Ryerson University
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What's Wrong with Canada's Federal Whistleblowing System

An analysis of the *Public Servants Disclosure Protection Act* (PSDPA) and its implementation

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About The Centre for Free Expression
The Centre for Free Expression at Ryerson University is a hub for public education, research and advocacy on free expression and the public's right to know. Our work is undertaken in collaboration with academic and community-based organizations across Canada and internationally.

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Introduction

This document sets out in simple terms many of the shortcomings of Canada's federal whistleblower-protection system which came into operation in April 2007, created by the Public Servants Disclosure Protection Act (PSDPA). It is a work in process that will be updated from time to time.

For reference it includes, in an appendix, a previous report which I wrote while serving as executive director of the whistleblowing charity FAIR (Federal Accountability Initiative for Reform). That report was published in April 2012, when the PSDPA had been in force for five years.

Another five years have passed, and this latest report benefits from many additional insights, gained from sources such as:

- dozens of federal government whistleblowers who have approached the whistleblowing NGOs (FAIR and Canadians For Accountability) and who have shared their experiences of seeking help from the Public Sector Integrity Commissioner's Office (PSIC)
- monitoring of selected whistleblowing cases as they unfolded (often over many years) and in-depth investigations of a few, such as the Don Garrett case
- reports from the Auditor General on the handling of certain cases by PSIC
- judicial review decisions handed down by senior judges, with judges' observations regarding PSIC's actions
- testimony provided to the Government Operations committee in early 2017 by whistleblowers and expert witnesses during the statutory review of the law.

During the early years of operation of this whistleblowing system, it was possible to critique the law, but only to speculate regarding the expected real-life effects of its shortcomings. Also, it was uncertain how the law would be interpreted and enforced by the Integrity Commissioner. Now, with a ten-year track record under three commissioners, and information available from many more sources, the effectiveness of the system can be evaluated with some confidence and precision.

This report examines not just the way the Act is written, but how it has been interpreted and enforced by the responsible agencies, how it has been monitored and overseen, and above all how effective it has been in protecting whistleblowers and exposing wrongdoing.

David W. Hutton

Key Observations

a) The system has been completely ineffective in protecting whistleblowers

If the aim is to prevent honest employees from suffering reprisals for voicing concerns about possible misconduct, then this system has failed completely.

PSIC is the only place where whistleblowers can go with complaints of reprisal. Yet few of these complaints have been investigated and even fewer (only seven in ten years) have been referred to the Public Servants Disclosure Protection Tribunal, which is the only body that can order a remedy. The process is cumbersome and appallingly slow, since PSIC acts as a gatekeeper and conducts investigations that may take a year or more before even deciding whether to make a referral to the Tribunal. And PSIC has never sought injunctive relief to halt reprisals while complaints are being investigated. Consequently, even for those few whistleblowers who do eventually reach the Tribunal, their lives and careers have typically been destroyed long since.

In ten years, not a single person has completed the Tribunal process. Tribunal proceedings are costly and intimidating, and the lack of a 'reverse onus' (as explained below) means that whistleblowers have little chance of success, so there is intense pressure on them to cut their losses by agreeing to a so called 'voluntary' settlement. Of the seven cases sent to the Tribunal, five were settled in this way before the process was complete, while two are still active.

Finally, in ten years, no-one has been punished by the Tribunal for taking reprisals against a whistleblower. In five out of seven cases the Integrity Commissioner has used a section of the law that prevents the Tribunal from even examining whether there are grounds for an aggressor to be punished. In this way Commissioner has guaranteed in most cases that anyone who may have taken reprisals will go scot free.

In summary, this system does not offer whistleblowers even a faint hope of timely and effective protection.

b) The system has been largely ineffective in exposing government misconduct

The federal public sector is a vast, complex, far-flung empire, employing about 400,000 people in hundreds of organizations, across the country and abroad, which consumes about $1 billion every working day. No rational person believes that this entire system is squeaky clean, and media reports frequently reveal serious problems as well as attempts to cover these up. Anti-corruption professionals such as certified fraud examiners know, based on extensive research, that corruption is found everywhere, and that the typical organization loses 5% of its resources to fraud[1]. The challenge is how to find such wrongdoing so that it can be stopped.

The same research studies also show consistently that whistleblowing is by far the most effective single mechanism available for uncovering wrongdoing – better than internal audit, risk management and other management controls all combined. This makes perfect sense when we consider that most of the 400,000 public servants working in the system are honest people who can act on our behalf as inspectors, flagging suspicious activities

[1] ACFE Report to the Nations, 2016

so that these can be investigated. But they can do this only if it's safe – if they will not be punished by the suspected wrongdoers, who are often in positions of power.

If the government's whistleblowing system were working effectively we would expect significant cases of wrongdoing to be exposed regularly, and serious cases – perhaps comparable to the Sponsorship Scandal – to be exposed occasionally. None of this has happened in the past ten years.

Departments have their own internal systems, but these are only capable of dealing with relatively minor matters that don't seriously embarrass the department or its senior leaders. Most departments receive small numbers of disclosures, and they find very few cases of wrongdoing: even large departments may go for years without reporting any.

The Integrity Commissioner's office has much greater power and independence, and handles cases brought to it by whistleblowers who choose not to use their departmental system. However the number of cases of wrongdoing found by PSIC has been miniscule – only 13 cases in ten years – and in five of those years PSIC found no wrongdoing at all.

Based on the very low levels of activity at all levels of the system and the relatively minor nature of most wrongdoing found, the system is clearly not working effectively to expose wrongdoing in this huge public enterprise.

c) The system is not trusted by public servants

A recent survey of public servants within Public Works found that more than half would be reluctant to report wrongdoing for fear of the negative impact on their careers, and there is no reason to suppose that the situation in other departments is significantly different. The Integrity Commissioner argues that this is a problem of 'culture' in the public service, which his small office is not equipped to change. But the real problem is that public servants have good reason to mistrust this office, based on its track record. Public servants' attitudes towards whistleblowing can be changed, but not through empty promises of protection or appeals to come forward.

What will make a difference is visible, concrete action demonstrating that whistleblowers have been treated fairly and protected from reprisals. As one focus group participant in a PSIC-commissioned study said "Show me that these stories have happy endings. Show me the discloser who got a promotion and the wrongdoer who lost his job."

