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Chair

Mr. Leon Benoit

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•(1535)

[English]

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

We're dealing with the whistle-blower legislation, Bill C-11. At our committee meeting this morning, our witness was Mr. James McVay from the U.S. Office of Special Counsel. This afternoon we will continue with Mr. McVay.

We'll just continue through the rotation with the questioning, starting with Mr. Boshcoff.

Mr. Ken Boshcoff (Thunder Bay—Rainy River, Lib.): Thank you very much, Mr. Chair.

Mr. McVay, since this morning, have you had a chance at all to get any of those numbers with regard to the size of the operations for the Office of Special Counsel or the Merit Systems Protection Board?

Mr. James McVay (Principal Legal Advisor to the Special Counsel, U.S. Office of Special Counsel): I'm sorry, I haven't. I got you the actual size of the Office of Special Counsel and the Merit Systems Protection Board, but what I don't have an answer for is the size of the Inspector General offices throughout the United States federal government.

I wouldn't be able to get that with a simple phone call. That would take some time, being that each IG has their own office. I'd have to do an investigation of that.

Mr. Ken Boshcoff: Actually, even your answer in terms of the complexity of the nature of the Inspector General operations, as opposed to being one confined, right-off-the-board number, is helpful to us in terms of understanding the process. So it is appreciated.

When we talked about the various groups that have responsibility for this, we ended by trying to determine the nature of, when we found someone who had a wrongdoing, the commitment to follow-up—in some cases, as you mentioned, the FBI, those types of things. Where is the U.S. Senate and where is the U.S. Congress in these? Is there any role for legislative bodies in determining a course of action after wrongdoing has been shown or whistle-blowing has occurred?

Mr. James McVay: I want to make sure I understand your question. You want to know if the United States Congress, either the House or the Senate, plays a role once there has been a determination of wrongdoing on the part of a federal executive agency and its managers.

Mr. Ken Boshcoff: Yes.

Mr. James McVay: In terms of the statutes that we are responsible for enforcing, there aren't any, regarding whistle-blower retaliation. However, I know that the Congress, through its oversight committees, would be involved and interested in widespread abuses such as that. I'm sure they would have their own interest in conducting hearings, etc., for their own legislative reasons.

Now, when it comes to what I was describing this morning as our disclosure unit, where there is an allegation of a disclosure but there has not been a retaliation, we make a substantial likelihood determination and refer it back to the agency for investigation.

As I explained at that time, after they do the investigation and report back to us, one of our duties is to review the investigation, to look at it for reasonableness, and then draft a report to the oversight committee of that agency in the Congress and explain what our belief is about the investigation, about the thoroughness and reasonableness of the investigation.

At that point, I'm sure the Congress itself would be able to handle, through their own powers, the problems they see.

Mr. Ken Boshcoff: Is that standard operating procedure in the United States? Is the oversight mechanism something that's automatic to many parts of the legislative process?

Mr. James McVay: With regard to that piece of legislation, yes, it happens virtually any time we make a referral to an agency under our statute for an investigation. Outside of that statute, I don't know that I'd really be able to say. But since coming to Washington, I've noticed that it's very common that Congress has significant oversight over the executive agencies, to make sure we're doing our job.

Mr. Ken Boshcoff: I was recently in Washington with the all-party delegation of parliamentarians and Senators. One of the things that came up was that due to commitments overseas, primarily in Iraq, many of the program dollars that would have been allocated for things like the Great Lakes cleanup, as an example, had been transferred to a general fund.

When those things happen—and this is done quite legally, of course, within their own transfer and discretion, by the government in power—is there some means whereby someone in government says, this money was promised for such-and-such a program?

Would that actually come into a whistle-blowing scenario?

Mr. James McVay: I don't know if that particular set of facts would. I will tell you that the Congress is.... Well, we have legislation, I believe called the Anti-Deficiency Act, that by law requires money that has been budgeted for specific purposes to be spent for that purpose, and ensures that it is. In fact, we have received whistle-blower disclosures regarding that, to make sure that funds are spent the appropriate way.

I don't know anything about the facts you brought up in your question, but I will tell you that this is something we have looked at in whistle-blower protections, to ensure that the money is appropriately spent by that agency.

Mr. Ken Boshcoff: Thank you very much.

The Chair: Thank you, Mr. Boshcoff.

Mr. Preston.

Mr. Joe Preston (Elgin—Middlesex—London, CPC): Mr. McVay, thank you again for coming here to Canada to visit us. The aid you're giving us in constructing legislation will be very valuable to public servants here in Canada.

