, of getting well known, or better known, through our now 13 case reports is that the people are realizing that maybe they do have some teeth. People are fired. People are resigning during investigations at high levels. This seems to have had the effect of people lawyering up earlier in the process, which is understandable but not necessarily helping to increase access to the justice system, of which we are arguably a part.

With respect to reprisal specifically, and true to my earlier—

The Chair: I'd ask you to please keep it brief.

Mr. Joe Friday: Okay. The issue of broader and more direct access to the tribunal is one that is currently under discussion, intensely and intently, in my office and will be the subject of some review during a lean process of investigations. How can we satisfy the requirement to carry out an investigation without being told by the court that we didn't do enough and we have to go back and redo it? How can we implement our act so that we do a screening and then let the course of events proceed rather than going through a full investigation and then a full hearing before the tribunal? To get through our office faster or more directly to the tribunal is something about which there should be a lot of discussion, and it flows directly from my proposal to create a reverse onus.

The Chair: Thank you.

Mr. Clarke.

[*Translation*]

Mr. Alupa Clarke: Thank you, Mr. Chair.

I will try to explain something I have been thinking about. We will see how it goes. I will speak as slowly as possible for you, Mr. Friday. However, my remarks are addressed to everyone.

This week, we heard from a number of witnesses who talked about the shortcomings of the act. They said that our law may be even worse than that of Zambia, I believe, or perhaps another African country was mentioned. In fact, I believe that we cannot make comparisons with the laws of other countries because each country has its own political culture and political system.

Mr. Joe Friday: I completely agree.

Mr. Alupa Clarke: I have to say that the analyses we are carrying out in order to discover the shortcomings and problems amount to a microanalysis. From the outset, the committee has focused on the details of the bill and the internal mechanisms. I am wondering whether there is a broader problem.

In fact, in Canada, it is as though we vacillate between the U.S. and the U.K. mechanisms. I will elaborate on what I am trying to say. In the United States, accountability for political decisions made by the bureaucracy rests with the authority responsible for the public service whereas in the UK it is a function of ministerial responsibility.

We definitely see that ministerial responsibility, in the most extreme cases, that is, the resignation of a minister, practically no longer exists in Canada. No politician has the courage required to resign. We could talk about this at length.

It seems that, in 2007, we wanted to create a law patterned after what was being done elsewhere in the world. However, in some ways, it is not adequately aligned with our political system, which is based on the Westminister system.

My colleague spoke about the internal mechanism. If a public servant witnesses an act of wrongdoing, he or she reports it to the senior officer responsible for disclosures within the department. This senior officer must inform the deputy minister of the department in question, and not the public or the Commissioner. The deputy minister may perhaps inform the minister—but surely will not—or perhaps will inform the Treasury Board, which is supposed to be at the top of the decision-making chain. This stems from our parliamentary system of ministerial responsibility.

We can see this with the Phoenix pay system. No employee who witnessed wrongdoing with respect to Phoenix would inform the senior officer at Public Services and Procurement, who in turn would tell Ms. Lemay. Ms. Lemay is managing the crisis at this time. Her minister asked her to resolve this as quickly as possible stating that she herself would not resign on this account. In the past, the minister would have resigned a long time ago, if only as a matter of honour.

Do you not believe that instead of reporting wrongdoing to the Treasury Board or the deputy minister, the senior officers should report the wrongdoing directly? It would be a way to establish a real system of accountability for the bureaucracy.

● (1020)

[*English*]

The Chair: Unfortunately, the preamble to the question took about four and a half minutes—

Mr. Alupa Clarke: Yes or no?

The Chair: —so you have less than 30 seconds.

[*Translation*]

Mr. Joe Friday: We are talking about the independence of an external agency with respect to an internal process. As the independent Commissioner, it is difficult for me to manage an internal regime.

[*English*]

But I do understand the very issue of the potential conflict. I often say that the senior officer in a department is the one job I would never want.

Mr. Alupa Clarke: But—

Mr. Joe Friday: People come to you, and you are part of that system.