There has been no such 'happy ending' yet for any government whistleblower, but if and when it occurs, this will be the start of a cultural sea change, as word spreads quickly through the grapevine.

d) The system is considered deeply flawed by international experts

Leading whistleblowing experts from four other jurisdictions, invited to testify to the Government Operations committee during the statutory review of the law, condemned the current system as inadequate and lagging far behind recognized best practices. Here are two representative quotes:

"I would replace it. I would go back to square one because of its complexity and because of its tortuous expression." – Prof. AJ Brown (Griffith University, Australia)

"…in this act, with the PSIC and its commissioner, whistle-blowers have a toothless investigative agency…" – Tom Devine (Government Accountability Project, USA)

These are just samples from hours of expert testimony that excoriated Canada's current whistleblowing regime.

e) Measurement and monitoring of performance has been inadequate

The law does not define any objectives or desired outcomes for this system (which would help identify performance measures) and the mandatory annual reporting that is required of PSIC, departments and TBS is very limited, consisting of little more than a few numbers showing levels of activity.

Treasury Board Secretariat (TBS) is responsible for monitoring the departments' internal whistleblowing systems, but due to the limited annual reporting, has essentially no means of judging their effectiveness. It also has no means of monitoring their performance during the year. For example TBS has no means of knowing if a department is struggling to deal with a high-risk disclosure or if an internal investigation is going off the rails, for example due to interference by departmental management.

The public and lawmakers have no effective means of monitoring performance. With proper measurements in place it would be simple to track how the system is progressing in terms of: treating whistleblowers fairly; processing cases expeditiously; gaining the trust of public servants at large; and reducing the frequency of wrongdoing within the public sector.

However, instead of reliable, published performance measurements there is only anecdotal information, occasional ad-hoc surveys, infrequent judicial reviews and audits. Some organizations such as whistleblowing NGOs and unions are able use their resources and inside knowledge to figure out to some extent what is going on, but most people – including parliamentarians and the public – are left in the dark.

f) Parliamentary oversight has been essentially non-existent

Parliamentary oversight of PSIC relies upon an annual report that often contains little meaningful information. However, the committees responsible for oversight of PSIC have compounded this problem by consistently refusing to hear testimony from other informed sources, such as unions or whistleblowing NGOs. Committees also seem to have neglected to keep themselves informed regarding the relevant findings of other independent agencies (e.g. reports from the Auditor General, and judicial review decisions) that shed light on PSIC's performance.

As a result, year after year, oversight hearings have been brief, polite and meaningless charades, where there was no critical questioning and MPs learned nothing – while well-informed experts silently fumed with frustration in the public gallery.

It is inexcusable that in a modern democracy, an important watchdog agency that is so clearly troubled and failing in its mandate should be allowed to operate for a full decade with virtually no critical examination or intervention by Parliament.

g) The actions of successive Integrity Commissioners have undermined the system

The effectiveness of any whistleblowing system is critically dependent upon the character and motivation of the senior leaders responsible for implementation. This is especially true with the PSDPA, since it places few obligations on Integrity Commissioners to take any specific action, while granting them almost unlimited discretion to refrain from taking action. Under this law the Commissioners have almost unlimited authority – and many possible rationales – for refusing to deal with cases brought to them. For example, the can decide that the suspected misconduct does not quite fit the definition of wrongdoing in the Act; or that the matter would be better dealt with by someone else; or that the case is out of his jurisdiction because the whistleblower approached the Privacy Commissioner or launched a grievance. They may also refuse to act for 'any valid reason'. The list goes on and on…

Unfortunately reports from whistleblowers who have approached PSIC, and the findings of judicial reviews, indicate that all three commissioners, past and present, have used their discretion inappropriately, fobbing whistleblowers off to other agencies or denying them due process.

These sources (and reviews by the Auditor General) also highlight another aspect of the commissioners' poor performance: the frequent mismanagement of investigations, with long delays, files repeatedly lost, cases repeatedly reassigned to different investigators, security violations, and so on. This is inexcusable in an agency whose central function is investigations, and suggests that the investigative function is receiving inadequate attention or priority.

h) Successive governments have blocked examination and review of the system

After publication of the Auditor General's damning report on the actions of the first integrity Commissioner, Christiane Ouimet, the government blocked any follow-up, so the committee that received this report (Public Accounts) was prevented from drafting a report with recommendations. Consequently there were no recommendations made, for example to sanction Ouimet, to prevent recurrences of poor leadership, or to improve oversight of PISC – which had evidently been completely lacking during the three years of her tenure.

The statutory five-year review of the law, which should have taken place in 2012, was delayed for another five years, without any announcement or explanation. When the review was suddenly launched in 2017, testimony soon made it clear that the system was largely non-functioning – and had been for the past decade.

These actions call into question whether either of the governments that have held power since 2007 have any appetite to create an effective whistleblower protection system.

The Sponsorship Scandal: a footnote

This whistleblowing system came into being largely because of the Sponsorship Scandal, which not only led to the fall of a government, but also demonstrated how easy it is for senior people to redirect millions of dollars of public funds to illicit purposes, and to brazenly continue doing so for years.

But ironically this whistleblowing system, had it been in place at that time, could not have prevented or exposed the Sponsorship Scandal because:

- It does not cover wrongdoing by politicians and their staff, only public servants
- It does not permit proper investigation of government wrongdoing if there is any private sector involvement
- It does not cover private sector wrongdoing at all
- It does not explicitly cover violations of Treasury Board policies, such as the procurement policies that were at the heart of the Sponsorship Scandal. Even Treasury Board has argued in the past that these are only guidelines, so that managers can exercise their discretion to bypass them.

Our current whistleblowing system is therefore incapable of preventing or exposing any similar frauds being carried out today.

APPENDIX: Key Problems noted in 2012

The *Public Servants Disclosure Protection Act* ("Act") is a complex piece of legislation with real potential to harm whistleblowers rather than assist them. The following is a list of some of the Act's main shortcomings, as identified by FAIR's in-depth analysis over the past five years.

1) The law's purpose, objectives and assignment of responsibilities are unclear

a) The law fails to establish institutional integrity as the objective

The preamble stresses the legitimate need to *maintain public confidence* in the integrity of public servants and public institutions, but does so in a way that focuses on appearances rather than reality.

