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Mr. Tom Lukiwski

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● (0845)

[*English*]

The Chair (Mr. Tom Lukiwski (Moose Jaw—Lake Centre—Lanigan, CPC)): Colleagues, I think we'll start if we can. We're just a couple of minutes past our scheduled start time.

As you know, we have officials from the Office of the Public Sector Integrity Commissioner of Canada with us to provide us with a technical briefing.

We will conclude this portion of this morning's meeting at 10:15. We'll suspend for a couple of minutes and then go in camera, at which time we'll start talking about the outline and the drafting for the report on the whistle-blower protection act study that we've been seized with for the last several weeks.

Now, in terms of what we're going to be doing today, I believe everyone has copies of the deck in front of them.

My understanding—and Mr. Radford can perhaps correct me if I'm wrong—is that we don't have any visual presentations. We'll be going off paper copy only.

As the presentation ensues, if any of you has questions, please, standard procedure, raise your hand. I will identify you and interrupt the presenter, and the question can be asked at that time. I think that would probably be more effective than waiting until the end of the presentation, and hopefully, that won't be too cumbersome for our presenters.

With those brief words of opening and introduction, Mr. Radford, and Mr. Lampron, thank you once again for appearing. The floor is yours.

Mr. Brian Radford (General Counsel, Office of the Public Sector Integrity Commissioner of Canada): Thank you very much, Mr. Chair. It is our pleasure and an honour to be here this morning.

Thank you for accepting a technical briefing from our office. I am accompanied by Mr. Lampron, our director of operations. He oversees the admissibility analysis process as well as the investigations for disclosures and reprisal complaints. Mr. Lampron has over 20 years of experience as a military officer in the military police, he's been a senior investigator of the Conflict of Interest and Ethics Commissioner's office, and at NRCan, as well as the Bank of Canada.

As you have indicated, Mr. Chair, our presentation this morning is of a more technical nature. We welcome questions, of course. You do have a deck before you that is quite detailed. I don't intend to read every page of the deck. I'd rather speak to some key points. I think this is also an opportunity to speak to issues that have arisen before this committee and maybe bring you to specific provisions of the act that might address some of those issues that you've heard about from witnesses.

If we turn to pages 3 and 4 of the act, we will start with a bit of a historical perspective. The Public Servants Disclosure Protection Act that came into force on April 15, 2007, ultimately was the final version of the PSDPA but it was not the only version. There was an earlier bill that received royal assent in November 2005, yet it was never proclaimed into force at that time. There was an election and the PSDPA was subsequently amended by the Federal Accountability Act. The result is the act that we have before us today.

If you'll permit me, I'll speak of a few differences between the 2005 and 2007 versions, and the reason I'm doing that is that I believe it may help in your deliberations, especially on the issue of, for example, direct access to a tribunal, to the tribunal, or to another adjudicative body in matters of reprisal complaints.

One of the key distinctions or differences between the 2005 and and 2007 versions is that in 2005 reprisal complainants could access directly, at the time, the Public Service Labour Relations Board, if they were public servants, or the Canada Industrial Relations Board, if they were employees of crown corporations.

As you can see, there is a dramatic difference between the 2005 and 2007 versions. The 2007 version, our act, requires complaints be made to the commissioner's office, but the commissioner must decide within 15 calendar days whether to investigate a reprisal complaint, and then there must be an investigation. The law, the courts, inform us that investigations must be as thorough, neutral, and fair as possible, and as you can imagine those take a little bit of time. There must be an opportunity to comment on preliminary findings, etc.

There are advantages and disadvantages between direct access—whether it's to the current tribunal or another body—and an investigation. Without an investigation, the adjudicative body, the tribunal, would have presumably been seized with some 250 complaints, not all of which necessarily fall within the definition of a reprisal, not all of which necessarily fit within the jurisdiction of the act. The commissioner's office does an important screening function.

The commissioner's investigation does uncover evidence that all of the parties can use, in particular the complainant. The commissioner's office interviews witnesses, obtains documentary evidence, and that evidence forms part of the record before the tribunal.

● (0850)

In a sense, the complainant is not necessarily alone and facing their employer before the tribunal under the current regime. The commissioner is an independent party representing the public interest before the tribunal; however, as you can imagine, there are some cases where, if we believe that a reprisal has occurred, the interests of the complainant may align themselves with the public interest in denouncing and addressing reprisals.

That said, clearly, a two-tier regime with an investigation followed by a full tribunal hearing takes much longer. Also, in a sense, it does preclude complainants from having control over their complaint. Their complaints are submitted to us and we must investigate. We must fulfill our statutory duty to investigate. Accordingly, only a small number of complaints end up before the tribunal.

The 2007 regime, as highlighted on page 3 of your deck, created two very distinct regimes.

We investigate disclosures of wrongdoing, and we have filed 13 case reports before Parliament on such wrongdoing. Of the 13 Federal Court and Federal Court of Appeal decisions that have dealt with PSIC's decisions—judicial reviews—we have never had a disclosure of wrongdoing, either in an investigation or in an inadmissibility analysis decision made by the commissioner, overturned.

We have had four decisions of the commissioner overturned by either the Federal Court or the Federal Court of Appeal, but they have all been in reprisals. I say this because, clearly and admittedly, reprisals are difficult. They are a personal recourse belonging to a person. We are tasked with investigating that person's claim that they suffered reprisals, but we must remember that it is their situation. It is their life that is affected. Currently, the act imposes on the commissioner an important screening function. The results, as we know, are few reprisal complaints before the tribunal.

That said, cases before the courts—the four decisions of the courts that have overturned decisions of the commissioner—have greatly assisted us and informed the commissioner in our work.

In 2014, the Federal Court of Appeal indicated that we must look at reprisal complaints from the perspective of “plain and obvious”. A reprisal complaint must be investigated unless it is plain and obvious that it doesn't fall within our jurisdiction: that it doesn't meet the definition at all of a protected disclosure, that no protected disclosure has been made, or that the person is not part of the federal public sector, for example.

The recent case of Ms. Therrien further informs our decision-making process. There is a restriction under subsection 19.3(2) of the act—and my colleague will speak about that a little later—which specifically reads that the commissioner cannot deal with a reprisal complaint if its “subject-matter” is being dealt with by another body or person acting under another act of Parliament or a collective agreement.

For us, until the Federal Court of Appeal decision of January, “subject-matter” meant, for example, that if it is a termination of employment, are you contesting the termination of employment by way of a grievance? Are you contesting your suspension by way of another process before another body or by way of a grievance? The Federal Court of Appeal instructs us in the case of Ms. Therrien that “subject-matter” includes the merits of the complaint. This is new. This is new law, and we will, of course, follow the Federal Court of Appeal decision in this matter.

All of this is to say that reprisal complaints fall within a fairly complex regime where people exercise a right.

● (0855)

It is a remedial statute. It must be given broad, liberal interpretation in order to bring it to life. The screening function has its advantages and disadvantages. That is my bottom line. It is interesting that in 2005 the version of the act that received royal assent did not call for commissioner's investigations.

There are other important distinctions as well in the 2005 regime. In 2005 the commissioner could investigate reprisals as wrongdoings. A person could exercise their recourse, and at the same time, the commissioner could investigate a reprisal as a matter of wrongdoing. It strikes me that it might be a little difficult to achieve; nonetheless, that's what the 2005 PSDPA called for.

