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Chair

Mr. Tom Lukiwski

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● (0850)

[*English*]

The Chair (Mr. Tom Lukiwski (Moose Jaw—Lake Centre—Lanigan, CPC)): Colleagues, I think we'll begin. We're a few minutes late starting. We have not seen Mr. Conacher appear yet, but I understand that he is on his way.

Once again to our witnesses, Mr. Devitt, Mr. Devine, and particularly to Mr. Worth, who is appearing before us for the first time, welcome to our committee as we continue our study on the Public Servants Disclosure Protection Act. As we have done in previous committee meetings, we will be asking each of our witnesses to give a brief opening statement. That will be followed by questions from all of our committee members. We have approximately a little less than two hours for questions.

Colleagues, I would like to take about 15 minutes at the end of the meeting just to go over some very quick committee business, so I'll be adjourning this meeting at approximately 10:30. My understanding is that the witnesses before us will be able to stay for the entire duration of the meeting, except for Mr. Devitt who has to leave at 10:15 to catch a plane.

With that then, colleagues, I think we'll start with our opening statements.

Mr. Worth, you have not appeared before our committee before, so we'll start with you.

Mr. Mark Worth (Manager, Blueprint for Free Speech, As an Individual): Thank you very much.

I want to thank the chairman of the committee for allowing me to speak with you today. It's a great honour.

I also thank you, honourable members of Parliament, for the time to provide input on your important initiative.

My name is Mark Worth. I am the director of the international whistle-blower project at Blueprint for Free Speech, which is an NGO based in Australia and Germany. I'm also the founder and co-coordinator of the Southeast Europe Coalition on Whistleblower Protection, which is an NGO [*Technical difficulty—Editor*] board member of the Platform to Protect Whistleblowers in Africa, which is a new NGO founded last month in Senegal.

We work in many countries around the world, in all regions, promoting whistle-blower protection, promoting whistle-blower legislation, working on whistle-blower cases, investigating cases, and writing about what's happening on the issue in general.

I want to start off by telling a little story. There was a man who worked for a government tax office. In 2013 he reported to the authorities that there was large-scale bribery occurring in the government tax agency, the government tax office, which was permitting companies to pay lower export fees and lower import fees. His disclosure led to the arrest of 53 people, so it had a huge impact in the country in terms of holding the guilty parties to account. He was fired quite swiftly and went to the government authority to get whistle-blower protection. He was granted whistle-blower protection status, which meant he had a right to be reinstated to his position with the government tax office; however, the director of the government tax office would not reinstate him. There's a provision in the law in that country that says that if a director of a government agency does not comply with an order to reinstate a whistle-blower, then that person, that director, is personally liable for fines of up to 10,000 euros. On June 4, 2015, the prosecutor called the director of the tax office telling him to reinstate the whistle-blower or else he would be fined 5,000 to 10,000 euros. The next day the man was reinstated. There was a big party and he got his job back.

This is an example of how whistle-blower laws—if they are tightly written, if there is good enforcement, if people understand the process, if there are penalties for retaliation that are actually levied if need be—mean that the whistle-blower can benefit from these rights.

The story I just told you did not happen in Canada. It didn't happen in the United States, which many would argue has the oldest and best whistle-blower laws in the world. It didn't happen in the U.K., which, perhaps not deservedly, has a very good reputation for its whistle-blower law. It didn't happen in Australia or Japan or South Africa or South Korea or anywhere else that has laws that have gotten a lot of attention. It happened in Bosnia and Herzegovina. This is a country that is not known for its success in fighting corruption, but in the case of whistle-blower protection, there have been some good examples.

Bosnia and Herzegovina, which is ranked 83rd out of 176 countries on Transparency International's corruption perceptions index, in this regard has a whistle-blower law that has very strong features that are better than Canada's, which is ranked ninth on the CPI. I think there is a lot to learn not just from the obvious countries when we talk about whistle-blower protection but from the countries that have provisions that are working in practice and that are actually helping people.

There's a lot of creativity in whistle-blower laws today. When Canada's law passed in 2005, we did not yet have the Transparency International principles. We did not yet have the OECD principles. We did not yet have the Council of Europe principles. We did not have other principles developed by other NGOs and organizations, so I think the review you're doing is coming at the right time. There's been a flurry of whistle-blower laws passed. Just since 2010 there have been about 25 whistle-blower laws passed around the world. There are a lot of lessons to learn, and I hope we're going to get into some details throughout the next couple of hours.

One point I would like to make at the outset is that I do not know the Canadian legal system. I just know the American system, and to some extent, the German system, where I live. I think it is not appropriate for an executive branch agency, the Public Sector Integrity Commissioner, to have the power to decide when and if a whistle-blower should have access to a judicial branch agency. I don't want to oversimplify that, but the way I understand it is that the Integrity Commissioner can refer cases to the tribunal. That is not even close to being best practice. I hope that either the law is changed to allow the commission itself to make rulings on reprisal, reinstatement, compensation, and penalties, or give the whistle-blower direct access to a tribunal. For a whistle-blower to have to go to an executive branch agency in order to get access to a judicial branch agency perverts the separation of powers.

Again, thank you very much for the opportunity to speak today. I'm looking forward to the other input and to answering your questions.

Thank you.

● (0855)

The Chair: Thank you very much, Mr. Worth.

We'll go now to opening statements from our other witnesses.

Again, I remind our witnesses that you have testified before at this committee, so if you could keep your comments fairly succinct, it would allow more time for questions from our committee members and I would appreciate it.

Mr. Devitt, we will start with you.

Mr. John Devitt (Chief Executive, Transparency International Ireland, As an Individual): Thank you, Mr. Chairman, and thanks again to the committee for your invitation. It's a privilege to address you again.

I don't have much more to add to my earlier testimony to the committee. Perhaps I can remind the committee of some of the key features of the Irish legislation with which I'm most familiar and touch on some of the points raised at the last hearing.

The Irish legislation, the Protected Disclosures Act, was introduced in 2014. It replaced or sits alongside about 18 other pieces of legislation on the Irish statute book covering or protecting whistle-blowers. For the first time, it protects whistle-blowers in the public, private, and non-profit sectors.

Essentially all categories of worker with the exception of volunteers are protected, and they are protected against many different types of reprisal both formal and informal. They are protected against formal sanctions, which means dismissal or disciplinary action for having made a protected disclosure. Then their employers are vicariously liable for any mistreatments a whistle-blower might suffer as a consequence of making a protected disclosure. The employer is thus responsible for ensuring that a whistle-blower is not subjected to blame or discrimination or any other mistreatment during the course of their work.

They also have direct access to the courts. One of the most important features of the Irish legislation is the ability of a whistle-blower to bring, within 21 days of being served with notice of dismissal, an injunction or interim relief application to one of the lower courts, the circuit courts in Ireland. That means that a person making a protected disclosure can stop their employer from dismissing them within 21 days.

This is, as I said, one of the most important features, and it's important because, were they not able to avail themselves of this protection, they would likely have to wait two years for their case to be heard in the Workplace Relations Commission and suffer the financial consequences of that and the psychological and practical consequences arising from being out of work for up to two years.

The system has yet to really vet in. We're still waiting for courts to hear many of the cases, but we know that three-quarters of the cases brought to the circuit court for interim relief have been successful so far. We're confident that it has brought or will bring about an attitudinal change towards whistle-blowing in Ireland. We're already seeing the majority of employers in the private sector stating their commitments to protecting whistle-blowers. Some 90% of employers, according to one of our latest surveys, say they are supportive of whistle-blowing, even if the disclosure involves the release of confidential information or might damage the reputation of the employer.

The real test of this legislation is, as is the case with any legislation, in the way it's implemented. We're currently working with the government. We have support from the Department of Justice and Equality in Ireland and the Department of Public Expenditure and Reform to roll out a new program called “integrity of work”, which I'm more than happy to talk about further. It commits employers to ensuring that their employees do not suffer as a consequence of reporting and that action is taken in response to their report.

This is a new program, which we're launching just this year. We've already gained commitment from the Irish police service, the Irish Prison Service, the Department of Justice and Equality, a number of charities, the Environmental Protection Agency.... Around 30 organizations are signed up so far. We're confident that it can help move the discussion forward, away from the legislation itself to the way the legislation is implemented in practice.

I don't have any firm recommendations to make about the Canadian legislation, other than perhaps to echo Mark Worth's concerns about allowing or affording an executive agency the opportunity to prevent workers from availing themselves of their legal rights and access to the courts.

● (0900)

Again I would repeat my comment in the last session to the effect that any legislation should be simple, it should be clear, and it should cover all workers across the economy, not just public sector workers.

The Chair: Thank you very much.

Mr. Devine.

Mr. Tom Devine (Legal Director, Government Accountability Project, As an Individual): Thank you, sir.