You said this in your opening statement:

...I am talking no less than good versus evil—right versus wrong. In its purest form a whistleblower is an individual that is willing to take on all odds, often in the face of danger and retaliation, to bring to the light of day a wrong that has been committed against society. Their intention is no less than creating a better society in which to live and an ethical government that rules us all.

Watergate was the root cause of most of the whistle-blowing legislation in your country. Since we here seem to be in a bit of an era of scandal now also, that may be the root cause of our need for whistle-blowing legislation.

Our legislation has built into it the ability to review itself after periods of time. At a five-year interval or a four-year interval, we review the legislation. Does yours have an automatic review, or is it just as Congress sees fit to look at reviewing it?

• (1540)

Mr. James McVay: I'm not familiar with the review mechanism. Is that what we call a sunset law, that it will expire by a specified date, or does it just have a clause that says on such-and-such a date, Congress will once again renew, and if they want to pass this legislation again, they can?

Mr. Joe Preston: I'm reading ours, and whether we want to put it in the legislation or not, this is the chance for us to make changes. As you have said, you may find areas of it that could use a little tweaking from time to time. It's an automatic review of those things so that from time to time you're actually fixing it.

Mr. James McVay: Okay. I understand your question now.

There is nothing within the statute itself that says the Congress is mandated to review it at any particular juncture in the future or any timetable in the future. I will tell you, however, they are never bashful, when they see something wrong or when advocacy groups bring something to light for them, about looking into it, and when there is a needed necessary fix, studying it and trying to fix it.

So from time to time the Civil Service Reform Act as well as the Whistleblower Protection Act have been amended to address those concerns of Congress.

Mr. Joe Preston: We spoke a bit before about vexatious claims, or claims that come forward that may or may not be factual. We had some witnesses before us not that long ago who talked about trying to build into the legislation something for....

You mentioned this morning air traffic control, and gave the example about the aircraft carriers, where public safety was at risk. In our case, it was a health-related thing, food safety or health safety. Do you know of a way to build it into the legislation, or is it in your legislation, that good scientific discovery requires good scientific discussion, one against the other, if you will, to flesh out what's right or wrong? Occasionally, in good disagreement, there's a chance for someone to come forward and say, I'm being disagreed against, but I believe public safety is at risk.

In that case, first of all, would you call that a vexatious claim, or is that simply a claim made with the facts that person has? And how do you build into the legislation, for areas of public safety, erring on the side of keeping the public safe rather than erring on the side of strong legislation to prevent false claims?

Mr. James McVay: Let me address your first question, although I'm not sure I have an answer for it.

There is a difference of opinion between qualified experts on what would be safe and what would not be safe. In that particular setting, there's nothing within our statute that says that if somebody comes forward with a disclosure of a specific and substantial danger to the public health and safety—that's the language of our law—that would state on its face whether it would be meritorious or not, we would have to review it. If we believed there was a substantial likelihood that it was true, we would do as we always do: we would refer it to the agency. Then we would rely upon the agency to investigate it and look at it itself.

Again, we are lucky in that we have the luxury of looking with hindsight at the agency's investigative report, and reporting back to the President and to the oversight committee what our thoughts are about it. I will tell you, however, again, that the agencies have some discretion and judgment to use the science that they believe is accurate and appropriate in making those decisions.

• (1545)

Mr. Joe Preston: So there's a bit of an overrule mechanism. It's a high standard, but there's a bit of an overrule mechanism by the agency itself in terms of saying that its point of view is correct.

Mr. James McVay: I would agree with that, yes.

Mr. Joe Preston: But as you say, there's a high standard it has to reach in order to be able to say that.

Mr. James McVay: That's correct. Again, we're talking about public health and safety. It has to be, in our language, specific, to the point where it has specificity enough that when we refer it to the agency, they will know what to investigate. But we're relying upon them to make that decision, knowing, of course, that they are subject to congressional oversight and the President.

Mr. Joe Preston: I have two other quick questions. First, on penalties for reprisal, is there a set limit to them, or do they range all the way up to and including, you know, beheading?

Mr. James McVay: The penalties for reprisal range from letters of reprimand, even informal counselling, all the way to debarment from federal service, which I will tell you is extremely rare.

In the general situation that occurs, after our investigation and our prohibited personnel practice letter to the agency head, which I described for you this morning, there is usually something worked out. If there is a discipline with a manager, it usually entails that manager going without pay for a few days to a week, or even longer if possible.