There was at the time no specialized tribunal for reprisals. As you know, we now have a specialized tribunal comprised of Federal Court judges and superior court judges. They are convened only when a case is referred to the tribunal.

In 2005 public servants were expected to first exhaust internal avenues before making a protected disclosure. They had to either go to their senior officer or a supervisor, or they had to satisfy PSIC that the matter was not appropriate to be dealt with internally, or that it had been reported internally and they were not satisfied with the results. Having exhausted the internal avenue, they could then go to PSIC. Frankly, we believe the current version offers far greater protection.

We will get to the definition of what a protected disclosure is because that is fundamental.

While the reprisal regime and the disclosure regime are quite distinct, where they align themselves is that all persons who have made a protected disclosure are protected, whether or not their wrongdoing is founded, whether or not their claim of wrongdoing even has merit. It is the act of coming forward, speaking truth to power, either under this act or under other procedures, that affords them protection. The ability to go directly to PSIC with the wrongdoing, I think, is an important one.

At the time in 2005, there was no opportunity for case reports on founded wrongdoing to go to Parliament. The commissioner reported to the chief executives. There was, of course, the annual report. There was, of course, the opportunity for special reports to Parliament, but there was not this automatic case report to Parliament.

There was no access to funding for legal advice. Currently under the act, under subsection 25.1, all persons who are involved in proceedings under the act—disclosures or reprisal complaints—are eligible to receive $1,500 or $3,000. One of the recommendations of the commissioner is to give us flexibility in those amounts.

These are really intended as introductory comments, but I think they are nonetheless important as we look at this legislation to understand these two distinct regimes.

In a judicial review involving the Attorney General for the Royal Canadian Mounted Police, versus PSIC, where the RCMP contested the findings of our disclosure investigation and our finding of wrongdoing, Madam Justice Elliott, in upholding the decision of the commissioner, wrote that the public interest importance of the act means that the act is there to address:

> ...wrongdoings of an order of magnitude that could shake public confidence if not reported and corrected. When the Commissioner is "dealing with" an allegation of wrongdoing, it is something that, if proven, involves a serious threat to the integrity of the public service.

We believe that the 13 case reports on wrongdoing that we've filed represent such serious issues. Admittedly, dealing with reprisal complaints has proven a little more difficult for us.

● (0900)

You have heard from the Treasury Board that chief executives have very important responsibilities under this act, and that is part of the culture shift that is also needed. There is a genuine fear of reprisal, and understandably so. To jeopardize one's career is daunting.

Chief executives and Treasury Board have important responsibilities, and we have important responsibilities to raise awareness about this act. Section 4 of the act specifically calls on Treasury Board to raise awareness about the act. Sections 10 and 11 of the act speak of the important responsibilities of chief executives to ensure confidentiality and to establish a disclosure regime within their department.

On this note, especially on confidentiality, my colleague Mr. Lampron will address confidentiality measures in the act.

Mr. Raynald Lampron (Director of Operations, Office of the Public Sector Integrity Commissioner of Canada): Thank you.

One of the most important aspects of the act is confidentiality and in support of confidentiality the act contains several obligations. One of them that falls on the commissioner and the chief executive is to protect the identity of persons involved in the disclosure process. That includes the discloser, witnesses, the alleged wrongdoer or wrongdoers. That is found in sections 11, 22, and 44.

It also demands that chief executives establish procedures to ensure the confidentiality of information collected in relation to disclosure. One of our case reports, the case report on the Canada School of Public Service from November 2013, is an example where a chief executive failed to ensure confidentiality. This was reported to us. We acted on it, investigated, and the commissioner made the finding. It is very important to us so that people can come forward knowing they have a measure of protection and that protection starts with their confidentiality. When we speak with witnesses we do everything in our power to ensure that these witnesses' confidentiality is maintained.

As such, when my investigators go on the road or do investigations and meet witnesses, we do it on neutral ground. Although the act says that we can request having facilities provided to us within the establishment where we do investigations, we choose not to do that in order to ensure that the persons we meet are not seen rotating in an office in a facility where it would not take very long for people to figure out what was happening.

When we meet witnesses we show a great deal of flexibility as to the timing, the alleged wrongdoer, or the complainant or discloser. As such, if they prefer that we meet after hours, we will do that so they do not miss time at work, or we'll arrange with them for the time that is most convenient. That is the way we also support confidentiality.

Of great importance as well, there are exclusions under the Privacy Act, the Access to Information Act, as well as the Personal Information and Electronic Documents Act, which provide us with the ability not to disclose the information under any of these acts if a request is made pertaining to the matters that we have under investigation. If we receive a request for access to information, a Privacy Act request, no documents pertaining to the investigation will be released. That is an important clause to us. It allows the organization to protect identity, and if an investigation reveals that there has been no wrongdoing, the information has been protected.

● (0905)

Mr. Brian Radford: In regard to these exemptions under the Privacy Act, the Access to Information Act, and the Personal Information Protection and Electronic Documents Act, you will recall that Commissioner Friday is recommending some amendments to strengthen those exemptions. These are recommendations five and six in his document that was presented at the time of his first appearance before this committee.

We will examine in the next few minutes the definition of "wrongdoing". In our view, the definition of wrongdoing is broad, and has given us all of the flexibility needed to investigate fully the matters that are brought to our attention. Over the years, in the first 10 years of our existence, we also developed some criteria and some factors that assist us in applying some of these definitions that the act does not necessarily define.

At page 8, you have the exact definition of wrongdoing as it is found in section 8 of the act:

> This Act applies in respect of the following wrongdoings in or relating to the public sector:

The first one is pretty obvious. It applies to a contravention of any act of Parliament or of a province or any regulations. It also applies to the misuse of public funds or public assets, or in gross mismanagement in the federal public sector. It applies as well to an act or omission that creates a substantial and specific danger to the life, health, and safety of persons; to a serious breach of a code of conduct; and to knowingly directing or counselling a person to commit wrongdoing.

It is also important to note that section 9 of the act specifically calls for possible disciplinary measures, up to and including termination of employment, for people who commit wrongdoing. On this, however, it is important to note that the commissioner is not responsible for that. We make recommendations, and some of the commissioner's recommendations have included "consider" investigating or "consider" disciplining for this particular situation or person.

That being said, chief executives, under the Financial Administration Act, have the responsibility to impose discipline on their employees. An investigation by the commissioner does not automatically result in disciplinary measures. However, we can make that recommendation.

On this note of discipline, you have been given a document in your kit, I believe entitled "Summary of Case Reports of findings of wrongdoing by the Public Sector Integrity Commissioner". It's in the stats document.

Mr. Nick Whalen (St. John's East, Lib.): Mr. Chair, can I ask where that is?

The Chair: It is entitled "Review of the PSDPA Technical Briefing – supporting data and operational statistics".

The Clerk of the Committee (Mr. Philippe Grenier-Michaud): Yes. It's page 7 of that document.

● (0910)

Mr. Brian Radford: I'm sorry for the confusion with the documents.

I just want to speak a little bit about these aspects of wrongdoing. When I joined PSIC, when it was created in 2007, I really expected to see a lot of allegations of misuse of public funds or assets.