The Chair: Unfortunately, we're—

Mr. Alupa Clarke: I just want to make sure the preamble is in the blues, Mr. Chair, because this potential conflict—

The Chair: Everything you have said, trust me, will be included.

Mr. Alupa Clarke: —would be dealt with if responsible ministerial principles were applied.

The Chair: It's in the blues. All your comments are in the blues. All committee members can be assured of that.

[*Translation*]

Mr. Joe Friday: That is a very good question, Mr. Clarke.

[*English*]

The Chair: Mr. Whalen, you have five minutes, please.

Mr. Nick Whalen: Thank you, Mr. Chair.

Mr. Friday, could you just remind the committee of how many disclosures of wrongdoing have been brought forward through your office since its inception?

Mr. Joe Friday: According to the information provided on February 14, it was 774 at that time.

Mr. Nick Whalen: How many people have been fired or removed from their jobs as a result of those complaints?

Mr. Joe Friday: We've had 13 founded case reports. The concept of wrongdoing is very broad. Sometimes it's more corporate in nature or more organizational in nature, such as a practice that may have occurred over a period of time that not a single person is responsible for. But in my most recent case report, we had a deputy minister, against whom I found a case of wrongdoing, resign during the course of the investigation.

Mr. Nick Whalen: So there are 13 out of 774. It's really a de minimis amount, wouldn't you say?

Mr. Joe Friday: I think that reflects the definition of "wrongdoing". As we discussed the last time I was here, I believe my office was put in place to deal with a level of seriousness that is not otherwise being dealt with, which is reflected in the act. Many of those cases are still before another body or.... Again, as I said in my last appearance, I can't deal with a complaint against a teacher or a hospital, because of the constitutional division of powers.

● (1025)

Mr. Nick Whalen: Sure.

We've heard there are no objects in the act, which makes it a bit difficult for people from other jurisdictions to appreciate what the purpose of the act should be. I feel that the purpose of the act should be to discover wrongdoing and institutional dysfunction and correct it.

How does the act allow you or other agencies of government to quickly correct and address incompetence, institutional dysfunction, wrongdoing?

Mr. Joe Friday: I will say that section 26 of our act specifically identifies the purpose of an investigation into a disclosure of wrongdoing, and that is to bring to the attention of a chief executive the existence of wrongdoing and to make recommendations.

Mr. Nick Whalen: Why not bring it to the RCMP, or why not bring charges, or why to the CEO and not to the regulatory agency that oversees the wrongdoing?

Mr. Joe Friday: The definition of "wrongdoing" is so broad, there's not always an overseeing agency. We deal with everything from human behaviour and interaction to potential crime. I want to be on the record as saying that I do not have criminal jurisdiction, but I do have the ability to refer a matter to the RCMP. I have done so as recently as earlier this year, and I can't speak about it.

Mr. Nick Whalen: Okay, so how many times has your office referred matters to the RCMP?

Mr. Joe Friday: Without having that information, my general counsel advises it was at least four times.

Mr. Nick Whalen: Again, it's a very small number, about half a per cent.

Mr. Joe Friday: Most people who come to us don't believe that we are the police and don't ask us to intervene. We sometimes uncover something, as we recently have, that could point to what we believe to be a potential criminal activity, and we refer that either to the Attorney General's office or the appropriate police force. We have chosen in the federal system to do that to the RCMP.

Mr. Nick Whalen: Thank you for that.

Madam Boyer, with respect to some of the complaints we've heard about there being a gatekeeper function on access to the tribunal, how does your other tribunal that you oversee work when somebody wants to appear before it? Do they have to be vetted by a separate organization?

Ms. Rachel Boyer: With tribunals, of course, it's based on their enabling legislation. It's the Competition Tribunal, so the law is completely different and the rules are completely different. Most of the applications come through the office of the commissioner of competition. We do have certain areas where industry can come to us directly; it's minimal. I would say that about 90% of the cases that come before that tribunal come through the commissioner.

Mr. Nick Whalen: Would it be possible for your office to handle the gatekeeping function itself and receive all requests to an adjudicator or adviser without having them go through the PSIC?