Again, debarment is the far end of it, where they're just prevented from working for the federal government.

Mr. Joe Preston: Wow. So it's very serious. Or it gets people's attention; that may be a better way of putting it.

Mr. James McVay: Well, we hope it does. As I told you this morning, when we do discipline a manager for violating a prohibited personnel practice, we make sure that we use that publicity in a way that benefits the merit system, so that other managers know this is something we're serious about, and have received, in cooperation with the agency, suspension of those managers. That gets their attention.

Mr. Joe Preston: There may be a bit of overlap in your country, because you also, if I'm not mistaken, have legislation to cover private companies in the sense that whistle-blowing protection is in companies that are publicly traded. How do you deal with, for example, a military contractor, someone who's working for a military contracted firm, who notices wrongdoing from a government employee? Do they come to your branch to allege the whistle-blowing, do they go through their own company...?

We've all heard the great stories of the \$300 hammer, the \$600 toilet seat, or whatever else it might be. In today's reality, it may now be private corporations contracted by the military, not actual military purveyors, who would be finding the stuff.

Mr. James McVay: We do not have jurisdiction within our prosecutorial discretion to prosecute a case for corrective action or discipline against a federal executive employee, except for a claimant who is a federal executive employee. So a private contractor who is a civilian has a different venue and avenue for addressing their whistle-blower complaints.

Now, the opposite would be a federal executive employee who blows the whistle on a private contractor. It has generally been thought that this would not be covered, because the purpose of our act is to root out government fraud, waste, and abuse. However, there is one case that touches upon this: if that contractor is engaging in activities that are an essential function of what the federal government does, in the discretion used by federal employees and managers, they may stand in the shoes, and that whistle-blower could receive protections for blowing the whistle on their actions.

Again, that is an area that has not been fleshed out in our law. The Special Counsel has made it very clear that if it happens, and it clearly is a federal executive function that the contractor is performing, we will probably test that area.

• (1550)

Mr. Joe Preston: If it's not fleshed out completely under your legislation, there'll be one test case, and then you'll know whether it is or is not.

Mr. James McVay: That is correct.

Mr. Joe Preston: Okay.

The Chair: Thank you, Mr. Preston.

For ten minutes, Mr. Szabo.

Mr. Paul Szabo (Mississauga South, Lib.): Thank you, Mr. Chairman.

Mr. McVay, I read your opening statement with interest. In it you gave us the example of Ernie Fitzgerald, who brought to light billions of dollars of cost overruns on construction of an aircraft. It cost him his job when his managers retaliated against him. It's a typical case where someone finds something, they do the right thing, and then they become a victim themselves. That's the reprisal part of this.

Did Mr. Fitzgerald have to personally be the sacrificial lamb? Why didn't you simply take his representation, you do your own investigation, and you do the whistle-blowing?

Mr. James McVay: Let me back up. Specifically about Mr. Fitzgerald, oddly enough, that was a case that actually arose prior to the legislation under which we operate. There was no Office of Special Counsel.

Mr. Paul Szabo: Let's look at a general case, then. Everything's in place. Somebody's found something. They've observed it one way or another. They're not absolutely sure, but they've used their best judgment or knowledge of most of the facts. They bring it to your attention.

Why do they have to be hung out to dry?

Mr. James McVay: They don't have to be hung out to dry, as you say. For example, in a situation where they disclose wrongdoing, and it's a situation where there has been no retaliation, we have, as I talked about this morning, a confidential system in our disclosure unit that takes the information and refers it, in a purely confidential manner, back to the agency, which we oversee, for its own investigation.

In a situation where there is retaliation, well, the managers are already involved, and he's already been "hung out to dry". So there is no reason it has to be that way; however, when it comes to our office, the context is that it already has happened.

Mr. Paul Szabo: We've seen many cases of this, where there are reprisals. I suspect that for an employee who maybe is very conscientious, who sees somebody chronically late coming to work or something and who might just make an off-the-cuff remark like, "Geez, that guy is late all the time", which a supervisor or manager could overhear, there might be a reprisal simply because they're not a team player.

It would seem to me that the negatives to being a whistle-blower are such that it would be a disincentive to ever be a whistle-blower, which is contrary to the objective of having whistle-blower legislation in the first place. How do we get around this thing so that people will feel that their anonymity can be sustained, and that you can have the information you want, and should have, to make sure that where there is wrongdoing, whether it be criminal or simply putting others at risk, mismanaging, etc., it is brought to the attention of the proper people, and remedied?