At the last hearing I discussed the best practices in global whistle-blower laws that help us distinguish between cardboard shield rights, which doom anyone who relies on them, versus metal shields, which have a credible chance of protecting those who depend on them.

In an analyzed way, I didn't think Canada's law had reached the level of being a metal shield. It was more like a paper shield.

I can just repeat those criticisms, or I can cover the same best practices with an eye towards sharing some of the solutions and examples of functional provisions that have been adapted in other countries, whichever you think would be the most helpful, sir.

The Chair: I think, sir, that the best thing for this committee is to allow them to question you rather than go over the same ground that you presented at your last appearance. If you have any new information, please present that now. Otherwise, I would suggest we wait until the information you try to present comes forward during the question section of the committee.

Mr. Tom Devine: Thank you, sir.

From that perspective then, let me share with you some of the solutions that have been made for the concerns that we addressed about this one. None of these are new problems, and there are many examples of ways to effectively achieve the criteria that I was advocating in the last testimony.

Let's go to the first one, context for free expression with no loopholes, so that restrictions based on formality, context, time, and audience aren't done arbitrarily, reducing the effectiveness of the law. Examples of where we met that criteria include the U.S. model, which protects against disclosures of illegality, gross waste, gross mismanagement, abusive authority, or substantial and specific danger to health and safety. The European model has also been very effective in that it allows a public freedom of expression when it's necessary because internal remedies aren't working. The U.S. model has cut all the loopholes involving job duties, formality, context, time of disclosure. If the information will make a difference under those laws, it is going to be protected.

With regard to subject matter, it's basically the same thing. The U. S. model protects any disclosure of unlawful activity, but based on violation of any law. There are no arbitrary restrictions. Some of the other nations have added to the scope of this. African nations such as Ghana and South Africa are protecting disclosures of threats to the environment. A relatively new development is catch-up protected speech categories, such as large-scale damage in Serbia, professional norms in Romania, and the public interest, generally, in Uganda. These allow us to make sure that the law doesn't limit how it can make a difference.

A third criteria that I thought was significant is protection against spillover retaliation because it does take a village to be effective. A lone wolf whistle-blower probably isn't going to make much difference except to destroy his or her own career. You need to protect that support base, not just the final messenger or ambassador.

The U.S. has in its laws protections for those who are about to blow the whistle, who are assisting in blowing the whistle, or who are perceived, even if mistakenly, as whistle-blowers. Serbia has separate articles in its whistle-blower law for associated persons, for those who are wrongly identified, and for those who are retaliated against just for asking the wrong questions, which are necessary for the research base. Relatives are protected in a number of the African nations' whistle-blower laws. Protection for all people who need the protection....

In the United States, we have a kind of piecemeal protection, but it does cover virtually the entire public and private sector. Other nations go much further. Serbia's covers public employees and private employees, so that's the military, the legislature, national security employees, corporate employees. It covers NGOs and the media. Anyone who is retaliated against for challenging abuses of power that betray the public trust is covered by that law. Korea's laws, Zambia's laws, and Uganda's laws all protect any person, not just national government employees.

Another significant criteria is confidentiality. The flow of information will dry up if you don't have effective protections. Here, if we look to the solutions that have been used, the United States and Serbia have both set the pace by having their laws not just protect the identity, but the identifying information that can be traced back to the whistle-blower. Before anything can be used, there needs to be advanced consent, unless it's necessary to satisfy legal process in which the whistle-blower gets an advance warning.

In fact, the Serbian law even says that the initial confidentiality provisions get carried over into any other government agencies that work on this. Korea actually has criminal penalties for those who breech confidentiality, which is a new dimension in a number of the more modern laws. This is a very significant criteria, and it has been developed.

With regard to unconventional harassment, over a third of the global whistle-blower laws now protect against civil and criminal liability, not just employment liability. There are so many ways to threaten, scare, or effectively silence a whistle-blower. Serbia's language in article 7 of their law is, I think, very illustrative. It's any action that puts the person at a disadvantage. You don't even have to be part of a list.

● (0905)

Anti-gag provisions so that other laws can't overcome the whistle-blower rights, whether they're agency regulations or other broad-based legislative laws, are very significant. The U.S. has five anti-gag provisions in their code and three in the Whistleblower Protection Act. I think Serbia's article 3 is illustrative. It says any provision that prevents whistle-blowing from occurring is null and void. That chilling effect has been the dimension for most of the best practices.

Another criteria is essential support services. Yes, you have an administrative remedial agency, but there are no limits on its discretion and there are no mandatory duties for it to help people. In the United States the remedial agency has a mandatory duty to investigate. It has no discretion to undermine the rights of those seeking help. It must explain its actions to the complainants. In Serbia and a number of other nations, every institution has to set up internal procedures and have somebody who will be there to assist in their implementation.

Burden of proof is the most fundamental cornerstone of any whistle-blower law. Canada does not have one. The reverse burden of proof is the global best practice.

Finally, for the purposes of this morning's presentation, there is the right to a genuine day in court. We're hoping that Canada may finally have, after a decade, the first opportunity for whistle-blowing in your country to get a day in court. This makes the law almost irrelevant, except potentially as a threat to those who are trying to enforce their rights.

Folks, the solutions to the problems that we've seen and summarized in this law do not involve a requirement for creativity. They just involve studying the record of 35 other nations that have been going through the same process of learning lessons and growing pains, and adopting the best examples. Our organization is here to help in any way that would contribute to that process.

● (0910)

The Chair: Thank you very much, Mr. Devine.

One way you could help, if it's possible, is to provide an English version of the Serbian whistle-blower protection act.

Mr. Tom Devine: Yes, sir.

The Chair: We would appreciate it very much.

Finally, Mr. Conacher has joined us.

Mr. Conacher, welcome back. Do you have any additional comments you would like to make before we begin questions?

Mr. Duff Conacher (Co-Founder, Democracy Watch): Thank you very much to the committee for this opportunity to come and testify again on this very important law enforcement matter. That's what whistle-blower protection is really about, I think, with “law” and “enforcement” defined broadly. Making whistle-blowers front-line inspectors in every workplace and everyone who engages with government or business fully empowered to blow the whistle and fully protected when they do is very important in maintaining a rule of law.

I'd like to highlight again a couple of key points, and echo what my colleagues have spoken about, picking up on their testimony. First of all, to remind you again, more than 21,000 voters have signed a petition that Democracy Watch set up on change.org calling for 17 key changes by the federal government to protect people who blow the whistle, not only on government—I know you're focused on that law, protecting public sector workers—but also on business abuse, waste, and law-breaking. As the current banking service scandal shows, and several other scandals with business, we need this protection extended and strengthened for all private sector workers and anyone who engages with business, not just with government.

In terms of coverage, that includes covering yourselves, also covering political staff, covering employees but also contractors, suppliers, and anyone who gathers information, as my colleagues have mentioned. Everyone should be allowed to file their complaint directly and anonymously with a protection commissioner or agency, whether you maintain the one commissioner we have currently and extend it to cover everyone in the private sector that the federal government regulates or set up a separate office that would protect private sector workers. Complaints should be able to go to them directly and anonymously, not through anybody's bosses.

As well, as has been mentioned, reversing the burden of proof as to whether retaliation has occurred is very key and a best practice. A couple of my colleagues have talked about the commissioner being an executive branch officer; they're actually a legislative branch officer. The current Integrity Commissioner is an officer of Parliament, but still is there as a gate you have to go through to go to court. You should either decide to empower that commissioner to issue penalties and provide compensation to whistle-blowers, or allow people to appeal directly to court if the commissioner is not dealing with their complaint in a timely way.

The appointment of the commissioner, or again if a second office is set up, is very important as well. Currently the appointment process essentially allows the government, especially with a majority, to choose whoever they want. It is a political appointment, which allows for both patronage and cronyism, but also the government to appoint someone who will be a lapdog. There should be a merit-based, open, transparent, and independent appointment process. This is very key because the three commissioners we have had, the two past ones and the current one, come from within the bureaucracy.

The current commissioner has been there essentially from the beginning with the initial commissioner, through all sorts of wrongdoing in the commissioner's office, and as far as I know, has not blown the whistle on that wrongdoing himself. I don't have a lot of faith in the current commissioner.

The next commissioner must be appointed, and all cabinet appointees should be appointed this way, especially those enforcing laws. I highlight this because the Ethics Commissioner, Official Languages Commissioner, and Lobbying Commissioner, are all being considered for appointment now by the Liberal government. The cabinet is controlling the choice of all those watchdogs, who will mainly watch over the cabinet and what the cabinet does.