Regrettably the goal of 'maintaining public confidence' is frequently used to justify cover-ups. Real integrity often cannot be achieved without the honest public exposure of serious misconduct when this has occurred. And attempted cover-ups not only undermine integrity but damage public confidence – often more than the original wrongdoing. The Act should emphasize integrity rather than the mere *appearance* of integrity.

b) The law does not recognize the primacy of the public interest

The preamble refers to the need to achieve a 'balance' between two principles: employees' right to freedom of expression and their duty of loyalty to the employer.

The need for this balance is well recognized in employment law. However, when suspected wrongdoing threatens the public interest, other principles come into play. Public servants' overriding loyalty must be to the public interest and to the organization's mandate, rather than to individual bosses – especially if these individuals seem to be engaged in misconduct. And public servants have an ethical, professional and sometimes legal duty to disclose misconduct.

History has shown repeatedly that expecting employees to unquestioningly follow orders is a recipe for unethical and illegal conduct, the abuse of state power, and sometimes catastrophic harm to the public. Loyalty to the public interest and the obligation to challenge unethical behaviour should be the guiding principles.

c) The law does not state what tangible results are expected

The preamble refers to establishing procedures, but does not articulate what tangible results these procedures are supposed to accomplish.

The Act should state a desired outcome, such as the following: "*wrongdoing in the federal public sector will be detected, reported and sanctioned, while public servants are protected from reprisal, resulting in greater institutional integrity".* By failing to define any desired outcomes, the law sets the stage for 'process without outcomes' – the common definition of useless bureaucracy.

d) The law does not specify useful performance measurements

By failing to specify desired outcomes, the law also provides little guidance regarding what should be measured to demonstrate that the system is working. The annual statistics required by the law are of limited value, mainly indicating levels of activity. Reporting should also be required regarding outcomes such as effectiveness, timeliness, service levels, and client satisfaction. Above all, there should be a measurement related to the main purpose of the law: improvement of integrity in the public service.

This can be measured by using employee surveys to determine the perceived frequency of misconduct. Such regular surveys show which departments are the most troubled, reveal trends over time, and put the responsibility for improvement where it belongs – on the departmental heads.

This has been done in other jurisdictions. Reliable, well-designed surveys of this nature have been carried out within the public service in Australia (by a consortium of universities) and the USA (where the survey is repeated about every 10 years by the Merit Systems Protection Board.)

e) There are major gaps in implementation responsibilities and in oversight

Overall responsibility

It is not clear what agency has overall responsibility for ensuring implementation of the law: PSIC and the Treasury Board Secretariat (TBS) have given conflicting answers and it appears that there has been no concerted effort to determine whether the departments are complying with the law. This is of particular concern since TBS has itself been delinquent in a key area of responsibility by taking a full five years to publish the code of conduct required under the law.

Departmental heads

The law places responsibilities on department heads to implement an internal disclosure system, but no accountability or oversight mechanism is defined to ensure that this is done – for example, by TBS audits of departmental systems.

The law places a few procedural responsibilities on departmental heads – e.g. to appoint a Senior Officer and to develop a code of conduct. But the law does not place any responsibility on them to achieve any particular outcomes – such as improving levels of integrity within their departments. And since there is no requirement to measure departmental levels of integrity, there is essentially no accountability for the leaders'performance in achieving tangible results.

Senior Officers for Disclosure

The leadership of the departmental disclosure system has been left to chance, although this is arguably the most important part of the system. Senior Officers could serve as a network of 'change agents', potentially transforming the culture and making reporting of misconduct a routine, expected behaviour.

But due to gaps in the law, this potential has been squandered. Senior Officers typically have other unrelated responsibilities that take precedence and they lack independence,

training, functional guidance, operating procedures, as well as any clear lines of reporting (e.g. to PSIC) for performance evaluation. In our observation they also lack a sense of community with their counterparts, and the moral support necessary in what can be a difficult job. In spite of some efforts by PSIC staff to fill this gap, the ingredients essential for an effective network of departmental 'change agents' are missing.

By clarifying responsibilities the law can help fill these important gaps in implementation.

2) The scope of the law is very narrow

The PSDPA covers only a small segment of the Canadian workforce: federal public servants. The scope is further narrowed because: important government agencies are wholly or partially excluded (Canadian forces, security agencies and the RCMP); because government misconduct that involves the private sector cannot be investigated properly; and because it does not address private sector misconduct at all.

a) For members of the Armed Forces, CSIS and the RCMP, the protection from reprisals is either limited or non-existent

The Armed Forces and CSIS are completely excluded from the Act – employees cannot approach PSIC to report wrongdoing or seek protection from reprisals.

Experience in Canada and other jurisdictions has repeatedly shown that organizations involved in national security issues are prone to mismanagement and outright misconduct, in part because they operate in almost total secrecy. In addition, retaliation by such agencies against truth-tellers is easy and devastatingly effective. Simply stripping employees of their security clearances – an action which is almost impossible to challenge – instantly renders these individuals unemployable in their chosen career for the rest of their life.

The RCMP, although theoretically covered by the PSDPA, is for all practical purposes exempted, since RCMP members cannot submit complaints of reprisal directly to the Commissioner: they must first exhaust their organization's internal complaints procedures [Section 19.1(5)]. But the RCMP has a track record of using these internal procedures to punish whistleblowers (and anyone else who falls out of favour with their bosses), and these proceedings can take a very long time. Thus it is unlikely that any RCMP employee will ever obtain any kind of protection from reprisal under this law, even years after the event.

The case of Cpl. Robert Reid provides a good example of how the RCMP takes reprisals at will against its own. Read, a 26 year veteran of the RCMP, was responsible for investigating government corruption involving the Canadian High Commission in Hong Kong. He eventually concluded that his investigation was being sabotaged by his bosses, took his concerns up the line of command and then to the media as a last resort. An RCMP external review committee vindicated Read, criticized the RCMP and ordered him reinstated – but the RCMP simply refused to comply. Read appealed adverse legal decisions all the way to the Supreme Court of Canada, which in May 2007 declined to

hear his case – a full thirteen years after he blew the whistle.

b) Government misconduct involving the private sector cannot be investigated

The public sector integrity Commissioner has no power to "follow the money" or to "follow the trail" of evidence if it extends beyond the public sector, and must abandon that part of the investigation [Section 34]. Consequently, in any case where subcontractors play a role the Commissioner's ability to investigate is fatally undermined.