In fact, if you turn to page 4 of the statistics, we have a breakdown of percentages. You will see, under "Breakdown of disclosure of wrongdoing allegations", that 20% of cases involve gross mismanagement, 24% a serious breach of a code of conduct, 17% a contravention of an act or a regulation, and 14% misuse of public funds or assets.

Especially since the public sector code of values and ethics came into effect in 2012.... There was a bit of a delay at the beginning. When the act was introduced in 2007, we didn't have the code of values and ethics, not until 2012. Since 2012 we've seen certainly a surge in allegations of serious breaches of codes of conduct. It can be an internal code of conduct or the more broad public sector values and ethics code.

The Chair: Do you have the breaches of code of conduct statistically further broken down? For example, have there been any cases of sexual impropriety or sexual harassment that would fall under the code of conduct?

Mr. Brian Radford: Yes. We have found a serious breach of the code of conduct in six of our 13 case reports filed to Parliament. Recently, at the Public Health Agency of Canada, a case involved belittling employees, yelling, verbal abuse, displays of anger, etc.

There was a case at the Parole Board of Canada a few years ago, in January 2014, involving the regional vice-chair of the Parole Board, a gentleman who is no longer at the Parole Board. Among the allegations were inappropriate forms of sexual comments, flirtatious behaviour, and being in too close proximity to female employees. We found that this constituted a serious breach of the institution's code of conduct, as well as the public sector code of conduct. There were other allegations as well. The person was removed from his position as a regional vice-chair and at the end of his term was not renewed, so he is no longer part of the Parole Board.

That is, to my recollection, the only instance where we have found harassment of a sexual nature. For the most part, what we see are allegations of bullying in the workplace, inappropriate comments, yelling, intimidation, etc. Some of our case reports speak to that, including the recent one, in February, at the Public Health Agency of Canada.

Other examples of breaches of code of conduct are perhaps more typical—

The Chair: Mr. Radford, I'm sorry to interrupt, but Mr. Whalen might have a question that is germane to your current discussion.

Mr. Nick Whalen: On the point of serious breaches of the code of ethics and values, can you describe a little for me how the decision is made as to whether or not something arises to become a serious breach of the code of ethics, versus a mere breach, and what other channels are available for an employee to raise issues of breach of the code of ethics that fall under the human relations stream rather than the whistle-blowing stream?

Mr. Brian Radford: I will invite you to turn to page 11 of your deck. I will take you through some of these factors.

These are factors that our office put together. Early in our mandate, we filed our first case report in 2012. At that time, when we looked at the definition of “wrongdoing”, we saw, for example, “gross mismanagement”. “Gross mismanagement” was not defined. We saw a “serious” breach of a code of conduct, but “serious” was not defined. We put our mind to criteria that could assist us, and I understand that senior officers within departments have used the same criteria in conducting their own investigations.

● (0915)

Mr. Nick Whalen: Mr. Radford, are these criteria published on the website?

Mr. Brian Radford: Yes, they are.

Mr. Nick Whalen: Okay, great.

Mr. Brian Radford: They are also reproduced in most of our case reports that deal with a serious breach of a code of conduct. They are, for the most part, common-sense factors.

We look at the gravity of the situation in terms of how it affects the employees, and the number of people it affects. The level of a person is very important, which brings me to the point that sometimes we name wrongdoers and sometimes we don't. We believe that with higher responsibility comes accountability. A one-time breach committed by a very high-ranking official can constitute a serious breach, or a repetitive situation that is relatively minor but is repeated over time, such as people ignoring policies.

On this point, I want to say that I've heard from time to time, “How come there is no breach of policy in the definition of wrongdoing?” We include breaches of policy in the definition of wrongdoing and of a serious breach of a code of conduct. Public servants are expected to abide by policies. It can also constitute a case of gross mismanagement.

Yes, our factors are available.

Mr. Nick Whalen: Okay. The second part of my question was, if someone wanted to follow a different stream, what other streams are available? Presumably they could go to the RCMP, if there has been harassment or assault or anything of that nature.

What can you say about other public sector streams?

Mr. Brian Radford: If a person is alleging, for example, discrimination on one of the prohibited grounds under the Canadian Human Rights Act, a proper venue for them would be the Canadian Human Rights Commission. There are provisions in the act that preclude duplication of processes. We've talked about these in the past as well. If a person has already gone to the Human Rights Commission, for example, and their matter is being treated there—if it's the same subject matter—we would decline to investigate that matter.

Harassment can also be pursued through the typical harassment policies of the Treasury Board that belong to their department. That is not, for us, a restriction. In other words, if a person has filed a harassment complaint under the Treasury Board harassment policy, that could become a relevant factor in deciding whether or not to investigate. This falls under the commissioner's discretion.

There may be valid reasons why we would investigate something, even though there's a harassment investigation taking place. Maybe the person is absolutely not satisfied, or, as we've seen in our recent case involving the Canadian Food Inspection Agency, three serious harassment complaints were not properly dealt with, so we investigated them.

Treasury Board harassment policy is a viable option and in fact a logical option. Under the Treasury Board policy, continued harassment—in other words, retaliation—is also a form of harassment, so the person is protected.

I want to say at this point—and I'm jumping a little bit ahead of myself, but I think this is a good opportunity—that we consider the making of a harassment complaint internally as a form of protected disclosure.

This means, in other words, the person comes to us for the purpose of reporting reprisals and says, “I'm suffering reprisals; this is happening to me.” We ask the person, “Did you make a protected disclosure?” and the person says, “I reported harassment against myself.” We consider that to be a case of protected disclosure because harassment, in our view, is a breach of a code of conduct.

At the admissibility analysis stage of a reprisal complaint, we don't ask ourselves whether it was or was not serious. We say, tell us more about your harassment. For the purpose of reprisal protection, a harassment complaint is deemed to be a protected disclosure.

● (0920)

Mr. Nick Whalen: I have one more question, and then we can move on.

In that regard, when you're managing this human resources issue in an area of our act that doesn't appear to be in some of the other acts in other countries, where there needs to be a terminable offence before it will rise to the point of being protected under the public interest disclosure laws and where codes of conduct and values aren't normally treated this way, is there any evidence that people are using this to get a shield that they shouldn't be entitled to? That's a complaint we've heard. Or is there no evidence that people are making false allegations of harassment in order to gain the protections of the act, which are quite strong?

Mr. Brian Radford: That has not been our experience.

Mr. Nick Whalen: Okay. Good.

Mr. Brian Radford: For example, we have never refused a reprisal complaint on the basis of bad faith. We've never found bad faith.

One of the recommendations of the commissioner, of course, is to remove the bad faith requirement.

Ms. Yasmin Ratansi: You mean the good faith requirement.

Mr. Brian Radford: Yes.

Also, the PSDPA does not include vexatious or frivolous types of provisions. Maybe some other statutes do, but this act does not.

Mr. Nick Whalen: There already exists a higher standard, so it doesn't need them. Isn't that right?

Mr. Brian Radford: Yes, and the idea is to protect as many people as possible from reprisals, which is a different subject from the actual merit of their wrongdoing, their disclosure. Some people can be mistaken on the facts. Some people may think there's wrongdoing when there isn't. Nonetheless, we want to protect them. The idea is to speak truth to power and for us to play a role in that approach.