Ontario has the best practice approach for appointments of provincial judges: an independent commission that has six members that come from outside the government and seven members that are appointed by the government—which is the one flaw because the government should not be appointing a majority of that committee, called the judicial appointments advisory committee—but it's operated for 20 years. It does a merit-based public search for candidates who are qualified for these kinds of positions, including people from outside government. It recommends a short list of three, and the cabinet has to choose from that short list. The political control over the appointment is taken away, and you actually have independent judges appointed.

● (0915)

It's the only place in Canada where it's done. It should be done for every cabinet appointment across Canada, again especially in law enforcement agencies that are watching over government.

Turning to the protection commission or agency, I favour the model of giving them the power to impose penalties and require corrective action. They should be empowered and required to conduct audits and rule on all complaints publicly and in a timely manner. The identity of all wrongdoers should be made public, which is not currently the case but should be required. Also, the commission should be allowed to impose penalties and require corrective action of the heads of any government institution in terms of their internal system for showing whistle-blowers that they can blow the whistle and how, including requiring changes to their training system, etc.

They should also have the power to levy significant fines. In the public sector, it should be $100,000 to $200,000 fines for retaliation, and in the private sector, 40% of the business employee's annual salary should be the penalty to actually discourage this kind of retaliation.

Compensating whistle-blowers if their claims are proven is controversial, but the Ontario Securities Commission has done that. Up to $5 million can now be awarded in Ontario for disclosure of security fraud, a wrongdoing by publicly traded companies on the Toronto Stock Exchange, following the U.S. model. It is very important, I think, to at least adequately compensate them, not necessarily to go to the level of a reward but to adequately compensate them for the danger of sticking their neck out. Democracy Watch recommends that at least a minimum of one year's salary be the reward if such a whistle-blower's claims are proven.

Finally, we should allow whistle-blowers to appeal to court if the protection commissioner or enforcement agency that the commissioner has referred the whistle-blower to does not deal with their complaint in a timely manner. We should allow them to appeal to court directly and ensure an independent audit of the protection system by the Auditor General at least every three years.

I look forward to your questions about these and other changes. The devil is in the details of all of these changes. Whether the law says that a commissioner and everyone else involved “may” do something or “shall” do something is very important. It should say “shall” in every case, requiring people to fully and effectively protect whistle-blowers and ensuring high penalties for those who retaliate against them.

The Chair: Thank you very much.

We'll start our seven-minute round of questions now, with Mr. Whalen.

Mr. Nick Whalen (St. John's East, Lib.): Thank you, Mr. Chair, and thank you all for your testimony again today.

I would like to focus on a couple of issues I've been asking previous witnesses about in previous sessions.

The first relates to the scope of what a public interest disclosure should be and what the act should cover. The Canadian act covers serious violations of the employment code of ethics for public sector employees. I notice that employment-related matters and employment contract-related matters are explicitly excluded from the Irish act and also from some of the other acts we've looked at.

I'm wondering what your thoughts are—very briefly because the time is short—on whether or not we should exclude employment contract-related matters from the whistle-blower protection law as a means to focus our attention on the more important and truly public interest disclosures that aren't employment matter-related.

Maybe we can start with Tom.

● (0920)

Mr. Tom Devine: Sir, by employment-related contract matters, do you mean disputes involving employees and related to salary or working conditions?

Mr. Nick Whalen: It could also involve harassment. It could be any breach of the code of ethics under the employment contract.

Mr. Tom Devine: Yes, sir, almost all of the whistle-blower laws have a two-part structure for anything involving harassment, retaliation, and things affecting the rights in the employment contract. That's part of the remedial section of the law that's investigated.

Mr. Nick Whalen: Sorry, Tom, it's actually under what constitutes a public interest disclosure, so let's not talk about retaliation for a second. Clearly, it would be retaliation if it were done against a whistle-blower.

I'm focusing on what constitutes a public interest disclosure, and whether or not we should move to explicitly exclude contract- and appointment-related matters from our definition of "public interest disclosure".

Mr. Tom Devine: Yes, sir. Most of the whistle-blower laws do exclude things involving personal injustice—injustice against yourself or threats to your rights as an employee—from the disclosure channel, which is the retaliation channel. They're normally quite separate.

Mr. John Devitt: In the U.K., a whistle-blower has to show that they are not only reporting a crime, for example, but that it's in the public interest to report that crime.

In Ireland, rather than introduce a public interest test, we made it clear that only those disclosures not related directly to the employee's own contract of employment can be considered protected disclosures. That was aimed at preventing employees from mixing up personal grievances with public interest disclosures.

Mr. Nick Whalen: Thank you.

Mr. Mark Worth: I have not seen a provision in the law that distinguishes rampant, systemic, or across-the-board workplace problems like discrimination, unsafe conditions at work, or bullying from individual employee grievances. Certainly, individual employee grievances should be excluded, as John and Tom rightly say.

This was snipped out of the Public Interest Disclosure Act in the U.K., because it was creating all kinds of problems with people claiming to be whistle-blowers if their chairs weren't comfortable or their parking spaces were taken away.

I would recommend a study to come up with a definition for rampant, systemic, or across-the-board, employment-related problems. I think the public would be interested to know if we have a company of 500 people, and half of them are discriminated against for a certain reason or are being denied overtime pay, especially if it's in a public institution. I think that should be included.

Mr. Duff Conacher: I would echo what my colleagues have said.

Mr. Nick Whalen: Another area of concern we've been focusing on a little bit in the committee is to whom disclosures may be made. Currently, our own Public Sector Integrity Commissioner is asking us to broaden the definition of "supervisor". I'm wondering if we should define much more broadly to whom disclosures may be made, and whether or not it would make sense to protect whistle-blowers against reprisal when they do their own investigation, try to educate themselves, disclose to their peers, or go directly to law enforcement or the media without first going to their supervisor.

Again, I know it's a complicated question, but are there any additional considerations we should take into account as we consider broadening the scope of disclosures when we might also be considering broadening the protections to extend to the private sector in addition to the public sector?

I guess we can start again with Tom.

The Chair: Gentlemen, unfortunately we only have a couple of minutes—even less than that—for all of our witnesses to respond. Please keep your comments very short.

Mr. Tom Devine: Thank you.

Yes, the protection must extend beyond disclosures to supervisors or any specific channels. There's no one formula or recipe that fits all these situations. To make a responsible disclosure you need to do a lot of homework, talk with other potential witnesses, and do research.

Before you start making accusations, you need to give the system a chance to do the right thing, which means making those disclosures to your supervisor and upwards within the chain of command. The general principle is that you should have the freedom of expression to make that disclosure wherever it's necessary in order to make a difference in challenging the abuse of power or other misconduct.

Many of the laws say—

● (0925)

Mr. Nick Whalen: Sorry, Tom, I want to give other people a chance on this.

Are there any differentials between the public sector and the private sector with respect to this principle, yes or no?

Mr. Tom Devine: Not at all, sir. It doesn't matter whether the institution that betrays the public trust is public or private.

Mr. Nick Whalen: Thank you, Tom. I have to move to the next one.

John, can you give us the Irish perspective?

Mr. John Devitt: We know from survey data in the U.K., Ireland, and the U.S. that over 90% of workers will normally report inside their organization. As Tom said, people want to be given the opportunity to report through line management and through the relevant channels internally before they feel forced to go outside the organization.

In Ireland, a whistle-blower can go outside the organization in situations where it's considered to be reasonable, where they believe, for example, that they may suffer as a consequence from speaking up internally, or where that information may be covered up. They are afforded the opportunity to report to a member of the media or a member of Parliament. In situations where the information is related to serious wrongdoing, they will be protected when reporting it to a journalist.

The Chair: Thank you very much.

[*Translation*]

You have seven minutes, Mr. Clarke.

Mr. Alupa Clarke (Beauport—Limoilou, CPC): Thank you, Mr. Chair.

Greetings to everyone, no matter which time zone you are in.

Mr. Conacher, the committee has repeatedly heard from witnesses that the Office of the Public Sector Integrity Commissioner had committed wrongdoing. That made me curious, so I'd like to know what that wrongdoing was.

Mr. Duff Conacher: The explanation requires me to use a fair bit of technical jargon, so it will really put my French to the test.

Mr. Alupa Clarke: This is the place to practise.

Mr. Duff Conacher: I think I'm going to switch to English.

[*English*]

Mr. Alupa Clarke: Of course, no problem.

Mr. Duff Conacher: The wrongdoing with regard to the commissioner's office is historical. Christiane Ouimet was audited by the Auditor General as the first commissioner and was found, in more than 200 cases, to have essentially not investigated but rejected the whistle-blower's complaint.

Mario Dion was found by the Federal Court to have been negligent in a couple of cases. He also hid the identity of wrongdoers in some other cases by claiming that the Privacy Act required him to do so. It doesn't require the commissioner to hide the identity of any wrongdoers; it allows that disclosure completely. He also just did a paper audit of the more than 200 cases that Christiane Ouimet had left hanging, a very cursory audit, only pursued full reviews of about a quarter of them, and left the others sitting there.