The major scandals that have become public in the past few decades – the tainted blood scandal, the gun registry overrun, the sponsorship scandal – all had significant private sector involvement. In an era where public-private partnerships are in vogue, and when contractors perform an increasing proportion of the government's work, this is a gaping omission in the law.

c) The law does not address private sector misconduct at all

The Act claims to protect 400,000 public servants, but ignores the remainder of Canada's 17 million employees. This very limited scope leaves the vast majority of Canadian workers vulnerable, and denies citizens of an important tool to combat corporate misconduct.

There is abundant evidence that private sector companies – such as the food industry, the pharmaceutical industry and resource industries – can cause severe damage to public health and safety and to the environment, and that regulatory oversight of these industries is weak. Employees in the private sector are terrified to speak out for fear of career-ending reprisals – even in sectors such as aviation where safety problems put their own lives at risk. This situation undoubtedly costs lives.

In June 2009 FAIR testified to the Parliamentary committee investigating the Listeriosis outbreak that whistleblower protection should be extended to everyone in the food sector.

> "*Unless we create effective whistleblower protection for people working in the food industry – from the public servants who make policy and oversee the industry, to the managers and workers on the production lines – Canadians will continue to die needlessly because of avoidable failures within the food supply."*

In December 2010 the USA did exactly this, passing the strongest whistleblower protection in history for workers in this industry, including the right to jury trials.

Other countries have protected private sector employees by passing sector-specific laws (as in the USA) or 'sector-blind' laws, such as the UK's whistleblower law, which covers all employees, both in the public sector and private industry and has been working effectively for more than a decade.

3) The avenues for seeking investigation and redress have been restricted rather than expanded

For truth-tellers to prevail, they need to retain their autonomy in selecting what avenue of redress to pursue including access to our courts of justice. But the approach of successive governments has been to force whistleblowers into one administrative process (as defined by the PSDPA) and to foreclose all other remedies. This renders whistleblowers second-class citizens by denying them genuine legal remedies.

a) Whistleblowers are now blocked from access to our normal courts

Public servants no longer have the right to sue their employer. They were stripped of this right in 2003 by *section 236* of the *Public Service Modernization Act.*

This important and far-reaching provision was quietly passed into law soon after whistleblower Joanna Gualtieri prevailed in a jurisdictional battle over her claim of reprisals by her bosses. Justice Department lawyers had claimed that Gualtieri had no right to go to court, that her remedy was to submit a grievance – an absurd argument, as this would have amounted to asking the very people who were harassing her to investigate themselves.

The Ontario Court of Appeal unanimously agreed with Gualtieri. But rather than appeal the case to the Supreme Court of Canada, where it likely would have lost, the Government simply rewrote the law and foreclosed employees from accessing our courts. Some lawyers call this '*the Gualtieri clause*', created to prevent anyone else from ever seeking justice in the way that she did.

Subsequent court rulings such as the *Vaughan* case (SCC 2005) have reinforced this denial of due process for whistleblowers, forcing them into the grievance system where their concerns are often dealt with by the same cadre of managers who are orchestrating the reprisals. This situation was reaffirmed in 2009 by the Ontario Court of Appeal, which ruled that even as a whistleblower Ian Bron had no right of access to the courts – the grievance process was his only recourse.

b) There is little protection against bullying and harassment – for any employee

Many of Canada's learned judges do not appear to understand that bullying and personal harassment, although grievable, are not adjudicable under federal workplace laws and collective agreements. And courts have ruled that a grievance cannot be considered a legitimate legal remedy [see *Danilov, Pleau and Gualtieri*].

It's no wonder then that there is a growing epidemic of bullying and harassment in the public service, as evidenced by the *Public Service Employee Survey*, conducted every three years. The 2011 survey showed levels of harassment at an historic high with on average 29 percent of employees reporting that they had been harassed in the past two years. In some departments the percentage was 40 percent or higher.

Yet the government seems to be taking little action. From 2004 to 2007 Canada Public Service Agency reported annual statistics on the implementation of the Treasury Board

Policy on the Prevention and Resolution of Harassment in the Workplace. These reveal a progressively worsening situation, until in 2008 the agency simply stopped issuing reports.

Widespread workplace harassment is an issue that affects all government employees and not just whistleblowers. But whistleblowers are the most vulnerable population because of the high risk of reprisals by managers accused of misconduct, and the viciousness of such reprisals. Bullying and harassment are the weapons of choice today for managers who want to punish and dispose of employees without being called to account for their actions.

This type of reprisal is no trivial matter for the victims. Over time it can have deadly results, resulting in severe, permanent psychological injuries such as PTSD, with measurable changes in the brain and devastating symptoms such as nightmares, flashbacks, panic attacks, insomnia, clinical depression, and suicidal thoughts. These psychological wounds are a hard burden to bear for someone who has also lost their job, their career, their reputation and their livelihood as a result of reprisals.

c) Going public is strictly prohibited in most circumstances

Many experts believe that the most effective way to blow the whistle is to go to the media, particularly when 'official channels' have failed. The history of major scandals in Canada illustrates this point: in every case it was relentless media coverage that drove the process of uncovering wrongdoing, while the official response was to delay, minimize and cover-up.

For this reason, whistleblowers must have a clear right to go public when other methods of disclosure are not working. But this law prohibits going public except in the most limited of circumstances. This prohibition on communication with the media – especially regarding government misconduct – is denial of Canadians' constitutional right of freedom of expression.

d) The law criminalizes whistleblowers for minor procedural errors

The law places numerous restrictions on whistleblowers, requiring them to follow a narrowly-defined bureaucratic process which ignores completely the risks and burdens undertaken when someone is putting their career at risk to expose wrongdoing. Moreover, any mistake made, however innocently, in following these procedural rules turns the whistleblower into a "wrongdoer" under the Act. This is surely not what Parliament intended, but it is exactly the type of legal technicality used by wrongdoers to take reprisals against their accusers.