I'm not going to read the factors that we've put together for a serious breach of a code of conduct, but suffice it to say that it includes the full gamut. It can be a one-time serious breach. It can be multiple little breaches. It can be conflicts of interest, and we've seen that in some our case reports. It can be ignoring policies. The behavioural issue is becoming prominent. We've seen it in some of our case reports. We are certainly receiving a fair number of allegations that concern bad behaviour at work by senior people.

Ms. Yasmin Ratansi: Do you have an example?

Mr. Brian Radford: As in our case report on the Public Health Agency of Canada, it's physical or verbal displays of anger, bullying, asking employees to stay late—

Ms. Yasmin Ratansi: Why doesn't it go to the labour relations board or to their unions? Why does it come to you?

Mr. Brian Radford: When it comes to disclosures of wrongdoing, in some instances, using the commissioner's discretion...and we'll talk about the discretionary factors under subsection 24(1) of the act. At the admissibility analysis stage of a disclosure—again, I'm talking about a disclosure, not a reprisal complaint—if a person is presenting to us a single situation of harassment, such as "I am being harassed in this fashion by my supervisor", under the discretion of the commissioner, fairly often we say they should file a complaint under the harassment policy, first of all.

Sometimes it's a one-on-one type of situation. It's a "he said, she said" type of situation. We conduct confidential investigations. It's a little difficult. We don't conduct harassment investigations and we try to pass that on to our staff.

The distinction between a situation such as at the Public Health Agency of Canada, where multiple employees were affected, and a person's individual harassment situation is that we are not there to substitute ourselves for the internal harassment investigation process. That's where it belongs.

A person who feels harassed should, ideally, exercise their recourse under the harassment policy and try to get that resolved. As we know, the harassment policy involves early mediation. It involves an opportunity for the parties to speak. We don't conduct investigations in that fashion. We conduct confidential investigations into wrongdoing.

What we do accept for investigation and what we've pretty much always accepted for investigation are the systemic situations of harassment. When a senior-level person is bullying an entire unit or office, that is wrongdoing as a potential case of gross mismanagement or a potential serious breach of a code of conduct.

That doesn't mean that individuals who are affected within the office cannot also have another recourse, but we would look at the systemic issue.

● (0925)

Mr. Kelly McCauley (Edmonton West, CPC): Mr. Radford, you mentioned if an individual comes to your department with an individual case of harassment, you advise them to go back to follow up with a proper route. If they feel there's reprisal after that intervention in the department, you will step in then in the best—

Mr. Brian Radford: Yes.

Mr. Kelly McCauley: Perfect. But individually, it's worked out through the department's harassment process.

Mr. Raynald Lampron: Using the well-known mechanism provides them with the protection of the act. For them, for the disclosure to come forward, and where the commissioner's decision is not to investigate, because it would be better dealt with internally....

Mr. Kelly McCauley: Do you keep statistics on how many will come forward for those items that you advise them to go back and seek?

Mr. Raynald Lampron: We have statistics on how many times the commissioner uses paragraph 24(1)(f), which is having a valid reason not to investigate. Yes, we do. The statistics on this is that 47% of the cases where the commissioner chose not to investigate is due to that paragraph.

Mr. Kelly McCauley: Do you keep a breakdown of those 47%, and for what reason...?

Mr. Raynald Lampron: A breakdown of each one of the different...? No.

We have it under each one of the different reasons that it is not sufficiently important or has been adequately dealt with. For a decision-making process, we have statistics on that, yes. Within paragraph 24(1)(f), we do not at this time.

The Chair: We have Madam Ratansi, and then Mr. Ayoub.

Ms. Yasmin Ratansi: Thank you, Chair.

I am a little confused. I guess we've been looking at too many laws and listening to too many expert witnesses, but what's the difference in our law? Is there a fine line that's drawn between "protected disclosure" and "public disclosure"?

Mr. Brian Radford: Yes.

Ms. Yasmin Ratansi: Okay, perhaps you could explain. I've gone to page 13, your slide 13, which talks about the definition of "protected disclosure" and then it says that public disclosures to the media are permitted. How does the person get protected if it's a wrongdoer and he or she gets frustrated and goes to the media?

Mr. Brian Radford: Let me address that. The definition of protected disclosures is at slide 13, as you've indicated. A form of protected disclosure, but a form that is quite qualified, is a disclosure that is made to the media. Disclosures to the media or to another public entity other than the four that are mentioned at the top of the page...and I'll explain those in a second.

You would only be protected under this act from reprisals if you go to the media and can demonstrate—and the burden is on the public servant—that there was no sufficient time to make an internal disclosure or to disclose to PSAC.

The other criteria is that it must constitute a serious offence under an act of Parliament or a legislature where it constitutes an imminent risk of substantial and specific danger to life, health, and safety.

Ms. Yasmin Ratansi: What do you mean by sufficient time? Is there risk involved? How do I prove to somebody—

Mr. Brian Radford: It is a combination of all those things.

For example, all of the criteria must be met, so if there is not sufficient time to make the disclosure and if, in addition to that, it is a serious offence or an imminent risk, the person who goes to the media would be protected.

The person could then come to our office and say, "Look, I disclosed to the media because it was on a Friday night. My supervisors were away. I knew of a situation that could cause a train derailment. I knew of a situation that could be very serious."

● (0930)

Mr. Kelly McCauley: It's highly unlikely though.

Mr. Brian Radford: It is unlikely, sir. Section 16 of the act is what speaks of media disclosures. It codifies what existed in common law by the Supreme Court of Canada from the decision of Fraser and other decisions, before the PSDPA came into effect.

Ms. Yasmin Ratansi: I just want to say that it's very subjective. As Mr. McCauley says, it's not likely to happen.

Are there a number of days that...? Suppose I saw some wrongdoing. What is my time lapse? What is my protected environment? What are the number of days needed to say, "Within five days nobody worked on it so you're protected"?

It's very confusing, you know. You would hate to be a whistle-blower.

Mr. Brian Radford: I think that if you are a whistle-blower and you blow the whistle to the media, you are facing hardship. It brings you back to the situation before this law was created where people had to invoke whistle-blowing as part of their defence. They had been fired. They had been disciplined, and they said, "Wait a minute. I breached my duty of loyalty or of confidentiality to my employer because this was so important that I needed to speak publicly about it."

There is no doubt that the PSDPA restricts that kind of whistle-blowing. The factors at 16 are strict. I do not have an immediate definition for "imminent" other than what we all understand imminent to mean. What is a serious offence? I think all offences are serious, but in the act, Parliament nonetheless chose to certainly curtail the protection that comes from whistle-blowing to the media. There's no doubt about that.

The Chair: We'll go to Mr. Ayoub and then to Mr. McCauley.

[*Translation*]

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

Gentlemen, the presentation is not finished, but I have a number of questions to ask and comments to make. I do not want to put words in your mouth, I just want to know how you see things. I looked a bit further into the presentation and I saw that there are a lot of restrictions, a lot of structure. Structure is good, but when it really complicates a situation, one feels that one is in a maze with no way out.

A number of points were raised in previous testimony, particularly with regard to section 34. It is on page 14 of your document. When an investigation requires the commissioner to obtain information from sources outside the public sector, he or she must cease that part of the investigation.

I am putting myself in a whistleblower's shoes. They are expected to disclose information and they are told that they are protected. But they are in a no-win situation if they are not directed, accompanied and counselled from the outset.