We have about 150 cases that date back to Christiane Ouimet that still haven't been fully investigated and looked at by the commissioner's office. That's the wrongdoing, and the current commissioner was there for a lot of the time. That's why, again, I don't have much faith in him, and the next person to be appointed has to be appointed using the Ontario method. The politicians cannot be allowed to choose these people anymore.

Mr. Alupa Clarke: Thank you very much.

Mr. Devine, you said that we should absolutely include the private sector in the law. I assume that's a fact in the United States. Can you just share with us how it works exactly, a whistle-blower law applied to the private sector?

Mr. Tom Devine: I'm not sure that I heard your question properly, sir, but that is the overwhelming rule, that the whistle-blower laws apply to public or private sectors. Some nations have them divided into different structures for the different contexts.

Mr. Alupa Clarke: Technically speaking, how does it work in your country? How does it apply to the private sector? For instance, when it's in the public sector, we have those internal agencies in the departments. How does it work in the private sector?

Mr. Tom Devine: We have very similar rights for public or private sector, but yes, they are enforced through separate channels. Our labour department sponsors an administrative law process for informal investigations that can graduate into administrative due process hearings for private sector employees. If they don't get a timely decision, generally within 180 or 210 days from their administrative process, they can start fresh in federal court and have a jury trial to enforce their rights.

● (0930)

Mr. Alupa Clarke: Someone in the private sector doesn't have to inform his or her superior. Am I understanding that correctly?

Mr. Tom Devine: That's absolutely right. There's no requirement to go through the chain of command for a private sector employee.

Mr. Alupa Clarke: How is it in the public sector in the United States? Does the whistle-blower have to go through the chain of command?

Mr. Tom Devine: No, they don't. The reason is that, in many instances, there's a conflict of interest that means going through the chain of command is actually going to be obstructing justice, and you have to have the freedom to adopt those scenarios. The key challenge for us has been making sure that they have protection when they do go through the chain of command, because the instinct of over 90% of whistle-blowers is to follow the system, and oftentimes that can be quite treacherous.

Mr. Alupa Clarke: Mr. Worth, you have put forward some amendments that, according to you, would be positive for the law. Are there any other changes that you haven't spoken about this morning that you would like to share with us concerning our specific law?

Mr. Mark Worth: I wanted to mention that according to the website of the commissioner, there have been 653 disclosures under the act in the past eight years. These might not have all been related to the disclosures, but there have been 215 reprisal complaints during that period. That's a ratio of 3:1. For every three disclosures that have been made, there has been one reprisal complaint. Whether or not they all came from the disclosures, it's not clear, but that's the percentage.

Of those 215 reprisal complaints, only six cases have gone to the point of maybe having a hearing at the tribunal. That's a percentage of 2.9%. In the U.K., in the 18 years that law has been in place, 18.7% of people filing a claim under their whistle-blower law have had a hearing. That means that six times more people in the U.K. have gone to hearing than in Canada. That's a very low percentage. I think we need to study the barriers to having a hearing.

I apologize for a mistake when I described the commission as being an executive branch. It's legislative. Court protection is not the best practice. You need to have an agency, like the gentleman from Democracy Watch says, like Bosnia has and many other countries do now. The executive branch agency has the power and in Bosnia, they do it in 30 days and emergency cases are processed in seven days to assess the retaliation and protect the person. John and Tom can testify that each day that goes by for the whistle-blower, they fall further and further into the hole of career assassination, character assassination, ostracizing, brutal harassment, and very bad conditions at work. The case that was on the schedule yesterday at the tribunal, the Chantal Dunn case. I don't even know if that case happened at the tribunal yesterday. That case is from 2012. That's atrocious. You can't wait four and a half years for a case.

The Chair: I'll have to interrupt. I'm sorry—

Mr. Mark Worth: Please, let me finish.

In the U.K., the average case takes 20 months, so I think the big change you need to make is to get rid of this tribunal system completely, unless it's like an emergency backup in case the executive branch doesn't work, like the man from Democracy Watch said. You need to have a swift executive branch or administrative system to protect these people.

I look at whistle-blower protection—here's my last point—

The Chair: Thank you, sir.

Mr. Worth, I'm sorry we're going to have to interrupt.

Mr. Alupa Clarke: Thank you.

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

Mr. Erin Weir (Regina—Lewvan, NDP): If, Mr. Worth, you want to take a couple of moments to just finish the thought, please feel free.

Mr. Mark Worth: Thank you, sir.

I was going to say that whistle-blower retaliation is a workplace hazard. If you have a factory where there's an unsafe bulldozer or an unsafe forklift, the labour inspector can go in and have it fixed immediately or if they don't have it fixed, they shut it down. If there's a restaurant with a dirty kitchen, they can go in and fix it immediately. In Germany, where I live, if you're a pregnant woman and you're fired for being pregnant, you can be reinstated the next day. There is no reason whatsoever that whistle-blower retaliation cannot be ameliorated and fixed through a workplace labour inspectorate system. The inspector could go into the workplace, assess the problem, and create an order to fix it, which is just like cleaning up a dirty kitchen, cleaning up an unsafe construction site, or any other workplace hazard. We are completely against this having to go to court.

Has anybody in the room ever gone to court? Nobody wants to do that. I have and for the smallest things. Nobody wants to go to court. It's very naive to think that whistle-blowers, who are damaged or might not have any money, have the will, the energy, and the money to hire a lawyer to go to court and wait, in the case of Chantal Dunn, four and a half or five years for a trial. Even in the U.K., like I mentioned, it takes 20 months. We are completely against any kind of court remedy, except as the last resort.

I want to thank the gentleman from Democracy Watch for the time.

Thank you.

● (0935)

Mr. Erin Weir: That was a good point, and I will absolutely pass on the thanks to Mr. Conacher.

Certainly I think we've established that it's important to give people access to court but also that court is not necessarily the most effective or practical option in many cases.

Mr. Devine, you made the point that our committee need not be particularly creative and that to a large extent we can draw upon international best practices in setting up a whistle-blower protection system. On the other hand, we heard last night from Professor Brown in Australia that it would be a mistake to simply try to replicate the legislation of another jurisdiction and that we need to fit these international best practices and concepts into the Canadian institutional context.

I guess one aspect of that context I'd like to raise is the role of Treasury Board, because we've talked a lot about the Public Service Integrity Commissioner, who is an officer of Parliament, but the whistle-blower protection system in individual government departments and agencies is really administered and overseen by Treasury Board, which is the federal government entity that functions as the employer throughout the federal public service.

I'd like our international guests to perhaps comment on whether this is appropriate or how it could be reconfigured, but maybe I'll go first to Mr. Conacher who, I think, is more immediately familiar with the Canadian system and the role that Treasury Board plays in it.

Mr. Duff Conacher: Yes, the Integrity Commissioner is there essentially to receive complaints, but the administration of the whole internal system—and I'd emphasize that—is very much a system that is saying, yes, you can blow the whistle but no one's allowed to hear about it except internally within government, which doesn't really do much in terms of upholding the public's right to know or really protecting the public. That internal system is all designed to then delay, deny, deceive or divide whistle-blowers and essentially deny them full protection.

That's why I think it's so important that the existing commissioner or a separate commissioner set up for federally regulated private sector workers be given that power and be given the power to order chief executives, heads of government departments, and externally businesses, to take corrective action when they find out that their training and education of workers is not enough or when the internal system has any flaws.

There should be regular audits by that commissioner, and they should have the power to say, "You have to clean this up. This is not best practice. You have to make these changes" and to penalize those chief executives and heads of departments, institutions, and businesses if they do not make those changes to ensure that the initial-stage internal system is actually functioning to protect whistle-blowers and not retaliate against them.

Mr. Erin Weir: Thank you.

I will throw it over to our international guests if they have any thoughts on the role that Treasury Board plays in the Canadian whistle-blower protection system, and whether it might be better to have the structures within departments and agencies instead of reporting to a more independent entity such as the commissioner.

If you're not familiar with that aspect of the Canadian system, there's no pressure, but I'm curious as to whether anyone has any thoughts.

The Chair: Do you want to pick your witness, Erin? We have only about a minute and a half left.

Mr. Erin Weir: Perhaps I'll start with Mr. Devine, just given that he talked a lot about using these international best practices.

● (0940)

Mr. Tom Devine: Your concern is very well taken. The point of the Civil Service Reform Act of 1978, which set up the modern structure for the U.S. whistle-blower law, was to separate out the agency that had management responsibility from other institutions, which would be independent of those duties and therefore be able to concentrate, without conflicts of interest, on merit-system ranks, such as whistle-blower protection. It would have to be separate. Otherwise, you'd basically be asking an institution whose primary purpose may be at odds with your own interests to be responsible for providing justice when you challenge its alleged abuses of authority. It just doesn't work.