Mr. James McVay: The best answer I can give you is that if we do our job under the statute, if we make sure that we conduct ourselves in an independent way, if we make sure that in the cases that call for it, we maintain the confidence, which we clearly do.... Even under the Freedom of Information Act, we have the authority, under the current statute we operate under, not to provide the name of that individual, or provide the information, if there's an ongoing investigation.

So our best way is independence and to do our job. I believe the federal workforce will therefore have confidence that if they come forward and make a disclosure, they will be protected. I think this opinion I have is buttressed by the fact that the complaints we receive actually have increased almost yearly, and have increased even in the last few years. If we didn't have the confidence of the federal workforce that we were protecting their independence and actually working for those whistle-blowers, I think you would see the opposite occur.

Mr. Paul Szabo: In our legislation, we define "civil servant" as much more than the literal civil servant but everyone under the umbrella of the act. People at some crown corporations or agencies aren't specifically civil servants. And I'm pretty sure there are a number of cases where whistle-blowers are not lily white themselves.

The culture, as I see it here, in my experience dealing with people in the bureaucracy, is that people.... It's a big business. It's enormous. It's the biggest business in the country. It's easy to hide in there, to be almost invisible. It tends to be a culture that doesn't promote productivity and efficiency. I would suspect that this culture, if that's the way it is, would tend to hire people who fit in with the way it is rather than with the way they would like it to be, simply because there are no champions within the system.

Do you have any sense of whether or not the culture of a large bureaucracy is very difficult to operate a whistle-blowing mechanism in, simply because everybody protects the system that's protecting them?

• (1555)

Mr. James McVay: Let me make sure I understand your question. It's your impression that the bureaucracy has a tendency to protect—

Mr. Paul Szabo: The status quo.

Mr. James McVay: —the status quo, so that when someone does blow the whistle, it upsets the status quo, and even managers, as well as sometimes co-employees, are upset by whistle-blowers.

The answer is yes, it does occur. I don't see, however, that it has ever been an impediment to us doing our job, nor do I see it as an impediment to the whistle-blower coming forward and disclosing what they believe is a violation of law, rule, or regulation.

Mr. Paul Szabo: To conclude—for this round—I'm beginning to think that the large-government bureaucratic environment is an unhealthy place for a piece of whistle-blower legislation that has a bureaucratic structure, that has all kinds of things, that takes years and years to resolve things. In a smaller, tight-knit thing like a crown corporation, which has a defined boundary, it probably is insulated enough that it really has some pride in what happens there.

I'm wondering whether or not you think the legislation dealing with the large-bureaucracy types should in fact do even more to protect the identity of those who have information that may or may not be correct, so that they would be able to comfortably make that available without having themselves be on the file.

Mr. James McVay: Confidentiality is extremely important, I would agree. However, I would tell you that the confidential nature of our whistle-blower disclosure unit is such that the federal managers are not going to find out who made that disclosure, because usually, certainly in the United States, the bureaucracies are so large that simply because there is an investigation that comes up over a particular violation, it isn't going to specifically point the finger at anybody.

It is true that these processes take a while, because, again, we're not just talking about giving rights to whistle-blowers and ensuring that they're confidential, etc. Oftentimes we're talking about a prosecutorial setting where we're potentially debarring a federal executive employee, who has significant due process rights to examine witnesses, to make sure that the full adversarial process fleshes out the truth.

So yes, that system can take a while. It's still, however, of great benefit to our government and to our economy in the United States to have whistle-blower protections.

Mr. Paul Szabo: Thank you.

I wouldn't mind getting on for a short follow-up afterwards.

The Chair: Sure. Thank you, Mr. Szabo.

Monsieur Gagnon.

[*Translation*]

Mr. Marcel Gagnon (Saint-Maurice—Champlain, BQ): Thank you.

I am sorry for having missed part of the discussion this morning. I would like to delve a bit deeper into the issue raised by Mr. Szabo. You said that there is a fine tradition of whistle-blowing in the United States. With which countries have you compared U.S. whistle-blower protection legislation? Are there instances to your knowledge where this type of legislation has had negative and undesirable consequences?

• (1600)

[*English*]

Mr. James McVay: I'm not sure I understand your question, but what I can say is that we have a fine tradition of whistle-blowing. I can only compare it to those nations that have come to us asking us for advice on whistle-blower protection laws. Oftentimes they come to us because they don't have whistle-blowing protection laws. We help in educating their government officials on how it's done and how they should enact their own legislation.