4) The coverage of wrongdoing excludes most real-life situations

Whistleblower laws require screening tests to exclude frivolous allegations – but it's important not to set the bar too high. Whistleblowers are simply witnesses who are usually seeing only a fragment of the whole picture: when seemingly minor violations are properly investigated, these often turn out to be just the tip of the iceberg.

The sponsorship scandal was uncovered by journalist Daniel Leblanc, whose interest was first piqued by the aggressive use of the Canadian flag in federal advertising in Quebec . Lacking anything meatier, he pursued this oddity and what he eventually uncovered brought down the government of the day.

Opponents of strong whistleblower legislation often caution that such legislation will open the "floodgate" to meaningless, and even vindictive, disclosures. But experience shows that this argument has no merit: the risks to whistleblowers are so real and intimidating that even with strong laws, people don't make disclosures without having good reason.

Sadly, under the PSDPA, many, if not most, credible allegations of wrongdoing will be screened out and not investigated for a variety of reasons.

a) The definition of wrongdoing captures only extreme cases

PSIC can only investigate alleged wrongdoing if the actions described fit the PSDPA definition of wrongdoing [Section 8]. However, the definition set out in the Act is problematic because of what it omits.

For example, Treasury Board Policies (e.g. the procurement rules that were at the heart of the Sponsorship Scandal) are not specifically included, although these are among the principal instruments used for management and control in the public service. Instead, the Commissioner will have to decide whether a Policy violation falls under one of the broader definitions of wrongdoing, such as 'gross mismanagement'. And this interpretation will be vigorously challenged by government lawyers defending the alleged wrongdoers.

b) PSIC can refuse to deal with any disclosure for jurisdictional reasons

The law allows (or in some cases requires) the Commissioner to refuse to deal with a disclosure that *is* being dealt with, *has been* dealt with, or *could be* dealt with by some other process. [Sections 23, 24]

This means that if the whistleblower has informed *anyone* else about the wrongdoing (such as senior management, the RCMP, the Auditor General or the Privacy Commissioner) then the Commissioner may refuse to look at the case on these grounds – even though this other body may not be doing anything with the information. Even if all other avenues have been blocked (by other bodies refusing to take any action or stalling endlessly) the Commissioner can still refuse to accept the disclosure on the grounds that the matter could be more appropriately dealt with elsewhere.

c) PSIC can refuse to deal with disclosures for other vague and subjective reasons

Even if the definition of wrongdoing is met and there is no jurisdictional issue, the Commissioner is still not obliged to investigate. The Commissioner can refuse to deal with any disclosure [Section 24] on other grounds, e.g. if the Commissioner believes that the whistleblower is not acting 'in good faith'; or it is 'not in the public interest'; or any other 'valid reason'. These vague and subjective provisions give the Commissioner far too much discretion to ultimately decide to do nothing. This is unacceptable for the

agency that is the very last resort for whistleblowers.

5) The provisions for investigations, sanctions and corrective action are inadequate

An important purpose of whistleblower legislation is to investigate and correct wrongdoing. While the PSDPA gives the Commissioner broad powers to investigate individual disclosures it does not provide the tools necessary to finish the job properly.

a) The Commissioner is restricted to a reactive, fragmented approach

A commissioner given the task of detecting wrongdoing within a massive organization such as the federal government should be able to implement the following strategies: 1) identify the departments at highest risk for wrongdoing in order to give these more attention; 2) look for patterns of complaint and combining related cases into broader investigations; 3) conduct regular audits of problem departments to examine their systems for ensuring compliance. The Integrity Commissioner can do none of these things.

The Commissioner is limited to investigating individual disclosures, one at a time. The Commissioner cannot initiate any investigation without having first received a formal disclosure from someone, even if there are allegations making headlines in the media or another agency has reported violations of some sort. And if the supply of substantive disclosures declines (as may happen if the agency loses credibility) then the Commissioner has little work to do. This is a reactive approach.

The commissioner should also be able to use proactive methods for protecting witnesses from harm as investigations proceed, as opposed to waiting for them to be harmed before pursuing a remedy. In other jurisdictions the whistleblower agency can take pre-emptive action to protect witnesses e.g. by going to court to obtain injunctions preventing employers from taking adverse actions against them. In Canada, the Integrity Commissioner has no such power.

b) Investigations cannot pursue former public servants

The prohibition against the Commissioner pursuing investigations into the private sector also prevents the agency from investigating misconduct that involves departed public servants. Upon resigning or retiring from the public service, any wrongdoer instantly becomes untouchable – beyond the reach of the Commissioner to question and investigate.

c) The Commissioner has no powers to correct wrongdoing or sanction wrongdoers

The Commissioner has no power to order corrective action, sanction the wrongdoer, initiate criminal proceedings, or apply for injunctions to halt ongoing misconduct. The Commissioner can only report the founded wrongdoing – to the department head and then to Parliament – and hope that something happens as a result.

This is perhaps the single most crippling shortcoming of the law. How can wrongdoing be deterred or honest employees protected when there is no reliable mechanism to

sanction proven wrongdoers?

In the very first case of wrongdoing reported to Parliament by PSIC in March 2012, a manager was found guilty of gross mismanagement and multiple violations of the *Financial Services Act.* The manager retired and thus became untouchable – yet the Commissioner declined to use the only sanction that was within his power: to name the individual concerned. The Commissioner should be required by law to name anyone found guilty of wrongdoing.

d) Parliament is not an effective forum for ordering sanctions or corrective action

Reporting wrongdoing to Parliament may be an appropriate process for reporting on the results of conventional audits but it is not adequate to correct serious wrongdoing or ensure that wrongdoers are appropriately sanctioned.

Although the courts routinely deal with such matters and have procedures and sentencing guidelines for determining sanctions, this is not the case for Parliament. A prime example is the case of the first (and so far the only) wrongdoer to be exposed through the actions of PSIC staff – former Integrity Commissioner Christiane Ouimet.

Instead of leading promptly to judicial orders for corrective action and sanctions for Ouimet (and perhaps others), the Auditor General's intensive 2-year investigation into Ouimet's actions dead-ended in a highly partisan parliamentary committee that was forced into a secret session by the government majority, who then voted not to follow up on the AG's report. Morover, rather than sanctioning Ouimet, the Government gave her a $500,000 golden handshake and protected its interests with a gag order.