I'd also like to just do a PS on this idea of courts versus informal administrative agencies. It's not a matter of one or the other; you need both. In a global system of justice, there is no substitute for due process and the right to confront your accusers and present your own evidence on the public record. You can't cancel that out. It can be done through administrative due process or through a public judicial system through the courts.

But Mark is right that many people can't afford to go through the full-fledged production of going to court and having the trial. There has to be an informal low-cost administrative remedy. The key is to have controls on that remedy. Without those controls, the delays can be just as bad or worse than in court. The secrecy can be absolute, unlike court, and further, they can turn into traps, Trojan horses. Further, they can actually create victims and investigate the whistle-blowers instead of the retaliation.

The problem with Canada's administrative remedy is that it is uncontrolled.

The Chair: Thank you very much, Mr. Devine.

Madam Shanahan, you have seven minutes, please.

Mrs. Brenda Shanahan (Châteauguay—Lacolle, Lib.): Thank you, Chair.

Actually, I want to give my colleague Nick Whalen some time.

The Chair: Certainly.

Mr. Nick Whalen: Thanks, Madam Shanahan.

I will continue on with Mark and Duff and let them have an opportunity to answer the question of broadening the circle of to whom a whistle-blower may disclose, and whether or not it should extend to co-workers, directly to the police, directly to media, or to others. What should be protected? Also, are there different considerations in respect of the chain-of-command disclosures that might exist in the public sector versus private sector whistle-blowing?

Mr. Mark Worth: The one difference between the public and private sector is that in the public sector you want to have, for every agency or institution, a dedicated person regardless of how big it is. In the private sector many laws say, okay, if a company is over 50 employees, or 100, or has *x* amount of dollars of annual revenue, you have to have an appointed person. If it's a mom-and-pop shop with three employees, it doesn't make sense to have a whistle-blower intake person. You need to figure out the threshold for requiring a company to have a point person.

To answer your first question, you want to have as many disclosure channels as possible. I find your law, as currently written, very confusing. You can report this here, report that there. You don't even want to put a lawyer through having to read this law. It's very complicated. The Australian law also is very complicated.

The notion of the three-tier system—internal, regulatory, then external—could be modified to your liking. If it's reasonable and possible to report internally, that should be certainly encouraged. But as Tom said earlier, you don't want to take away the right to free speech of the employee and the worker. If they're not comfortable reporting internally, and they have a reason for that discomfort, they should be able to go to the regulator directly. In cases of extreme or dire emergencies—threat to life, threat to the environment—or if evidence might be destroyed, as John mentioned earlier, people should have the right to go to the public without reporting internally or to the regulators.

Mr. Nick Whalen: Thanks, Mark.

Mr. Mark Worth: The idea is to get the information out there, not to limit—

Mr. Nick Whalen: Sorry, Mark. We have very limited time.

Mr. Duff Conacher: I would just like to say that you want to have multiple channels. Canadian public sector workers, anyone, has a constitutional right to blow the whistle directly to the public if there is endangerment to health and safety under Supreme Court of Canada rulings from the past. But it is vague. It should be set out much more clearly in the law.

I very much favour the commission and an education program for all workers—public sector, private sector, and anyone who engages with government—including public advertising about this. An office is there to go to as a clearing house, to find out exactly what you can do. You can go anonymously to that office. Once you go to that office, even if you try to be anonymous and it doesn't work out, you're protected as soon as you contact them, and that office would help you figure out whether you are in a situation where you can go public right away, and would be in part a legal clinic providing you with free legal advice. We need that.

● (0945)

Mr. Nick Whalen: Thanks, Mr. Conacher.

Brenda, thank you.

Mrs. Brenda Shanahan: Okay. Thank you very much.

Sorry, I haven't been present for all of the testimony, but I am very much encouraged by the passion of the witnesses we have here today that this is a topic that we need to address thoroughly. I'm curious about international cases such as Serbia where I believe the whistle-blower law was brought in fairly recently. Do we have a tally of the results? Do we see that kind of cultural change? If so, please expand on that.

Mr. Tom Devine: Thank you, Madam.

The record is incomplete, to my understanding, but there is some preliminary data. In the first nine months of Serbia's law, there were 35 applications for temporary relief; 26 of those were granted, which is an extraordinary success rate in freezing retaliation. Aside from the public record of some recent statistics, more recently since last fall, out of 13 cases, eight have been granted temporary relief: five initially and three on appeal. That's really a surprising track record of effectiveness and a good endorsement for the law's potential.

The United States' track record has been about a 25% to 30% success rate for decisions on the merits with our most effective whistle-blower laws, so that to me is the range that you can hope for with a law that works.

Mrs. Brenda Shanahan: I'm concerned about really the very initial stages: an employee sees something and is not really sure. How do we encourage more people to come forward along the whole spectrum from what could be just something they want to question to actual criminal wrongdoing?

Mr. Tom Devine: There, the key is protection for internal disclosure. You have to have the right to go public when there's a conflict of interest or obstruction of justice within the institution, but the knee-jerk reaction for almost all employees—more than 90%, and almost every study shows this—is to choose to go to their boss first, to operate within the environment that has been their professional world or life. They very rarely break ranks except out of extreme frustration or after beating their head against the wall repeatedly.

If there's retaliation at those early stages, the word gets around quickly and everybody knows: don't open your mouth. You have to make sure, then, that it's at least safe to operate within institutional channels and then give people the right to go outside if necessary.

Mrs. Brenda Shanahan: Thank you very much.

The Chair: Unfortunately, we're out of time.

Mr. McCauley, take five minutes, please.

Mr. Kelly McCauley (Edmonton West, CPC): Gentlemen, thanks for your time today, and to some of you, welcome back.

Mr. Devine, I want to compliment you on your paper of November 25, “International Best Practices for Whistleblower Policies”. It's very good.

You spoke about protection for those who are about to be whistle-blowers. Can you expand on that a bit? How would you suggest we give protection for those about to be whistle-blowers?

Mr. Tom Devine: I'm not sure I heard your question properly.

Mr. Kelly McCauley: You talked about our need to have protection for whistle-blowers, but also for those about to be whistle-blowers. How would that look?

Mr. Tom Devine: Basically, this is an expanded version of the protection against prior restraint. Often there will be pre-emptive strikes because someone is digging where you don't want them to look, they're asking the wrong question, they're raising challenges internally that aren't accusations or a formal list of undisclosures, but they're putting the wrong topics on the table. You want to act against them before they can become whistle-blowers and trigger their rights.

The law has to cover all the stages at which someone is perceived as a threat for exercising freedom of speech.

● (0950)

Mr. Kelly McCauley: You also spoke about the need for whistle-blowers to have their day in court. Do you mean their day in court just for job reinstatement or for other resolutions?

Mr. Tom Devine: The minimum is to have the right to present your own evidence, testify on your own behalf on the public record, and challenge your accusers. It's a challenge to retaliation.

Some of the most effective whistle-blower laws enfranchise whistle-blowers to go to court on the attack against the corruption or abuse of power through private attorney general statutes. It came out of England's Magna Carta initially. The False Claims Act in the United States, which allows the whistle-blowers to file lawsuits challenging fraud in government contracts, is America's most effective anti-corruption law. It has increased the take against fraud in government contracts from an average of around $10 million a year to an average of more than a billion dollars a year, and more than $3 billion a year in the last few years.

Mr. Kelly McCauley: Thanks.

Mr. Devitt, welcome back again. You spoke about having, in Ireland, direct access to the courts for job reinstatement. Is it for any other reason, or it solely for job reinstatement?

Mr. John Devitt: It's for job reinstatement pending the outcome of a hearing at the Workplace Relations Commission. The circuit court isn't making a determination on the outcome of the case. It's simply stating that the worker—the applicant in this case—has a case to be heard before the Workplace Relations Commission. Those cases might take two years or more to be heard, and pending that hearing, they should be reinstated by their employer.

Mr. Kelly McCauley: Thank you.

You mentioned that three-quarters were successful, with obviously one-quarter unsuccessful. Were the one-quarter frivolous, or was it just not enough evidence? Do you have any idea why...?

Mr. John Devitt: When I say three-quarters, I mean there have been six applications so far through the Irish courts. Four have been successful and two unsuccessful. They were based in large part because the court determined in four instances that there was no protected disclosure made.

Mr. Kelly McCauley: Thank you.

Mr. Worth, we have just a short amount of time. You spoke about having a dedicated person in each department for whistle-blowers to go to. We have that throughout the government, but one issue we've seen very clearly is that while many resources are put there, they're not very effective. You spoke about its being important to have someone to go to. We have that, but what we hear again is that the dedicated person who is supposed to be looking after whistle-blowers still has almost a conflict of interest, because they're reporting to the department inside the department, to the assistant deputy minister or the deputy minister.