Explain to me how your group manages to reassure people like that and to get others to do the work for which you are responsible.

Mr. Brian Radford: Before I give the floor to my colleague, Mr. Lampron, let me make it clear that section 34 is the subject of one of the commissioner's recommendations. In recent years, we have tried to stretch that elastic a little. We ask former public servants to talk to us anyway. When we are dealing with a contractor or a consultant who deals with the government, we expand the definition a little in order to obtain information. Section 34 is certainly an obstacle.

I will let my colleague comment now.

● (0935)

Mr. Raynald Lampron: In terms of section 34, if people are not part of the public service, we have no power to require them to provide us with documents or testimony in an investigation. However, we ask them if they can co-operate with us by providing documents voluntarily. That is the approach we have taken in order to be able to continue the investigation when evidence lies outside the public sector.

Up until now, that has worked very well. People have co-operated in cases connected to the public service. However, if there is no co-operation, or if, when evidence lies outside the public sector, people do not provide us with the information, we are at a dead end. That has happened to us before.

The act allows us to send the document to police authorities or to a provincial attorney general so that the investigation can continue. At that point, we send the information and the necessary evidence to the new body handling the investigation thereafter, and the investigation continues.

When there is a lack of co-operation on the part of people outside the public service, an obstacle or interruption does not mean that the investigation comes to an end. In fact, if a police force such as the RCMP agrees to continue the investigation, it continues and the person is advised.

Mr. Brian Radford: One of the commissioner's recommendations is to get rid of section 34.

There was a second part to your question. I would like to discuss it.

Mr. Ramez Ayoub: I have several others, but go ahead.

Mr. Brian Radford: Earlier, I talked about protected disclosure and the way in which we define it. As much as possible, we try to help people who have made a protected disclosure by using the broadest possible definition of “protected disclosure”.

On page 13 of the document, we say that a protected disclosure is one made in accordance with the act. In other words, to a supervisor, to their organization's senior officer, or directly to us. One of the commissioner's recommendations is to broaden what is understood by “supervisor”.

We give the benefit of the doubt to complainants when we are dealing with complaints about reprisals. For example, if someone does not use the form provided for the purpose by the department, we consider that the fact of their communicating wrongdoing to us verbally is sufficient to protect them.

With a parliamentary procedure, people who appear before you, as we are doing today, are protected. Under another federal act, for example if someone has had problems after submitting a complaint to the Privacy Commissioner, we consider it protected disclosure too. People do not necessarily have to turn to the Privacy Commissioner if they want to complain about that situation. They can come to us and file a complaint about the reprisals.

Mr. Ramez Ayoub: Excuse me, but subsection 23(1) states that the commissioner cannot deal with a disclosure when it involves another federal act. The person is protected, agreed, but the role of the commissioner, of your organization, stops there.

Mr. Brian Radford: That is the difference between “disclosure” and “reprisals”. Subsection 23(1) applies to disclosure.

Take the example of someone saying that there is wrongdoing, that all the requirements of the Access to Information Act are not being complied with and that his or her department is hiding information. If the person has already complained to the Office of the Information Commissioner, subsection 23(1) applies and we cannot investigate. If the person has not complained to the Office of the Commissioner, we will ask the person if he or she has considered doing so. It is at their discretion.

Mr. Ramez Ayoub: We are talking about people disclosing something general. In that case, we just need to turn around and tell them to make the request themselves. The judgment you make is about the request and not about the individual. Is that correct? You say “if the person has already complained”. Do you understand the nuance?

● (0940)

Mr. Brian Radford: The subject of the request may not be the reason for a disclosure investigation; however, the individual remains protected against reprisals at all times. So there may be situations where people are protected against reprisals because they have gone to the Office of the Privacy Commissioner.

Mr. Ramez Ayoub: Normally, people making disclosures are protected, even in terms of confidentiality. They should never find themselves in situations where they are subject to reprisals for a request that is not certain to be followed up basically because it was made elsewhere.

Mr. Brian Radford: That's right, except that not all recourse is confidential. Clearly, complaints made under the Access to Information Act and the personal information protection act are confidential. However, there are other organizations, like the Canadian Human Rights Commission, where recourse is less confidential.

The people remain protected. The message we are sending to people is that they are protected to the extent possible.

For the people who want to disclose wrongdoing, we have a system that allows them to communicate with us in order to get information about the act. In our annual reports, we publish the statistics on the numbers of people who have contacted us; we call it preliminary information. We try to guide people. Of those people, quite a good number do indeed make a protected disclosure. If they ask, we can also offer them legal counsel for $1,500. It's limited, but at least it can guide them a little. The system is not perfect.

We have a role to play. We try to steer the people who call us in the right direction. In addition, each disclosure is given an admissibility review.

Mr. Ramez Ayoub: Thank you.

[*English*]

The Chair: We have four other colleagues who have questions.

We'll start with Mr. McCauley.

Mr. Kelly McCauley: Very quickly, I want to go back to the imminent danger and reporting things to the media. He mentioned that it just codifies something that's already been established. Could you tell us about that briefly?

Also, an investigation can often take three to six months. When we have a situation, not like a forest fire that is going to happen tomorrow or something at Transport Canada, but perhaps there's a procurement thing that could happen with a one-month deadline but it would take three or four months to investigate. Would that also not qualify as a reason to go to the media, knowing that if I go to you, it's not going to be resolved for three to six months, but a contract or some wrongdoing within a procurement could be happening within a one-month period?

Mr. Brian Radford: Honestly, I think in—

Mr. Kelly McCauley: I know I'm probably stretching it, but again, I'm trying to put myself in a whistle-blower's shoes to get a sense of the importance of timing.

Mr. Brian Radford: I think if a procurement issue also comprised a potential serious offence—

Mr. Kelly McCauley: It could be wrongdoing, graft, corruption, poor planning, whatever.

Mr. Brian Radford: The gravity of it and whether it qualifies under section 16 as a protected disclosure would really depend on the seriousness of the offence. For a case of bribery, for example, or similar situation, it may be difficult to demonstrate how imminent the situation was, but there are ways of doing it. If the contract is about to be awarded, for example, there are ways of doing it.

There's no doubt, Parliament as it created the PSDPA implemented some strict criteria around public whistle-blowing. Before the implementation of this act, people who faced labour relations difficulties as a result of blowing the whistle were often using whistle-blowing as a defence to challenge their termination of employment, their discipline. It was after the fact, they were using it as a defence, and they had to demonstrate according to the Supreme Court of Canada, in the case of Fraser, which goes back to the 1990s, that they met those criteria.

What Parliament did in 2007 was essentially take the common law criteria, codify them, and say, if you meet those criteria, you no longer have to defend yourself in court, although you still can. The act provides that a public servant can exercise any other recourse at 51.2 of the act if they choose to. They're not blocked from exercising other forms of recourse. The act does specify that if you exercise another recourse, you then cannot make a reprisal complaint at the same time.

The Federal Court of Appeal in the case of Ms. Therrien instructs us a little bit on that, so we may have to look at what that means exactly dealing with the same subject matter.

Essentially, all public servants can still exercise whatever other recourse is available to them with respect to whistle-blowing to the media. Only if they meet those criteria can they then avail themselves of the PSDPA protection, which means they make a complaint to our office, we decide whether or not to investigate, and then if the commissioner has reasons to believe that a reprisal occurred at the end of the investigation, there's a referral to the tribunal.