The bottom line is that reporting wrongdoing to Parliament does not necessarily lead to sanctions or corrective action. The Integrity Commissioner should have the power to order corrective action and sanctions when wrongdoing is proven.

6) Most complaints of reprisal are likely to be rejected

PSIC is the only agency within the federal government with a mandate to protect whistleblowers: there is nowhere else for them to go if they suffer reprisals, and PSIC acts as gatekeeper to the Tribunal – the only body that can give the whistleblower a remedy for reprisals and sanction the aggressors. But the law sets out a multitude of reasons for rejecting complaints of reprisal, and gives the Commissioner full discretion to reject any claim of reprisal.

a) PSIC can refuse to investigate any reprisal for jurisdictional reasons

As with disclosures of wrongdoing, the law requires or allows the Public Sector Integrity Commissioner to refuse to deal with a complaint of reprisal that *is being* dealt with, *has been* dealt with, or *could be* dealt with by some other process. [Section 19.3]

For example, if the whistleblower has already launched a grievance because of reprisals but realizes that this process is not working. PSIC will refuse to deal with this person's complaint because there is another process (the grievance) under way. Once the

grievance is settled, PSIC will again refuse to deal with the complaint because it has *already been dealt with* by another process. Suppose that the bosses accused of wrongdoing were involved in disposing of the grievance? That doesn't matter – because the grievance process provides a comprehensive remedy, according to legal precedents. What if the whistleblower didn't launch a grievance? PSIC can still refuse to deal with the case on the grounds that it *would* be better dealt with by some other process – like a grievance.

This is a true 'Catch-22' situation. Since the law allows (or requires) PSIC to defer to any other jurisdiction, there's virtually nothing left that it can or must deal with: the Commissioner can turn everyone away.

This is especially troubling when we consider that grievances and internal departmental investigations almost never work in whistleblower cases – because bosses can so easily manipulate these processes and turn them into reprisals. This law was supposed to help overcome this problem by providing somewhere safe for honest employees to go when all other official channels have failed.

b) The time limit to file a complaint of reprisal is far too short

Whistleblowers have very little time to file a complaint – only 60 days from when they knew, or ought to have known about the retaliation.

This is far too little time. In practice, reprisals are often subtle at first, causing the whistleblower to think that they are just going through a rough patch with their current boss, only to discover months (or even years) later that the organization had been systematically engaged in a campaign of adverse personnel moves including negative appraisals, denial promotions, and generally making life difficult for them.

The Commissioner *can* extend this time limit – but the law is written in a way that puts the employee completely at the mercy of the Commissioner's discretion.

c) PSIC can reject complaints based on various technicalities

The Commissioner may judge that the complainant is not a whistleblower because they did not follow the exact steps required to demonstrate that they had made a 'protected disclosure'. For example, raising concerns with management might not qualify as a protected disclosure on the basis that it wasn't submitted in a formal written complaint.

And if adverse actions began before this formal step was taken, then in the eyes of the law such adverse action cannot be considered reprisals for making a disclosure, since the "formal" disclosure had not yet been made. This lets aggressors off the hook – as long as they begin their reprisals quickly, before the potential whistleblower has made any formal disclosure.

Another variation on this theme is that PSIC can reject a complaint of reprisal on the grounds that what was disclosed was not truly wrongdoing i.e. it does not meet the legal definition set out in Section 8. This is perverse: no employee should lose their career because they drew attention to what they honestly believed was wrongdoing – even if

they proved to be mistaken.

d) The Commissioner need not refer any case to the tribunal

The Commissioner has the authority to refuse to refer any case to the tribunal -- regardless of the findings of the investigation – based on the broad discretionary powers.

e) There is no mechanism for PSIC employees to report reprisals

Although the law provides a mechanism for PSIC employees to report misconduct taking place within the agency (they go to the Auditor General) there is no equivalent provision for them to report reprisals externally. This was one of the shortcomings in the law noted in the Auditor General's report on former commissioner Christiane Ouimet. The AG's report cites one egregious case of harassment, and 18 of 22 PSIC staff fled the office in the first year – yet these individuals had no means of recourse under this law.

f) Non-government whistleblowers effectively have no protection

The government has claimed that this Act protects all Canadians who blow the whistle on public sector wrongdoing, not just public servants. This is false. For whistleblowers who are not public servants there is no mechanism to protect them from reprisals.

Anyone can make a disclosure to the Commissioner and the Act states that employers cannot retaliate against employees who have made a disclosure. But whistleblowers outside of the public sector are entirely on their own in trying to seek a remedy for any reprisals they experience, and without a remedy there is no protection.

This is a serious problem; the bureaucracy has a long arm, a long memory, and many ways of taking reprisals against people who are not public servants. Contractors can be quietly ordered to fire (and blacklist) employees who raise concerns – or risk losing government business. People who receive services or benefits from a department can suddenly find these being withheld. Personal information can be illegally accessed and leaked to smear and discredit whistleblowers.

Both of these latter techniques were used against veteran Sean Bruyea, in a classic example of how whistleblowers are treated. Aggressive tax audits, intrusive surveillance, false accusations of wrongdoing leading to police investigations, even arrest... The possibilities are endless and limited only by the imagination of wrongdoers in powerful positions striving to protect themselves.

7) PSIC's role vis-à-vis the Tribunal is inappropriate

After an investigation into a complaint of reprisal, the Commissioner may decide to refer the case to *the Public Servants Disclosure Protection Tribunal* which hears evidence from both sides and makes a ruling. The Tribunal can sanction the wrongdoer and can order certain remedies for the whistleblower.

The law gives PSIC complete control over whistleblowers' access to the Tribunal, with the power to name who may (or may not) be sanctioned for taking reprisals, and with standing to argue for or against the whistleblower. Yet PSIC has no power to investigate reprisals, and thus no sound basis for exercising these powers.

a) PSIC has no power to investigate reprisals

The PSDPA gives the Commissioner all the powers of the *Inquiries Act* to investigate disclosures of wrongdoing – investigators can compel testimony (under oath if necessary), subpoena witnesses and documents, and enter premises to seize evidence. However the law is toothless with respect to the Commissioner's ability to investigate complaints of reprisal.