Ms. Rachel Boyer: I'm sure that we would be able to apply whatever changes to the legislation that Parliament decides to give us. When the act was put into place in 2007, without knowing what would be coming before the tribunal we had a structure of about 15 FTEs. Right now it's minimal. There's me, and I'm shared with another tribunal. There's a senior legal adviser who chairs.... We're four.

Of course, that's about efficiencies.

Mr. Nick Whalen: I have one more question for you.

The Chair: I'm sorry, unless someone cedes their time to you, I'll have to go over to Mr. Clarke for five minutes.

Mr. Alupa Clarke: Did you have something?

The Chair: Mr. McCauley.

Mr. Kelly McCauley: Mr. Friday, I just want to get back to what Mr Clarke was going on about. We know Treasury Board is responsible for setting up in each of the departments across the government the chief officer to set up whistle-blower protection and all the functions within the departments. We've heard quite a few different views throughout the whole committee process on this, and Mr. Clarke touched on this, that a lot of times that's part of the problem. If you're within department X, and there's wrongdoing, you report it up. We saw with Phoenix that all these items came up. Who do you report it to? You report it to the person who is in charge of Phoenix.

Should that role, that function, across all the departments be taken away so that instead of reporting to the chief executive inside, they'd report to, perhaps, your department or an independent department? That would be seen as a very strong, independent role, and people would have confidence to come forward—they're not going to be finking on their boss, so to speak, or ostracized—and they'd be comfortable that it's going to be fully independent from their own department.

● (1030)

Mr. Joe Friday: I think there are several issues in that question, one again being I think there's value in having access to as many routes or avenues or options as possible to come forward with your concerns.

Mr. Kelly McCauley: Before you continue, part of the reason, as well, is I know there are concerns that the information on whistle-blowing, the protection and everything else, is also not being disseminated out to the public servants. We heard very clearly, and it's in all their surveys, that a very high majority do not feel comfortable with the process, do not know their rights, etc. My concern is, if we're leaving it with the departments for such an important role, instead of leaving it with, for the sake of argument, yourself, to ensure there are standards being set and rules being followed, it becomes a secondary issue, because I know the departments are also doing other work.

Mr. Joe Friday: Again, the....

Mr. Kelly McCauley: I'm looking for your opinion. It may be difficult.

Mr. Joe Friday: Yes, you raise a very important issue, and one that I would be lying if I were to say we have not thought about and discussed ourselves over the years as to what the best structure might be. Right now, reporting is done through Treasury Board. If there's an internal finding of wrongdoing within a department, it's very different than if I make a finding. If I make a finding, I have to report this to Parliament. So I've tabled with the Speaker of both Houses my two reports in the last two weeks, had a press conference following it, had coverage. That is an important part of transparency, from my perspective.

That obligation is not identical for internal disclosures. The information you will get is the information in the annual report on the PSDPA that Treasury Board puts forward. That may be a reflection of a presumption—and I don't know—that the more important cases that deserve a public airing are those that end up coming to me, and the presumption is that the less serious might be dealt with internally. That is not consistent with what we see. We see everything from extremely widespread, important issues to individual issues that someone just doesn't feel like coming forward with internally.

The act, and almost everything in the act, tells me what I am supposed to do as commissioner. The act speaks very little about what happens internally with the internal regime. That is left for internal administration. When I speak to senior officers—

Mr. Kelly McCauley: But the concern I have, and the experts we've spoken to have, is this role is taken away from them. It's nice that we have you, but this role is given off to their departments and there's no oversight from yourself for standards, for transparency and, most importantly, for protection for our public servants.

Mr. Joe Friday: I believe that the desire was to give that role to the employer, to one of the central agencies, that being Treasury Board in this case, because of their responsibility for administration of this act, and, as I mentioned earlier, section 4 of our act. But that oversight doesn't exist in my hands. Again, the act, I think is quite detailed about what I can and can't do, but relatively silent with respect to what others can do.

One small anecdote, when I was general counsel, when I came over—

The Chair: Very briefly, sir.