How do we get to having whistle-blower protection people—key people in every department—who are there solely for the whistle-blower and not to look after the bureaucrats above them or to protect the department first?

Mr. Mark Worth: I think you can have a contact point, but you have to have a dedicated whistle-blower institution at the federal level or national level to enforce the rights. That way you avoid the conflict because the rights are enforced by a dedicated whistle-blower institution. However, I would argue that you still need a contact point within each government ministry or agency.

Mr. Kelly McCauley: Thanks.

The Chair: Thank you very much.

Madam Ratansi, you have five minutes, please.

Ms. Yasmin Ratansi (Don Valley East, Lib.): Thank you all for coming.

Welcome, Mr. Worth.

My questions are threefold, and I'll ask them now so that I do not have to wait.

When you are giving us examples of successful protection, do you have data that tracks the type of whistle-blower, whether it's financial, environmental, or whatever, and what the intersectionality is? Are they women, men, financial officers? Who goes out and does it? Is there an evaluation mechanism for the whistle-blower act so that you could go and check it? I was looking at the U.S. one that Mr. Devine gave us, and it was in 1989 that they overhauled that whole thing.

Mr. Worth, I'll start with you, and then I'll go to Mr. Devine, Mr. Devitt, and Mr. Conacher.

● (0955)

Mr. Mark Worth: We actually do have data that we can forward to you on the breakdown of reports made in countries like the U.K. and certain countries in eastern Europe that have whistle-blower institutions in place.

I don't want to generalize about whether it's mainly women or mainly men. Certainly, you have a lot of whistle-blowing in banking and finance, in education, in health care, in the delivery of public services like medicine or hospital care. Wherever people interact directly with an institution or with a public service you have a lot of whistle-blowing—public procurement, for example. My sense is that it is mainly men in some countries and that, in some countries, it's mainly women. You have a broad base of age groups represented, but I'm very happy to send to you and the entire committee breakdowns of data, if you would like.

Ms. Yasmin Ratansi: Yes, and on evaluation mechanisms, if there are any.

Mr. Devine.

Mr. Tom Devine: There is really no particular type of whistle-blower. Wherever there is power, it can be abused, and people act on their consciences and challenge those abuses of power.

I would second Mark's insight that a particular sore spot that tends to accumulate whistle-blowers involves government contracts and procurement. That always seems to be the magnet for corruption, and it's easy to document that type of crime—

Ms. Yasmin Ratansi: Mr. Devine, if you have data, would you send it to us? It would help us.

Mr. Tom Devine: Yes, the most impressive data would be on the success of the whistle-blower rights in the False Claims Act to challenge fraud in government contracts. The track record has been phenomenal. I'm glad to share that.

Ms. Yasmin Ratansi: Okay, thank you.

Mr. Devitt.

Mr. John Devitt: Yes, we're more than happy to send you data that we're collecting through our helpline and legal advice centre. So far, we've found that more men are reporting than women, and that might be because they are working in centres where there is a higher risk of wrongdoing. We're finding that a lot of people are reporting concerns from the health care sector. That's the hot.... That's the one sector from where top people are reporting.

Ms. Yasmin Ratansi: Have you an evaluation mechanism, as well?

Mr. John Devitt: Yes, the Department of Public Expenditure and Reform in Ireland is responsible for governing this data. We're helping them to do that, and we're helping monitor the experience of individual whistle-blowers from different government departments. I'm more than happy to send you information about this.

Ms. Yasmin Ratansi: Mr. Conacher.

Mr. Duff Conacher: I mentioned some statistics from the past where we have about 150 complaints that have still not been fully addressed. Then you heard some more recent statistics from Mr. Worth, and that's why, again, I strongly recommend that there has to be an independent audit of the whole system.

Ms. Yasmin Ratansi: My question is whether it's men, women, or financial officers because if it's financially driven or environmentally driven, knowing that would help us as well.

Mr. Duff Conacher: I don't think we know the full picture in Canada because the reporting has been so bad in the past. There has been straight-up negligence on dealing with complaints, so we don't even know fully the picture of what's happened here. That's why we need it. We had one audit by the Auditor General. We need that to be required to be a regular audit of the entire system at least every three years so that the commissioner can't hide what's going on in the commissioner's office as well. The commissioner needs to be accountable also.

The Chair: I'm afraid we're out of time on that round.

Mr. McCauley, we have five minutes for you.

Mr. Kelly McCauley: Great.

Hello again, gentlemen.

Professor Brown yesterday spoke to us, noting that mandatory reporting is a necessary part of good disclosure legislation. That's something we don't have here. I'm just wondering, Mr. Worth, starting with you, because it goes to my last question about our internal process. Do you agree that the mandatory reporting of whistle-blower cases from the internal disclosure officer to the external oversight body is necessary?

Mr. Mark Worth: It is absolutely essential.

Actually, you do have some data on your website about the number of disclosures and reprisal complaints and so forth. What's helpful—and John pointed this out in Ireland—is the reason that reprisal complaints were denied or disclosures were ignored, the reasons that the people did not get compensated, the reasons that they did not get whistle-blower protection. This can help to expose holes and gaps in the protection system. I think that your data, which you have on your website, in your annual report, which is very good, needs to include more specific details, of course, without revealing any information about the whistle-blowers.

What actually happened to the disclosure? Was it investigated? We see many countries in eastern Europe and Latin America where we had this many disclosures, which led to *x, y, z* number of prosecutions and convictions, investigations, tracked all the way down the line. It was the same with reprisal complaints. How many were accepted? How long did it take? How many were denied? What was the reason? You need to get more information as to the outcomes of the disclosures and the retaliation complaints. It should all be made public every year and in a very easy-to-digest fashion, and we're seeing more of that. This has been a big development all over the world, more transparency in the entire whistle-blower system.

● (1000)

Mr. Kelly McCauley: What about in a case-by-case example? Someone comes forward. Right now it just sits there. All we hear is that once a year we get a report, "Hey, thanks". What about on a case-by-case basis, if for every single one that comes up, that information goes to the external body at the same time, so that, again, it doesn't just get lost in the department? From what our witnesses have seen, and what we've seen, actually, from the government people we spoke to, the habit is to try to keep it within the department and not really it follow up as aggressively as it should be.

The Chair: Do you want to address your question?

Mr. Kelly McCauley: I'd ask Mr. Worth.

The Chair: Mr. Worth, can you hear us?

Mr. Mark Worth: Yes.

Mr. Kelly McCauley: The question I had was this. We talk about it once a year; that's what our internal policy is. Once a year we get a report and there's no real follow-up on it from the powers that be within, say, Treasury Board or other departments. What about a disclosure for every single case as it comes up? It gets reported immediately to the external body as well as the internal body.

Mr. Mark Worth: Is that question for me?

Mr. Kelly McCauley: Sure.

Mr. Mark Worth: I think you can ask Tom. I know that in the United States, the Occupational Safety and Health Administration, OSHA, issues press releases when a worker is retaliated against and is reinstated, and on how much back pay the person gets. These press releases are very detailed. Maybe you can ask Tom about how that system works, whether they release all the cases or just the major cases.

Of course, in the United States the Securities and Exchange Commission and the IRS release case information as it comes available. The Department of Justice releases case information. It's incredibly useful to get that information out there. It has the effect of showing the whistle-blower that the system works.

I was in Brazil a couple of years ago and they told a story about a whistle-blower case that led to a conviction. Another person saw that, and the next day he or she blew the whistle on another case because they had confidence that the system was actually working. Transparency can build trust and confidence in the system among the public in general.

Mr. Kelly McCauley: Thank you, Mr. Worth.

The Chair: You have about 30 seconds.

Mr. Kelly McCauley: With just 30 seconds, Mr. Conacher, maybe you can explain. We see how the U.S. has a reward system for whistle-blowers. Do you see something like that working in Canada? Do you recommend that?

Mr. Duff Conacher: I think it's essential because—

Mr. Kelly McCauley: Would you see it across all whistle-blowing or just for securities issues?

Mr. Duff Conacher: No, all whistle-blowing. The OSC has set the precedent in Canada. I think it's essential because many people, even if the retaliation doesn't happen, are in some ways uncomfortable staying in their position. They want to make a transition. The reward should be, within government, priority in moving into another institution within government, and also compensation in lieu of that. It would be the same in the business sector and private sector.

The Chair: Thank you very much.

Monsieur Drouin.

Mr. Francis Drouin (Glengarry—Prescott—Russell, Lib.): Thank you, Mr. Chair, and thank you to the witnesses for once again being in front of us.