Under the law, PSIC investigators are powerless to compel anyone to cooperate or answer questions in the course of investigating allegations of reprisal; instead, they must rely on the voluntary cooperation of those potentially involved whether it be the accused, other witnesses, bosses or deputy ministers. Generally, people do not willingly cooperate in investigations which could result in punishment for themselves. It's difficult to see how, even with the best of intentions, PSIC investigations can be anything but incomplete and unreliable.

b) PSIC is the gatekeeper to the Tribunal

Given its lack of investigative powers, there is no obvious rationale for PSIC to have any role in determining if a whistleblower can take his or her case of retaliation to the Tribunal (only the Tribunal can award a remedy). Yet such determination lies exclusively with PSIC, which does not have to give reasons for its decisions, and whose decisions cannot be appealed. The whistleblower's access to the Tribunal (and hence a remedy) may therefore, in reality, be nothing more than an illusion.

c) PSIC determines who (if anyone) the Tribunal may sanction

Just as PSIC has total authority over whether a whistleblower may gain access to the Tribunal, PSIC also has complete authority to decide whether the alleged abusers who took the reprisals will be named and referred to the Tribunal for possible sanctions. Even if PSIC determines that reprisals likely took place and elects to refer a complaint of reprisal, it can do so without naming any respondent – thus the names of the alleged abusers remain secret and they are shielded from any sanction by the Tribunal.

d) PSIC has standing at the Tribunal but no clear role

Only a party with standing can appear before the Tribunal, and being granted standing is important – it gives that organization or individual the ability to be heard and put evidence before the decision makers. It is clear that the whistleblower and those accused

of reprisals should have standing. But it is less clear why PSIC should automatically have standing since, having no authority to carry out proper investigations, its contribution seems at best to be of little value.

It is even less clear what PSIC's role is, and whose interests are served by PSIC's participation. In the very first preliminary hearing held before a Tribunal, the PSIC lawyer told the Tribunal judges that they had no right to add respondents (i.e. those accused of taking reprisals) beyond those that PSIC had named in the referral, although the whistleblower wanted this done. In taking this stand, PSIC was in our view acting against both the whistleblower's interests and the public interest.

In an environment where the whistleblower is already severely disadvantaged by Government's deep pockets and army of lawyers, giving PSIC lawyers the automatic right to participate may only worsen this imbalance.

8) The Tribunal is unlikely to protect anyone

The Commissioner has no power to protect truth-tellers from reprisals – only the Tribunal can do this, by providing a remedy to the whistleblower and sanctioning the aggressors. But the Tribunal is likely to prove impotent, for several reasons.

a) Whistleblowers face a near-impossible burden of proof

The most serious problem is that the onus is on the whistleblower to prove that the adverse actions taken were retaliation for a disclosure of wrongdoing. In practice this is usually impossible for an employee to prove since bosses engaged in such harassment generally don't admit to it, and proof is hard to obtain.

In most other jurisdictions, this serious obstacle is overcome by a *reverse onus* provision: once the employee has shown that there is a connection between blowing the whistle and the adverse action (e.g. a short time frame between making a disclosure and being reassigned or demoted) then the burden shifts to the employer to prove that these actions were taken for good reasons other than retaliation. Even with this reverse onus, proving reprisal is not a slam dunk for the whistleblower – still only about 20% prevail and obtain a remedy.

b) There is no meaningful legal assistance for whistleblowers

The second problem is lack of legal counsel. Those accused of retaliation will almost certainly be defended by a team of Justice Department lawyers, with seemingly unlimited time and resources, all paid for by the taxpayer. Unless the union has agreed to accept the case (and they usually decline), the whistleblower will have to pay for a lawyer. Such legal proceedings are *very* costly, often running into hundreds of thousands of dollars. Moreover, finding good legal counsel familiar with litigating against the government (and willing to do so) is very difficult.

The Commissioner can provide the whistleblower with access to legal assistance – up to the limit of $1,500 (or $3,000 in 'exceptional circumstances'). This is an absurdly small amount, and even this is entirely at the discretion of the Commissioner. Former

Commissioner Christiane Ouimet never approved a penny in legal assistance during her 3½ years in office.

Yet the Justice Department can and does routinely spend millions of dollars defending the accused, entangling the whistleblower in legal manoeuvres for years while their legal costs mount up and their health and personal relationships are damaged by the stresses of an abusive legal process.

In the case of Joanna Gualtieri, the Foreign Affairs real estate specialist who exposed massive waste and extravagance in the provision of accommodations for diplomats abroad and then sued her bosses for harassment, the Justice Department legal team – which outnumbered Gualtieri's by eight to one – dragged out her case for almost 12 years, in the process forcing her to answer more than 10,500 questions during pre-trial discoveries. The Justice Department's legal files on this one case totalled more than 50 linear feet of paperwork – taller than a five-storey building.

Clearly there is nothing in this Act to level the playing field as far as legal muscle is concerned – even thought the whistleblower is acting on behalf of the public interest – and without substantial funds to provide legal assistance the whistleblower has no chance.

c) Whistleblower have no access to the courts for a remedy

There is little pressure on this Tribunal to perform: it can hold its hearings in secret, it can take as long as it likes, and it does not even have to file its decisions with the federal court. The only avenue of appeal is judicial review which will simply send the matter back for reconsideration if a mistake is judged to have been made – judicial review cannot order a remedy for the whistleblower. No matter how questionable the Tribunal's actions or decisions the whistleblower cannot gain access to the normal court system, with court reporters, rules of procedure and judges who can be impartial because their tenure is secure, and who have the power to award a remedy that redresses the wrongs committed.

The seriousness of this problem can be seen by examining USA experience of a similar arrangement (a special purpose administrative body, no access or right of appeal to the courts, and no reverse onus provision): of the first 2,000 whistleblowers who submitted complaints of reprisal, only four prevailed.

d) The remedies for whistleblowers who suffer reprisals are inadequate

The approach in other progressive jurisdictions is to provide 'make whole' remedies including compensation for permanent disabilities inflicted. Unfortunately this law trivializes the matter, treating reprisals like "bread and butter" employment grievances. This does not begin to address the magnitude of the potential harm to the whistleblower: the focus is on temporary economic loss, not psychological injury, and damages are arbitrarily capped.

e) The sanctions for taking reprisal are inadequate

Reprisals are often vicious, calculated, premeditated and sustained assaults upon an

employee, orchestrated by someone in a position of power who is trying to cover up unethical or even criminal acts. The effects upon the whistleblower are frequently devastating, life-changing and permanent.