Mr. Joe Friday: —I was asked by a department to give an opinion on an internal disclosure, and I couldn't do that because they had their own lawyers. The administration or oversight of the internal system is very different from my role, as an independent commissioner, and the rules that apply to me.

The Chair: Thank you.

Mr. Fonseca, welcome to our committee. You have five minutes for your intervention.

Mr. Peter Fonseca (Mississauga East—Cooksville, Lib.): Thank you very much, Mr. Chair. It's a real pleasure to be here.

I would like to hone in my questions on possible unintended, I would say, duplication or inefficiencies. Witnesses have suggested allowing PSIC to issue corrective measures when there's a finding of wrongdoing, however the act is not intended to replace other mechanisms or processes provided for in other pieces of legislation or collective agreements, i.e., criminal proceedings under the Criminal Code, or grievance procedures, harassment complaint processes, etc. A possible alternative when there's a finding of wrongdoing is to allow the information collected during an investigation to be used in the course of a disciplinary process under the Public Service Labour Relations Act.

What is the current system for disciplinary measures?

● (1035)

Mr. Joe Friday: I do not have the power to order discipline. The last two case reports involved behavioural issues of executives. In the first one, one of my recommendations was to take appropriate discipline. I'm not on the ground in that department to know what the person's record is, what the effects of the actions were. We put it in the hands of the deputy minister. A key pivot in this entire regime was accountability. It's holding to account a deputy minister, a chief executive, for whatever happens in his or her department under their watch.

For example in the first case report, if I were to say I think the discipline should be a week without pay, that becomes a labour relations issue between that employee and me. If I say the person should be dismissed, then I'm embroiled in a labour relations wrongful dismissal suit. I think it's very important to drive back the accountability to deputy ministers. I have the right, the authority, and the obligation, as you'll see in my annual report this year, to follow up and report on what a deputy minister has done with my recommendations for corrective action. A follow-up power is provided in the act, which I think is a very powerful tool for me to use to hold people accountable, as opposed to moving in and stepping into their shoes and saying I'm there to manage their department for them.

Mr. Peter Fonseca: With regard to the duplication, the investigation, and all the findings that have come from that investigation, do you feel they need to be done again by another body? Within this proposal, should that not be able to use that investigation that was done already? Why go through all that again?

Mr. Joe Friday: When I issue a case report, prior to the case report is a full investigative report with all the details. The deputy minister has that. They can base that on a very detailed case report.

For example, the last case report I issued, which is about 12 pages in what we released publicly, behind that is a huge preliminary investigation report that all affected parties comment on, and then a final report. That could be, 80, 90, 100 pages of detail, including more specific detail about what was done and the basis of my finding. The public sees a document specifically created for public consumption. The report will sometimes have witness names—we also protect the names of all witnesses and provide redacted reports if and when necessary—witness testimony, specific details, some of which you see in a case report, but not all. I do believe that the deputy minister, who is responsible for following up on a recommendation, certainly has a lot of information. They can nonetheless choose to continue with a separate investigation or a separate process flowing from mine, but they don't redo my work.

Mr. Peter Fonseca: It sounds as if yours has been very comprehensive.

Do you feel the act should be changed to address that?

Mr. Joe Friday: Our ability to make recommendations for corrective action and to follow up on them appears to me to be working very well in the 13 case reports that we've had to date.

The Chair: Thank you very much.

To complete our second round, we have Mr. Weir for three minutes.

Mr. Erin Weir: Thanks very much.

We have a protection regime for whistle-blowers from the federal public service. Other countries have whistle-blower protection regimes that apply to the private sector, to companies, to outside organizations. I'm wondering if you think Canada should pursue that as we look at reforming and improving whistle-blower protection.

Mr. Joe Friday: Certainly this act was created to provide a whistle-blowing regime for the public sector. My belief is that everybody in this country has the right to be protected against reprisal for coming forward with information that they reasonably believe to be true. I don't know if this act is the appropriate vehicle. I also know that all provinces and territories, except the Northwest Territories, Prince Edward Island, and B.C., if I'm correct, have a form of whistle-blowing protection to cover the provincial public sector. Many private companies have their own internal whistle-blowing regimes as well.