My first question will be for Mr. Devine, but others can feel free to jump in. It's just with regard to the November 25 paper that you wrote. We have heard from witnesses that once a whistle-blower choses to come forward, the organization or the department in Canada tends to go into defence mode as opposed to embracing whether the disclosure has merit. Often what this will involve is that the employees the whistle-blower works with, their colleagues, won't talk to them anymore. They won't engage with them and they won't help them. That has to do with what you've mentioned with regard to the spillover retaliation.

How do you recommend that we improve that culture with regard to the spillover retaliation? We've been hearing from witnesses that they're afraid that, rather than having their colleagues' support, they will get isolated within their own department. How do you improve that?

● (1005)

Mr. Tom Devine: The first thing is to make sure that the law protects all the people in the village that you want to and be working with the whistle-blower to prevent isolation. That's the primary requirement, which means that people who are mistakenly perceived to be whistle-blowers, people who assist the whistle-blower, and people who are providing supporting evidence be protected as well.

The second thing is leadership. So much of the problem with whistle-blowing is that it's perceived as disloyalty to the organization, and therefore, the dissent is a threat to the jobs, welfare, and careers of colleagues and co-workers. Most whistle-blowers, though, are acting in defence of the organization because they're afraid that the abuse of power is going to backfire and hurt everyone.

When a leader establishes an environment through communicating that he or she wants to know these problems before they get worse, that we can't fix these things or prevent disasters if we're blindsided, and let's have a free flow of information so that we can do the right thing and operate most effectively, when that sinks down and the labour force believes it, it is the right environment to be challenging the isolation that's fatal to whistle-blowers. This idea of having an internal office can be one of the critical front lines for that. The internal officer can be very dangerous. It can be a trap. It can be somebody who is basically just gathering information and has a conflict of interest, and then the disclosures to that person will spark retaliation and cover-up before it gets to an objective audience. However, that officer also can be an invaluable resource for the people. It needs to be structured effectively.

A question was asked earlier about how to do that. I would refer you folks to the criteria for the International Ombudsman Association because these internal agency officers are very similar. The two most significant functions of that are, first, that they have direct access to the organizational leadership—if they're not buried within a bureaucracy, it takes away the potential for plausible deniability—and second, that all communications to them and by them are automatically protected activity under the whistle-blower law because that can be an extremely dangerous job.

Mr. Francis Drouin: Mr. Devitt, do you have anything to add to that?

Mr. John Devitt: The one thing that makes a whistle-blower vulnerable, more than anything else, is the lack of response from their employer. If their employer does not act on the disclosure and colleagues of the whistle-blower observe a lack of action, they will assume that the person who has spoken up has done so without any just cause. It makes the individual very vulnerable. It puts them in a very vulnerable position to have their employer ignore their concern.

At a more extreme level here, we had cases involving two police officers and a chief of police who subsequently resigned after a major controversy arising from police corruption, petty corruption. Two police officers had exposed this corruption and then their actions were described in Parliament by the chief of police as disgusting. This served to further isolate the two men and put them under enormous pressure.

It's vitally important that employers are seen to take action. That's why we're working closely with them here and we're more than happy to share our experience with the committee in working with public bodies in ensuring that action is taken in response to concerns.

The Chair: Thank you very much. We're out of time for you, Francis.

Mr. Devitt, I understand you have to leave now to catch a plane, so thank you very much for your appearance before us. I'll mention to you, as I will to all witnesses at the conclusion of this testimony, that if you have any further information that you think would be of benefit to our committee, please forward it directly to our clerk. Your contributions are greatly appreciated.

Mr. Weir, we'll have a short three-minute intervention by you.

Mr. Erin Weir: If Mr. Devitt can stay for another three minutes, I was actually going to ask him to tell us a bit about the “integrity at work” model in Ireland.

Mr. John Devitt: This is a new initiative, which we designed, aimed at getting commitment from employers across the public, private, and non-profit sectors to respond and act upon reports made to them and to ensure that people don't suffer as a consequence of reporting.

We have around 30 organizations from the public and non-profit sector signed up so far. The Department of Justice and Equality and the Department of Public Expenditure Reform are sponsoring the initiative. It's in a trial phase. The employer has to sign a pledge, which they make public, to the effect that whistle-blowers won't suffer and that action will be taken in response to concerns. They need to make their staff aware of the availability of free legal advice from Transparency International or any other organization that might be in a position to provide it.

Also, there is an opportunity to come to us when a whistle-blower suffers reprisal or is not satisfied with the response of the employer. We then can file a report to the employer, including the chief of police or senior police officers, to highlight the experience of the individual, and as Tom pointed out, to avoid the opportunities for plausible deniability. In future, senior police officers won't be able to say they did not know that a whistle-blower was suffering as a consequence of speaking up.

One of the important features of this is that they also have to inform their primary stakeholders of their participation in this initiative so that Parliament will be aware that the police service is engaging in the initiative, as will the Policing Authority and the police ombudsman. Each of those different agencies will also be signing up; thus, if a whistle-blower from the police ombudsman or the Policing Authority wants to contact us, they can do the same.

We're trying, then, to establish a standard by which organizations will comply. We'll provide them with resources, a checklist, a self-evaluation, a tool kit, and then will provide them with an annual report based on the reports that are made to us and recommendations arising from the initiative.

I'd be more than happy to share more information with you at a later stage.

● (1010)

The Chair: Thank you, Mr. Devitt.

Colleagues, as I said at the outset of the committee hearings, I'd like to suspend at 10:30 to go into committee business. Given that, can we go to three five-minute rounds? We'll have one from each of the officially recognized parties of the committee, rather than the seven-minute rounds. That should get us to our deadline.

We will start, then, with Monsieur Ayoub.

[*Translation*]

You may go ahead for five minutes.

Mr. Ramez Ayoub (Thérèse-De Blainville, Lib.): Thank you, gentlemen.

Let me start by saying that, after listening to you, I wouldn't want to become a whistle-blower. Even if I had nothing to lose, I think that I would still come out a loser. No matter which country we are talking about or what its legislation or regulations are, I don't have much confidence.

I sometimes get the sense that the whistle-blower regime is a huge elephant. My definition of a whistle-blower is someone who indeed blows the whistle, but who does not become responsible for that action. The impression I have, however, is that, right now, the whistle-blower bears all, or nearly all, the responsibility. In many cases, the onus of proof is entirely on the whistle-blower. Things may be slightly different in some countries, where distinctions exist.

Mr. Devine, when I went to the Government Accountability Project, or GAP, website, I saw that people could report fraud or other illegal activity online. That made me wonder whether people weren't afraid to fill out the form on the Internet. All of the technical and legal details are listed, and then, it says that everyone is shielded. The whistle-blower, however, receives little or no protection, at least initially.

In the case of journalists, the public or confidentiality aspect hardly ever comes into question. Everyone knows that, when information is revealed to journalists, they usually take steps to protect their sources. In this situation though, a mechanism is being created to protect the system within the system. Frankly, I cannot get past the fact that the results are so poor, given all the costs and people involved. My sense is that very little is achieved in the way of results.

Mr. Devine, I don't know where you stand, but, on a philosophical level, I don't think we're moving towards practical solutions for whistle-blowers around the world.

● (1015)

[*English*]

Mr. Tom Devine: Yes. This is not a new phenomenon. As long as we've had organized societies, power's been abused and people, sooner or later, have stuck their necks out and challenged it and said, “This is wrong”. If they do it with weapons, sometimes they're called “revolutionaries” or “terrorists”. If they do it just with words, it's “freedom of speech”. This is always going to happen, and it's always going to be dangerous, because those who are threatened by it are never going to be passive. The challenge is to minimize the risk as much as possible for the responsible disclosures that will help the public good.

In terms of your questions on online disclosures and protection, those are facilitated by the U.S. law, which protects disclosures based on their contents, unless the information is classified or specifically prohibited by law. Except in those two contexts, you're eligible for free speech protections when you engage in public freedom of expression, which could be on television or through an online disclosure.

As far as few results go, this is a great question because the lack of results in every study that's ever been done is identified as the primary chilling effect. People remain silent observers instead of challenging abuses of power that betray the public, not because they're scared but because they don't think it will make any difference. With an effective whistle-blower law, you can get results.

Let me give you a brief menu of some of the results in the United States from our whistle-blower law.

The Chair: Mr. Devine, very briefly, sir. We only have a few seconds.

Mr. Tom Devine: It has stopped, has exposed blanket domestic surveillance and led to passage of the USA Freedom Act. It's gotten dangerous drugs off the market, such as Vioxx, which killed 50,000 Americans. It led to resources in Afghanistan and Iraq that protected our troops against land mines. Therefore, the casualties from land mines dropped from 60% to 5%. A whistle-blower in the Federal Air Marshal Service prevented a more ambitious rerun of 9/11. They have stopped the United States government from deregulating meat and poultry inspection, getting government-approved food vouched for by corporate honour system, five times. They've prevented nuclear power plants from being completed. There were accidents waiting to happen because they were systematically illegal. They have increased our national recoveries against fraud, from $26 million a year to over $3 billion in fraud in government contracts the last few years.