But it is a condition precedent that the criteria at section 16 be met, and they are strict. They're not impossible to surmount, but they are strict. They represent almost 100% of what the common law says about whistle-blowing.

● (0945)

Mr. Kelly McCauley: It would be pretty difficult to adjust or loosen it if we have an outside precedent?

Mr. Brian Radford: Yes. One philosophy of whistle-blowing is that you can create a right of whistle-blowing and if you meet the criteria that Parliament chooses for whistle-blowing, and Parliament is free to adjust those criteria, you can then invoke a recourse, whether it is a recourse under the PSDPA as we have now, or generally another recourse, which is not precluded under the act.

We may have erred. I believe this committee may have erred that there's only one choice. That is not the case. Section 51.2 of the PSDPA clearly specifies that all other forms of recourse continue to exist. What Parliament intended to do was to limit duplication of proceedings, which is what we are trying to implement when we decide whether or not to investigate.

Mr. Kelly McCauley: Thank you.

The Chair: We'll go to Mr. Drouin.

[*Translation*]

Mr. Francis Drouin (Glengarry—Prescott—Russell, Lib.): Thank you, Mr. Chair.

My question deals with protecting the whistleblowers' anonymity. Witnesses tell us that it is important to protect the names of the people making disclosures, but there is more to it than that.

I assume that, at some point, those making disclosures have tried to solve situations internally. However, if a problem is not solved, they decide to contact your office. It would be quite easy for an employer to know who disclosed the information because the employee in question has already tried to make him or her aware of the situation.

How do you go about protecting the confidentiality of the disclosure? When you communicate with disclosers, do you tell them that you are going to try to protect their anonymity to the extent possible—to use your words—because of the way things are, it is possible that their names will become known? Is that information communicated to whistleblowers?

Mr. Brian Radford: Yes.

First of all, discussions take place between the person making the disclosure, the whistleblower, and our office, either with Mr. Lampron or with our analysts. Our recommendation to our analysts and investigators is to take care not to promise absolute confidentiality. Absolute confidentiality does not exist. If there is a subsequent criminal investigation, subpoenas can be issued. If a judicial review is under way, confidentiality is subject to all other legislation.

Also, and this is important, confidentiality is subject to procedural fairness and natural justice. If the allegation is that someone banged their fist on the table and scared an employee during a meeting, in a way that was totally out of control, it may be impossible for us to fulfill our requirements for procedural fairness completely and paint a generic picture for the respondent, the person against whom the allegation is made. On some occasions, we have no other choice but to ask that person whether, on such and such a date, at such and such a meeting, they threatened such and such a person.

We treat everyone as if they were witnesses. In other words, we do not mention who the discloser is. That person is therefore a witness. There may be particular cases when we have no other choice but to say to someone, for example, that their head of finance told us about something and to ask them how they respond to it. So clearly, sometimes, we have no other choice but to reveal the identity of a source or a witness.

No disclosure that comes to us is not subject to detailed analysis on the merits before an investigation is launched. If the commissioner's decision is to not launch an investigation, no one will know. We do not advise the department and we do not obtain information from it in order to determine whether or not there is an investigation. So that is done confidentially. When an investigation is launched, we clearly do not identify the person making the disclosure in our notice of investigation. When we meet with witnesses and with disclosers, we have to be candid and tell them that we are going to do everything we can to protect their identity.

Mr. Drouin, you are perfectly right to say that situations have arisen in the past in some departments where workplaces are very small. In those cases, people know who made the disclosure. Unfortunately, those situations exist. Fortunately, there is protection against reprisals. Whether or not it is the best protection remains to be seen, but, fortunately, we do have that ability to protect witnesses and disclosers.

Let me go back to a comment made at the beginning of the meeting. The deputy head in a department has very specific responsibilities to protect the identity of witnesses and to establish a system that protects them to the extent possible. In most cases, identity can indeed be protected. There are also whistleblowers who are quite talkative. Some situations sometimes involve unions and, at other times, a group. We also have situations where there is a conflict in a department. Some are then more talkative than others. However, you are perfectly right, absolute confidentiality does not exist in the system.

Mr. Lampron, do you want to add anything?

● (0950)

Mr. Raynald Lampron: I take a lot of calls and I provide a lot of information to potential whistleblowers. In my experience, people come to us directly. They do not go to a department first, they come to us simply because they trust the Office of the Commissioner. That has been my experience over the last four years and it stems from the fact that we are becoming more and more known.

After a report to Parliament, we often see an increase in the number of calls from people communicating with us to obtain information on how to make a disclosure. They turn to the Office of the Commissioner directly. So it is also a way for them to protect their identities.

As my colleague Mr. Radford was saying, when we conduct our interviews and speak to people, we always tell them that we will protect their identity to the extent that the law allows. As I was saying earlier, we have to determine the places to hold the interviews, their duration and the time of day when they will take place—which the witnesses have the right to choose. In our reports, we will protect their identities to the extent we can by leaving out any reference to whether there were four witnesses, two witnesses or a single witness. It is all about protecting identities. In the case of fraud, it is not necessary to reveal the identity of an individual reporting two incorrect claims, for example. Our focus is on the claims.

Mr. Francis Drouin: My other question is about organizational culture and about the role of your office in promoting it. A few months ago, Mr. Friday talked about the training you provide. He talked about training for employees on their rights and on the way to turn to your office. Do you provide training to department heads to make sure that you are promoting an environment like that?

Basically, your office is the office of last resort when things are going very badly. Normally, we want things to be settled internally as much as possible. Do you play a role in that with department heads?

Mr. Brian Radford: To be clear, we do not provide training directly. Our commissioner's office is committed to meet as often as possible with the greatest possible number of public servants and managers. In the first document we distributed to the committee, we list the number of contacts that we make as well as the number of presentations. You can find that in tab 3. It shows the number of people with whom we meet. We do not provide training.

At the beginning of our mandate, from 2007 to 2010, I and a colleague personally provided training to lawyers from the Department of Justice. That was in the first years when the act was in effect. We have gained a little more experience and have begun to conduct investigations. As you know, our commissioner's office has taken a little time to get going. When we began to conduct investigations, we spent some time considering the natural conflict that could be created. If we conduct investigations in one department, in our view, providing training carries with it the risk of placing ourselves into a certain position, when we do not want to do so. We want to allow ourselves the flexibility to determine whether we are going to launch an investigation or not in such and such a situation.

We came to the conclusion that, ideally, it would be up to the Treasury Board Secretariat to provide the training. That said, we once held a seminar with senior departmental officials. I believe that it was in 2010-2011, with Commissioner Mario Dion.

Our focus is the presentations. We give presentations to unions, groups, communities, like the finance officers for example, and also to senior officials. We have an advisory committee made up of 15 or 20 senior officials from different organizations. We meet with them about four times a year. We are on that committee and we exchange ideas with them. The senior officials' community is quite active. It is represented by a small group, a sample of all senior officials.

● (0955)

Mr. Francis Drouin: Thank you.

[*English*]

The Chair: Colleagues, before we go to our next questioner, I want to remind all colleagues that Mr. Radford and Mr. Lampron are with us until 10:15, so we have slightly over 15 minutes. We have three other colleagues who have questions. I'm not sure how close Mr. Radford is to completing his presentation, if it's close at all.