I say that because historically we have had, I believe, a history of individuals who are willing to stand up against the odds and point the finger at government wrongdoing or corporate wrongdoing. I used a couple of examples in my speech here today. Those are the examples I point to, and they date back clear to the beginning of our country. That's the reason I put that in my speech.

I hope that answers your question.

[Translation]

Mr. Marcel Gagnon: The concern I have in terms of whistle-blower protection legislation is that it has the potential to create a climate of mistrust where people feel that they are constantly being watched. I feel that it must be difficult to work in an environment where you never know if the person next to you is a whistle-blower.

Have you ever seen any instances of score-settling? By that, I mean situations where a person keeps a particularly close eye on a particular workmate they do not like in an attempt to find an opportunity to point the finger. Are there any areas where there is a climate of mistrust with regard to this legislation?

[English]

Mr. James McVay: You bring up the climate of mistrust, and a concern that employees will have one-upmanship back and forth with each other.

I have not seen a great deal of that, frankly, or very little of it. What I have seen is a climate of mistrust where an employee is trying to do the right thing by his agency, within the law of that agency, and then managers who would rather work contrary to the law start taking actions against that particular employee. That seems to be more of the climate of mistrust that I have seen through my experiences with the Office of Special Counsel.

[Translation]

Mr. Marcel Gagnon: You used the term “lamplighter” as opposed to “whistle-blower”. As the saying goes an ounce of prevention is worth a pound of cure.

Does it not follow therefore, that if people are asked to take pre-emptive action, a large proportion of disclosures may only be based on suspicion? Have there been very many cases of disclosure, that, upon investigation, have been revealed to be unfounded or wrong?

[English]

Mr. James McVay: I agree with your observation that prevention is often better than trying to cure something that has already gone wrong. One of the things our agency does throughout the federal government is outreach, to educate federal managers on the rights of whistle-blowers as well as the appropriate way to treat their employees if in fact they do make a disclosure. So there is nothing broken to cure if in fact the managers are educated through our outreach system and therefore do not retaliate in a setting where a whistle-blower is bringing to light something that the agency should be doing differently.

• (1605)

[Translation]

Mr. Marcel Gagnon: Based on your experience, should this legislation cover Government agencies such as the RCMP or the

police in general? Are there any sectors to which this legislation should not apply?

[English]

Mr. James McVay: The only area that the Office of Special Counsel is involved in is in the area of the federal executive workforce. I acknowledge, being an attorney and working for the federal government, that there are other whistle-blower protection laws—for example, now in the area of securities law. I know it is out there, and it is working in the same fashion to protect people who come forward with a wrong, to protect those individuals.

In our legislation, there are exceptions where we do not have jurisdiction, and that is usually for intelligence agencies, people working in the national security field, such as the Federal Bureau of Investigation and the Central Intelligence Agency. Our Congress, and minds better than mine, have decided that it is more appropriate to opt them out of this type of legislation.

[Translation]

Mr. Marcel Gagnon: Thank you.

The Chair: Thank you Mr. Gagnon.

[English]

Mr. Lauzon, for ten minutes.

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

Welcome back, Mr. McVay. I hope our chairman provided you with an adequate lunch.

Mr. James McVay: It was wonderful.

And thank you again, sir.

Mr. Guy Lauzon: Great. Sometimes he doesn't do as great a job as he should on some of those things.

Voices: Oh, oh!

The Chair: That's my colleague. See what I told you earlier?

Mr. Guy Lauzon: A couple of weeks ago, a colleague of yours, Louis Clark, sat in that very chair and commented that whistle-blowing legislation in the United States of America effected savings in the billions of dollars rather than in the millions of dollars.

From your perspective, do you think that's a fair comment?

Mr. James McVay: Let me make sure I understand his comment. When whistle-blowers come forward to disclose government waste, fraud, and abuse, they're saving billions versus millions?

Mr. Guy Lauzon: Yes.

Mr. James McVay: I would agree with that, yes.

Mr. Guy Lauzon: Actually, I feel that if we get the proper whistle-blowing legislation, it will be an investment. I like to look at things as investments, so I'd like to pursue the value-for-money logic on this.

You mentioned this morning to our committee that approximately 1,000 employees were involved in looking after whistle-blowing in the States.

Mr. James McVay: I told you this morning that this was purely an estimate. I was just doing some quick math.

Mr. Guy Lauzon: I agree. I'm not holding you to that number.