The law should be able to handle the worst reprisals with as much vigour as physical violence, when a criminal bludgeons half to death a witness to his crime, since the consequences for the victim may be equally devastating. The punishment for such aggression should be harsh, and the remedies available to the victim proportionate to the harm done.

However the penalties provided in this law are essentially a slap on the wrist – mere workplace discipline. The maximum penalty is dismissal, and even this sanction is easily avoided, as explained below.

In other jurisdictions that take a more serious view of reprisals against truth-tellers, there are three possible consequences for aggressors: disciplinary measures up to and including dismissal; criminal sanctions up to and including jail-time; and personal liability in the civil courts, without the department shielding them by paying their legal bills with taxpayer dollars.

f) Aggressors can easily escape any consequences for taking reprisals

Since all of the sanctions envisaged by the law are employment-related, and since the law does not permit investigations outside of the public service, an aggressor can escape any consequences simply by leaving the public service – by finding another job elsewhere, or by retiring on their government pension.

The bottom line is that the 'ironclad protection' from reprisals that this Tribunal supposedly offers is a process laden with pitfalls for whistleblowers who are likely to languish (perhaps for years) without any legal assistance, before a secretive and unaccountable body, faced with an impossible burden of proof (for reprisals), and remedies that don't come close to compensating them for the devastation to their lives. And the aggressors will either get a mere slap on the wrist or get off scot-free.

9) The entire process is shrouded in impenetrable secrecy

This is an extraordinarily secretive system, and this secrecy benefits only the wrongdoers. It facilitates delay and legal obstruction in the name of 'procedural fairness', and shields departments from embarrassment. It works against the whistleblower and it does not serve the public interest

Virtually everything that is reported to the Commissioner (or is discovered during investigations) is kept secret – forever. The *only* substantive information ever revealed about wrongdoing is the information included in the Commissioner's case report to Parliament. This report may be as extensive or as terse as the Commissioner chooses, but in either case no further information is available to anyone.

a) Access to Information is blocked forever

The Act carefully and precisely blocks all possible avenues of access to any details of the Commissioner's investigations, putting these beyond the reach of Access to Information laws not just for a few years, but *forever*. This is one point on which the Commissioner has no discretion. Though claimed to be for the protection of the whistleblower, the effect is to shield the alleged wrongdoers – and PSIC staff – from any possible scrutiny or challenge.

b) Misclassification of documents cannot be remedied

Government departments and agencies have frequently been criticized for hiding embarrassing information by abusing the classification process e.g. classifying documents as solicitor/client privilege and/or cabinet confidence. In other jurisdictions, this shield of confidentiality can reviewed to allow alleged wrongdoing to be properly investigated. Under the PSDPA however, such classified information cannot ever be disclosed – either by an employee whistleblower or by the Commissioner.

Moreover, not even judges have the authority to review documents to determine if they have been wrongly classified. This arrangement gives carte blanche for abuses to the classification system.

c) Tribunal hearings may be conducted in secret

The tribunal may elect to conduct its proceedings *in camera* (i.e. in secret) if either party so requests – the agreement of the other party is not required. Those accused of reprisals will surely call for secret hearings, and while the whistleblower will surely object, the Tribunal has the discretion to conceal all the proceedings from the public.

Without public scrutiny of the proceeding, justice cannot be seen to be done – and is less likely to be done.

d) Tribunal decisions need not be filed with the Federal Court

Even when the tribunal has completed its work and handed down rulings, including penalties for reprisals and/or remedies for the whistleblower, these need not be filed with the Federal Court, so that no court reporter can discover what has been going on. There can be no possible justification for this provision.

e) Inappropriate gag orders conceal the truth

The whistleblower should retain control over when and how and to whom they disclose the evidence that they have. But once they make a disclosure to the Commissioner they have essentially gagged themselves and handed full control to the Commissioner over what – if anything – happens to the information.

When whistleblower cases are settled by the Canadian government, there is invariably a draconian gag order attached, which prevents the truth-teller from ever discussing the wrongdoing. (By comparison, in the USA gag orders can only cover the settlement amount – they cannot extend to the substance of the case i.e. the wrongdoing and reprisals.)

Such gag orders are an abuse of power, whereby public money is used to bully, blackmail and bribe victims of harassment, to force them into perpetual silence in return for an end to their ordeal in the legal system. They clearly work against the public interest. Yet this law does nothing to limit the use of such gag orders.

10) The law is unwieldy, complex and costly

Good legislation is succinct and unambiguous, providing a clarity that makes for effective implementation. Good legislation also makes full use of existing mechanisms that work and does not re-invent the wheel. Unfortunately, this law is unwieldy, complex and costly both to the taxpayer and the whistleblower.

Size and Complexity
This law is dense and complex, in part because it tries to do so much. To provide some comparisons, the text of the PSDPA law is *three* times the size of the legislation that has, with modest changes, provided our Auditor General's mandate since 1867. It is *three* times the size of the UK's legislation, passed in 1998, that has been so effective there for more than a decade. It is *six* times the size of the private members bill that was written by FAIR's founder Joanna Gualtieri and briefly debated in Parliament in 2004 – a properly designed law that focused solely on providing real protection for whistleblowers, and did so without creating any new agencies.

Cost
Finally, it is costly to implement. The two thus-far largely useless agencies that it has created – the *Office of the Public Sector Integrity Commissioner* and *the Public Servants Disclosure Protection Tribunal* – have a combined annual budget of more than $8 million. Over the course of the five years since their creation, tens of millions of taxpayer money has been squandered for no result. This money would have been much better spent providing adequate legal aid for whistleblowers in our regular court system.

In its size and complexity, this regime provides a completely new quasi-judicial system just for whistleblowers – but one that is destined not to work. It operates inside a bubble, shrouded in impenetrable secrecy, sealed off from our proper legal system, with layer upon layer of barriers and traps that ensnare whistleblowers, reject their cases and deny them due process.