What we do not have—and I agree with you—is one system that covers both private and public sectors. In smaller, perhaps less geographically and less constitutionally divided nations, that might be easier to do. As a matter of principle, I think whistle-blowing protection for both sectors is a goal.

It's a mark of an advanced democracy to have a whistle-blowing regime that protects all citizens.

● (1040)

Mr. Erin Weir: I'd put the same question to you, Ms. Boyer, because it strikes me that some of the cases before the Competition Tribunal might be illuminated if there were more protection for whistle-blowers in the federally regulated private sector.

Ms. Rachel Boyer: I'm not sure. If you look at it, some of the cases before the Competition Tribunal deal with mergers and that type of information....

Mr. Erin Weir: No, but more evidence might come forward if there were protection for whistle-blowers in private companies as well.

Ms. Rachel Boyer: Perhaps. I'm really not....

Mr. Erin Weir: You don't particularly have a view one way or the other?

Ms. Rachel Boyer: I don't particularly, no.

The Chair: Thank you very much.

Colleagues, that completes our second round. We have just a few moments left.

Mr. Whalen, I know that you had one question you wanted to get in. If you can get both the question and the answer completed in about three and a half minutes, the floor is yours.

Mr. Nick Whalen: Thank you very much, Mr. Chair.

Madam Boyer, I was going to follow up with a question along the same lines. I think the general consensus is that we're not happy with the act. We don't think that the act of 2007 that was brought in provides the protections that it needs to provide.

With respect to the private versus the public protection, I think I follow Mr. Weir's view, but with respect to protecting against reprisals, I see two parts of the regime. One is to protect the confidentiality of the disclosure so that people don't know who made the disclosure, and then, if there is still a reprisal, to go to the tribunal. Is there an inherent conflict of interest in the very entity that's meant to protect the confidentiality of the disclosure also determining who is allowed to go to the tribunal? They very well may be implicit or complicit in the disclosure of the identity of the person we're trying to protect.

Ms. Rachel Boyer: As soon as a case comes before the tribunal, we operate under the open court principle. That said, there are provisions within our rules and regulations to have confidentiality agreements and not to hold the hearings in public. It is part of our rules.

Mr. Nick Whalen: I'm sorry: it's the gatekeeper role of PSIC that I'm concerned about. They have been the entity tasked with protecting the confidentiality. Let's say a reprisal has occurred. Somebody wants to bring that before your agency, but they act as the gatekeeper. Is that not an inherent conflict of interest?

Ms. Rachel Boyer: From my perspective—and if I look at some comparisons—it was established within the act the same way that the Human Rights Commission and Human Rights Tribunal were established.... I don't see it as a—

Mr. Nick Whalen: It's the same question there. Do you think there's an inherent conflict of interest in the entity tasked with protecting the confidentiality determining whether or not your office is allowed to review the reprisal?

Ms. Rachel Boyer: No, I don't think there is a conflict.

The Chair: We will leave it at that.

Thank you, witnesses, for your appearance here once again. The study is still ongoing. I cannot assure you that you will not be invited back again, but if you are, I'm sure your discussion will be as informative as it was today.

Mr. Joe Friday: Thank you, Mr. Chair.

The Chair: Colleagues, we have a second meeting this afternoon. It was scheduled to start at 3:30; however, I've been informed that votes occurring after question period will not occur immediately. There will be a 15-minute bell now. There are three votes. That means we will be delayed somewhat. I anticipate the meeting won't start prior to 3:45 this afternoon.

Mr. Clerk, do we have the room until...?

● (1045)

The Clerk of the Committee (Mr. Philippe Grenier-Michaud): Yes.

The Chair: We'll go for the full two hours this afternoon. We will have representatives from the Treasury Board Secretariat and also, appearing as a whistle-blower, Madam Therrien.

Thank you once again to our witnesses.

We are adjourned. We'll see all of you back here around 3:45.