We'll try to get our questions in and then we'll wrap up.

Madam Ratansi, you're first up.

Ms. Yasmin Ratansi: You do not need to answer my question now, because I will collect my questions, give them to you, and then I'll let Mr. Whalen, who has the next questioner, speak.

We've been listening to a lot of witnesses who have made suggestions for changes. One of the changes they wanted was to deny the Public Service Integrity Commissioner the discretion to deny a complaint without investigation. Therefore, my question would be on empirical evidence. How many complaints has the Public Service Integrity Commissioner denied without an investigation?

The second thing that was suggested was that the Public Service Integrity Commissioner order or ask—they put down "order"—the CEO or department heads to take corrective action. Do you do that at the moment? If not, why not?

Mr. Whalen can take the next turn.

Mr. Nick Whalen: I'll wait for those two answers because they're similar to mine.

Ms. Yasmin Ratansi: Okay. That's fine.

Mr. Brian Radford: We will distinguish between disclosures of wrongdoing and reprisal complaints.

Mr. Lampron, can you inform us of the statistics and the grounds for refusals of both reprisals and disclosures, please?

Mr. Raynald Lampron: In the case of disclosures, we investigate approximately 25% of the disclosures made to us.

To that effect, there are a number of discretions the commissioner has to refuse to move forward with investigations. Ten per cent of those are considered to have been adequately dealt with under another procedure established under an act of Parliament. For the disclosure is "not sufficiently important", that's only 3%. For "the disclosure was not made in good faith", we've never had any of those so there hasn't been a refusal based on that.

For "the length of time that has elapsed since the date when the subject-matter...arose is such that dealing with it would serve no useful purpose", we had 2% of those, and many of those are simply predating the act. We haven't had one single refusal by the commissioner to move forward an investigation on that specific topic since 2013. The subject matter of the disclosure "results from a balanced and informed" policy is 1% of those that we refuse.

The greater portion, as I mentioned before, 47%, is that there's a "valid reason" not to deal with the disclosure. Within that, many of those are because they do not fall under the definition of wrongdoing under the act, or somebody comes to us and says that a member of Parliament has committed a wrongdoing. Our act does not extend to members of Parliament; therefore, we would refuse to move forward with that.

It could be the subject matter is already handled internally by another body. If somebody comes to us and says that they're being harassed at the office, and in the disclosure, also informed us that there is a harassment investigation being conducted currently, we would not move forward with that because it would be a duplication of process.

It could also be that the disclosure falls outside of the commissioner's jurisdiction under the act. If somebody comes to us and says that it's happening at the regional hospital, it could be a wrongdoing but we simply don't have jurisdiction. We have a lot of disclosures come to us that are, in fact, outside of our jurisdiction. To that effect, we've created a tool to help us move forward and inform the person as quickly as possible as to the fact that we do not have jurisdiction over the disclosure, so they should look at the others. Whenever possible, we try to inform them as to the mechanism in place or the body that could help them.

Finally, we've had a number come to us in which the allegations are based on speculation or there's not a great deal of specific information. For example, somebody has heard that something was not working well, so they say that we should look into it. They believe something's not working, or they've been told by someone else that this may be happening. We do not launch fishing expeditions. That's why the team that works under me in analysis conducts thorough and complete reviews of the information we have been provided in order to give the commissioner the best advice on whether or not he should launch an investigation.

I'd like to make it very clear that when we choose not to launch an investigation, the explanation letter sent to the discloser is very complete, thorough, and explains to the discloser why the commissioner has made the decision he has. It's not simply, "No, but thank you for playing." It is a letter that says he is choosing not to investigate for the following reason, which is identified to the person. To that effect, we've had requests for reconsideration that have come forward to us, and once again, we go through a secondary review process of the information that is now provided to see if there's a reason the commissioner should change his decision. If we choose not to, another explanation letter is sent telling the individual why, after the reconsideration, the commissioner's decision has not changed.

We do not leave people in the dark. We actually, very thoroughly, explain to them why the decision made by the commissioner has been made. We give them the reasons for his decision. To date, we have had some people who are not pleased with the decision, but they have actually thanked us for explaining why we cannot move forward.

● (1000)

Mr. Brian Radford: With respect to reprisal complaints, that's a very different world again. I think the courts have recognized that the commissioner enjoys quite a lot of discretion, and deference has been given to the commissioner by the courts in matters of disclosures of wrongdoing. Not so much deference has been given to the commissioner on matters of reprisal complaints.

Like I said earlier, in 2014, the Federal Court of Appeal said that reprisal complaints should be investigated, unless it is "plain and obvious" that there's a valid reason not to do so. We have been following the Federal Court of Appeal in this regard since 2014. We welcome that kind of instruction from the Federal Court of Appeal.

Mr. Lampron, what is the percentage of reprisal complaints we investigate?

Mr. Raynald Lampron: The percentage falls within roughly 20% to 25% again. Once again, when we go through the process, the analyst team looks at all the information that is provided to us, and there are numerous reasons we would not move forward. Sometimes the person will tell us they have not made a protected disclosure and that they just feel a reprisal at work, which turns out sometimes to be harassment.

Before the end of this presentation, I would like to reserve a couple of minutes to speak about conciliation, which is one of the reasons we sometimes do not end up with a case in front of the tribunal. Within our act, there's an ability to offer conciliation when there is merit. A great number of persons have had a very good process and a very good solution to some of their situations.

● (1005)

Mr. Brian Radford: Finally—

Ms. Yasmin Ratansi: I'm looking at the time and I think Mr. Whalen has questions. Why don't we give you the questions and you can submit written responses? Is that okay?

The Chair: I was about to suggest the same thing to our colleagues here. We have only about 10 minutes left. If you have questions that could be answered in written form, you can certainly pose the questions now, verbally, if you wish, or you can write to Mr. Radford and Monsieur Lampron and ask for a written response.

Invoking the right of the chair, I have one question that I will give you verbally and ask you to please respond in written form, as it would help us in drafting the report. Where does it say in the act that the reprisal complaint that is made to the commissioner has to be related to a disclosure? If you can give that response to us in written form, I would appreciate that very much.

Ms. Yasmin Ratansi: Don't forget my power question. You have the power to enforce somebody—

The Chair: We have Mr. Whalen, Madam Shanahan, and perhaps Monsieur Ayoub again.

Colleagues, if you could pose the questions and receive them in written form, that would help us greatly.

Nick, go ahead.

Mr. Nick Whalen: This is going to be somewhat difficult, because the questions were interim.

First, what are your internal timelines for providing the first decision letter as to whether you're going to pursue a complaint? What are the timelines for providing a decision on an appeal, as to whether you're going to pursue a complaint if an appeal is sought? Also, what are your service levels on the overall investigation? A lot of foreign acts stipulate those within the legislation, but ours doesn't.

My second question relates to parallel investigations. Within the act it seems that exclusive jurisdiction is being given. What sections of the act should we be concerning ourselves with if we want to grant non-exclusive jurisdiction to PSIC in relation to investigations of complaints and their right to pursue parallel investigations? Are there some pitfalls that you want to point out in respect of those?