If we protect these people, they can make a difference. They're changing the course of history, more than at any time before. This is a very strategic moment for Canada to get in as part of that process.

The Chair: Thank you so much, Mr. Devine.

[*Translation*]

Mr. Clarke, you have five minutes.

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

Mr. Conacher, before going any further, I would like you to clarify something for me.

You said that the commissioner does not have executive authority because he is an officer of Parliament, but Parliament has three branches: executive, legislative, and judicial. Why do you say that the commissioner's authority is legislative rather than executive?

[*English*]

Mr. Duff Conacher: The commissioner is an officer of Parliament, who is tied too much to the executive branch because the executive branch, the cabinet alone, selects the person, and that's the conflict of interest that others have talked about through the whole system.

Just to talk about one other thing that Tom Devine raised, and that is these internal disclosure people. Compare that to the access to information system. Under our Access to Information Act, there are employees who are access to information officers. Their job is to handle access to information. Under the whistle-blower protection law if someone is designated, they're still doing their other job, they're still within the whole hierarchy, they're hired by their bosses, and they're looking for promotion in their other job. They're just designated to be the internal disclosure person.

It would be great if those people could be the ombudspeople that Tom Devine has talked about, but they're not independent enough to be that.

One idea may be that the commissioner should be selecting those people, that those people should be made like access to information officers where their full-time job is to only do this. Have the commissioner select them, and not have their deputy minister or their deputy head be choosing them, to give them the independence to be that ombudsperson. Because right now I don't trust that those people, in the really hard cases, are not going to feel the conflict of interest from wanting a promotion to continue in their job, because they're just designated to be this internal disclosure person.

That's why I emphasize so much a central office that's a clearing house that everyone is promoted and educated about regularly, not just once when they're hired. When you're talking about some of the integrity at work initiatives, they're getting at the behavioural psychology of changing the culture and nudging people—which I'm sure you've heard about—governments nudging citizens to comply with laws. We need nudging within government as well.

One of the things I think should be done is that whenever a decision-making process begins, not only should people be signing the values and ethics code of the public service again but also everyone who is involved is handed a statement that they have a right to blow the whistle if there is wrongdoing in this process. That's how you nudge people and remind them. I just don't think that internal officer is ever going to be a person unless they become like an ATIP officer where they are hired independently—ATIP officers are not hired independently—where it's their sole job. Otherwise, they'll have the conflict. I think a great idea is to have the commissioner be able to hire all those people in every government institution.

You may say that's going to cost too much. Then you have to have a larger central office that everyone is educated about regularly, multiple times a year, that this is the place to go if you have any questions, and as soon as you contact them, even anonymously, you and all your colleagues you may have talked with about it are fully protected.

● (1020)

[*Translation*]

Mr. Alupa Clarke: In an ideal political system, the convention of ministerial responsibility would be absolute, meaning that a minister would resign as soon as their department committed a wrongful act. In England, that's how it works, but I'm not sure whether the responsibility is consistently applied, as was the case a few decades ago. Conversely, in the U.S., the responsibility lies at the bureaucratic level, and the government is not responsible for anything.

My comment transcends all partisanship and all government parties. Is the whistle-blower problem in Canada not due to the fact that absolute ministerial responsibility no longer exists? In other words, ministers don't step down when problems occur in their departments, unless the media outcry is strong enough.

We don't follow the honourable convention whereby a minister resigns when their department makes a mistake. Ironically, departments have an internal mechanism where employees have to first report the wrongdoing to a designated person, who then notifies the deputy minister. The deputy minister, in turn, notifies the minister. That chain of command is doomed to fail because everyone knows the minister will do everything in their power to push the blame down the chain, because they don't want to resign.

The problem is due to the fact that Canada does not follow the constitutional convention of the Westminster system. Is it not?

[*English*]

The Chair: Unfortunately, Mr. Conacher, we are completely out of time. As I am fond of telling all my committee colleagues, the five minutes allotted to them are for both the questions and the answers, but when we're out of time, we're out of time.

[*Translation*]

Mr. Alupa Clarke: That's what interests me in life.

[*English*]

The Chair: Mr. Weir, we'll end with you unless you want to cede some of your time to Mr. Conacher to respond to Mr. Clarke.

Mr. Erin Weir: Thanks. I would like to first go to Mr. Devine. Since you're in Washington, I can't help but ask about the current controversy involving former national security adviser Susan Rice and the disclosure of intelligence information. Do you have any comment? Are we going to see the American whistle-blower protection system in action here?

Mr. Tom Devine: We have a parallel system for intelligence workers. Twelve out of the first 32 nations that adopted whistle-blower laws had some type of exemption or reduced rights for national security workers. The majority rule is to give them the same protection against retaliation as everyone else.

The structure in our country is that they have free speech rights for dissent within the government agency. They don't have public freedom of expression, but they do have protection against retaliation for operating through the chain of command. They can make disclosures of misconduct, not only through the chain of command but also through the intelligence oversight committees in our Congress.

Actually, that system has been working fairly effectively because the leadership responsible for its enforcement has been operating in good faith and is highly committed to it.

● (1025)

Mr. Erin Weir: Thank you. I would like to give Mr. Conacher a couple of moments to respond to the question from Mr. Clarke about the Westminster system.

Mr. Duff Conacher: Yes. I think the point of the flaw is.... I don't think a minister should be accountable for everything that people in the bureaucracy do, because sometimes they're not informed. However, if they are informed about it, they should be held accountable. The real crux of the matter is that the deputy ministers and assistant deputy ministers are selected by the cabinet.

The Gomery commission—after reviewing the sponsorship ad scam spending scandal—recommended that deputy ministers be selected through an independent commission and given a fixed term of office, and that they should only be able to be dismissed with cause. That is key to having an independent public service. Everybody below assistant deputy minister and deputy minister knows that to reach the top, you have to please the politicians. That's why it's so key to have fully independent officers if you really want those internal people to be ombudspersons.

The ATIP officers are there already. Why not designate them as the people? They have more independence and they're within a system of access to information, which is part of whistle-blowing and the public's right to know. It's flawed.

The Gomery commission recommendation was responded to by the gang of 60 who came out—former prime ministers and deputy ministers saying you can't do this and deputy ministers have to be blindly loyal to their ministers. No, they have to be loyal to the rule of the law and upholding what's right and in the public interest. That's a fatal flaw in our system currently, and it means the public service is not as independent as it needs to be. Whistle-blower protection cannot work without a fully independent office for people to go to.

Mr. Erin Weir: I think you make a really critical point about the importance of the appointment process in maintaining that independence.

I would like to conclude by going to you, Mr. Worth, on that question of the process for appointing an independent commissioner and independent officers.

Mr. Mark Worth: Yes, this is the biggie. I mentioned Bosnia earlier. In Bosnia, the anti-corruption commission is accountable to a three-member parliamentary committee that has one member from each of the parliamentary factions. I don't know about the Canadian system, I am very sorry, but I am all in favour of the legislative branch having as much authority as possible. This is the most democratic branch, of course, and the most transparent branch usually. I think you have to give the people the opportunity to weigh in on the appointment to this whistle-blower office.

Maybe Tom can comment on the U.S. system, but our research shows that the most important thing is for the office to specialize only in whistle-blowing. If it's tacked onto some other institution, it's not going to work. If it's a side office in a ministry of justice or anti-corruption or something.... You need to have a whistle-blower office, and people there whose only job is to protect whistle-blowers. I think you need to have a whistle-blower office for the public sector and a whistle-blower office for the private sector.

In the United States, the SEC has a whistle-blower office. The Office of Special Counsel has an independent whistle-blower office. All they do is protect people from retaliation. The IRS has a whistle-blower office. You need to have a dedicated staff of people who spend all day working on protecting whistle-blowers and nothing else.

The Chair: Thank you very much. Unfortunately, colleagues, and to our witnesses, we're out of time.

I do want to comment, particularly to our witnesses. When this committee started undertaking a study on the current whistle-blower protection legislation, we all thought, at the committee level, that it would only take a few meetings. It has expanded far beyond that in no small part thanks to the testimony of individuals like yourselves.

This has been of great benefit to our committee. The committee members now fully understand the fact that we have a big job in front of us in terms of reporting back to the government as to potential changes and perhaps—I don't want to speak without the consent of the committee—necessary changes.

Should you have any additional information that has not been covered by this committee, once again, I would encourage you to submit that information to our clerk, anything you think would assist us in our deliberations. Thank you again.

Committee members, we will suspend for a couple of moments, and then we'll go in camera for committee business.

[*Proceedings continue in camera*]