With respect to the definition of "wrongdoing", we've heard from witnesses that gross mismanagement is too high a standard, that you guys should be allowed to investigate a negligence-level standard. How do you view that internally? What type of discretion do you have around determining whether something arises to the level of gross versus not, and have you ever denied an investigation on the basis that it was negligent but not grossly negligent in terms of the management?

On destruction of evidence, how does destruction of evidence fall within the definition of "wrongdoing"? In other jurisdictions, destruction of evidence is a separate ground and actually is a basis on which a disclosure to the public can be maintained. Presumably there's some way that's captured.

You'll see the blues and get all these questions in written form, so you don't have to scramble.

Within the definition of "protected disclosures", we've heard some evidence around a duty to protect and support. Some of the evidence we've received with respect to a duty to protect and support was that the department that's engaged in the disclosure, or even the overall organization such as yours that supervises the regime, would make sure that people who are witnesses to wrongdoing are actually being protected in supporting you. It's like standing back and monitoring their mental health and the way they're being treated within the public service. Could that duty be inserted easily into the act, or would it be too complicated to add such a duty because it might interact with too many sections of the act? I'd like your views on it, as experts on the act.

I'm not sure where this next question will go, unfortunately, so I might have follow-up questions with respect to it. I want to understand from Mr. Lampron the difference between an investigation that would occur under this act and an investigation that would occur if someone just went directly to the RCMP with respect to any of the matters that they consider to be a sufficiently grave form of wrongdoing. It would seem to me that this act provides much more protection to that type of whistle-blower, yet I don't understand why that would be the case.

Don't we want to protect anyone who is bearing witness in the public interest to wrongdoing? I want to have your thoughts on that to further questions, but seeing as there is no time, maybe we will engage in some type of email chain on this.

● (1010)

The Chair: We have Madam Shanahan, and then I'd like to give a couple of minutes to Monsieur Lampron, as he has requested to talk about the conciliation process.

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

My question concerns the information that was given to us in the technical document we have received, on page 6, concerning identities involved in disclosures of wrongdoing. It is noted there that there have been some incongruities. In proportion to their representation in the public service there are fewer people from the national capital region who disclose, fewer women, fewer francophones, and so on.

I'd like you to address how Mr. Friday's recommendations—I'm sorry, I don't have them in front of me—would be appropriate in what I consider very important, which is widening that funnel of initial disclosures.

The Chair: Thank you very much.

Before I go to Madam Ratansi, I would like again to advise colleagues that we have only a few moments left, which I wish to give to Monsieur Lampron to talk about the conciliation process.

Monsieur Lampron and Monsieur Radford, it would be greatly appreciated if you could submit the responses to these questions that you've just heard before the end of April, if possible. We're in a time crunch here, as we need to prepare a report. The quicker we can get your responses the easier it will be for us to incorporate them into our final report.

Mr. Brian Radford: Thank you for those questions, Mr. Chair. We will meet that commitment.

The Chair: Thank you very much.

Madam Ratansi, you had a comment.

Ms. Yasmin Ratansi: I have a question.

I saw the Deloitte report. Are you audited every year?

Mr. Brian Radford: No, we are not. The Deloitte report was a special report that was made in 2010. After the resignation of the first commissioner, Madame Ouimet, interim commissioner Mario Dion ordered a review of all of our closed files. As a result of that, Deloitte identified about 70 files that needed follow-up. Then there was a further follow-up of those files by two special advisers. It was in the aftermath of the Auditor General's report of 2010.

The Chair: Thank you very much.

Monsieur Lampron, I would ask you, if you could, sir, to talk about a very important subject, but keep your comments as succinct as possible. We need a little bit of time for committee business following your presentation.

Please, go ahead, sir.

Mr. Raynald Lampron: Thank you, Chair.

I just want to inform the committee that within the reprisal regime, once an investigation is launched, our investigation service standard foresees one year to complete it. In the case of reprisals, there is a human impact. There is a human cost to the person the reprisal is against. That is why there is a section in the act that allows for conciliation, when we launch an investigation and find that there is merit.

This means that we do not simply offer conciliation at the moment we launch an investigation, but when we begin the investigation and find that there is merit to offering conciliation, it is offered to the parties. If both parties wish to speak and possibly resolve the matter in a quick fashion, or simply sit and see whether there is a resolution, that is accepted by the commissioner and recommended. We move forward. The commission appoints a conciliator, and we pay for the conciliator and all of the services rendered. It is, therefore, at no cost to the parties. We cover the conciliation.

We have had a good number of conciliations that have been very successful early in the process. This has resulted in early return to work by some members who were either suspended or facing termination. Some measures have been rescinded, there has been financial compensation, and there has been opportunity restored.

That was done quickly when both parties had an opportunity to sit down. The settlements have been found by both parties to be very satisfactory, and we've had a great number who have returned to us saying that they appreciated the role we played in the conciliation.

The conciliation itself is confidential and the information provided to the conciliator is confidential. Should the conciliation not be successful, we will continue our investigation. That is why, during the conciliation mode, I am directly responsible for liaison with the conciliator and the party and am no longer the investigator. If it's not successful, the investigator will never know which party was responsible for the conciliation's not passing, and henceforward we continue with a very neutral and very complete investigation.

I just wanted to highlight that we have been very successful in conciliation. Many of these cases never made it to the tribunal because both parties had an opportunity to sit, discuss the matter, and come to a resolution that was both correct and enforceable. It's not a question of saying, “We're going to be nice to each other”; it's “How can we solve the situation?” The commissioner is the person who has the last say and can say, “The resolution you have come up with is a correct resolution and is in the interest of all the parties and the public.”

● (1015)

The Chair: You can make a comment, Nick, and then I'll do a wrap-up.

Mr. Nick Whalen: Thanks. My question doesn't relate to conciliation. One thing you said was about your acting as a veil between the investigator and the conciliation process. Is there a veil between the disclosure and the investigation process, and should there be?

I'll leave that thought with you because if I, as a whistle-blower, come forward to someone, the wrongdoing that I disclose should be independent of my identity if it's truly a public interest disclosure. Then, the investigation should be able to proceed without any knowledge of me and how that type of thing...but that's for later.

Mr. Raynald Lampron: There is a quick answer, if you wish. Once we launch the investigation, we meet with the discloser to get all of the information that we can to help us go forward. The discloser is never an acting player in the investigation. You do not become part of our investigation—

Mr. Nick Whalen: Sorry, that wasn't the question. It's the investigator. Does the investigator ever become aware of the identity of the discloser, the person making the disclosure? When is that necessary? If it's not necessary, are the protections in place to keep that—

Mr. Brian Radford: Under our current process, the identity of the discloser is known to PSIC and to the investigator.

Mr. Nick Whalen: They are known. Tell us why that's necessary.

The Chair: Thank you very much to both our witnesses. I apologize, Mr. Radford, if you weren't able to complete your presentation. I will not, however, apologize for the questions from my colleagues because I think it just demonstrates the level of engagement they have in this study, which is very admirable.

Should you, however, have any additional information that you weren't able to present to us here, I would invite you to please do so, sir, to our clerk and we'll have that distributed to all members of our committee. I'm sure that will assist them greatly in their deliberations.

With that, once again, thank you so much. It's been fascinating and we do appreciate your attendance here today.

We will suspend for just a couple of moments, colleagues, and then we'll go in camera to discuss future business.

[*Proceedings continue in camera*]