Mr. James McVay: As I told you, I almost would rather have not answered that question. I had to make an estimate based on *my* knowledge of the IG offices that have set up whistle-blower shops.

Mr. Guy Lauzon: This is just an exercise to try to get some perspective on it.

You also mentioned that you had approximately 2.6 million public servants in the United States of America.

Mr. James McVay: I believe that's correct, yes.

Mr. Guy Lauzon: So if that's the case...and let's say these numbers are relatively close, and we had 1,000 employees with an average salary of \$50,000 American. The total cost, if you had 1,000 employees, would be about \$50 million. For 2.6 million employees, it would work out to less than \$20 per employee, which I don't feel is a terribly big cost to give these people protection.

Now, if you and Mr. Clark are correct, and the savings as a result of having adequate legislation in place is in the billions of dollars, what a heck of an investment we're making.

Generally speaking, are my conclusions reasonable?

Mr. James McVay: I think they're reasonable. Just to be clear, and to make sure you understand where I'm coming from, your math on what it would cost sounds like a yearly cost.

• (1610)

Mr. Guy Lauzon: Yes.

Mr. James McVay: When I said I was confident that whistle-blower savings probably have been in the billions, I don't know that this would be per year. I was really giving you a history of what I know to be the savings going back many years. I'm sure there are studies out there that may indicate how much it is, but frankly, sir, I don't know.

My answer is clear, however, that it is my impression that whistle-blower protections save a lot more money not just in what we can count; it saves more money on what money is not spent improperly.

Mr. Guy Lauzon: That's not even considering the safety aspect as a result of whistle-blowing, as in the couple of the examples you recounted this morning.

Mr. James McVay: Absolutely. Let's take for consideration an aircraft that's being flown off the deck of a carrier, and the catapult malfunctions. What's the cost of that pilot's life? What's the cost of that airplane? What's the cost to the government in a lot of other ways?

Mr. Guy Lauzon: In morale and.... Yes, your point is very well taken.

You have 2.6 million employees—it's pretty apparent that I like numbers—and we have roughly 20% of that, if you work in our crown corporations and so on. So let's say, if our legislation covered 20% of the employees that your legislation would cover.... Your country is populated with ten times as many people, so I'm not sure I understand why we have 20% of this...but anyway, that's for another committee.

If all these numbers make sense, and we have 20% of the employees that the United States of America has, if our costs were

relative, we would have about a \$10 million cost. In other words, for our approximately 500,000 employees, our cost would be about \$10 million.

We had witnesses in the last couple of months who mentioned, for example, that possibly...and as Mr. Preston mentioned, we're undergoing an inquiry now on a sponsorship scandal where possibly \$100 million went missing. One of our witnesses suggested that maybe that could have been avoided.

We also had three witnesses who suggested that the BSE problem we have in this country could have been avoided if they would have been listened to. That apparently has cost our agricultural industry \$7 billion in the last two years. Then we have Ms. Gualtieri, who was here about a month ago, who suggested that millions of dollars, if not billions, were being wasted, she pointed out, in our foreign embassies.

So for \$10 million, even to avoid one of those, I think we'd get a heck of a return back on our investment.

Is that how the American government looks at it?

Mr. James McVay: I think that's how I look at it, and I think that's how Special Counsel looks at it. I can tell you that I don't really know...and I apologize for not spending a little more on what's going on in Canada. I can only tell you that our attitude obviously is to save money where we can, and we look at whistle-blower protection as one of many ways of doing that.

What we also believe in whistle-blower protection is that it gives us a more efficient workforce by ensuring that people are retained based on merit, so if we have better employees, we're going to have a more efficient government. One of the largest costs in government is the cost of salaries. Obviously, if we have better employees, we're going to save a lot of money on salaries.

Mr. Guy Lauzon: Is there one case that sort of jumps out where there was a significant saving, let's say in the last two or three years?

Mr. James McVay: The more significant cases over the last few years have really been in the area of public health and safety. Specific and substantial dangers to public health and safety were prevented because of actions of the whistle-blower, which saved millions of dollars, and not only there but also in the lives of federal executive employees, so—

Mr. Guy Lauzon: Are you suggesting nuclear power plants, maybe, which Mr. Clark spoke of?

Mr. James McVay: I can tell you for certain that examples would include air traffic controls, military aircraft, and things of that nature, that would cost far in excess of certainly our agency's budget over any period of time. So yes, it certainly is a significant savings.

Mr. Guy Lauzon: So there's a return on investment in whistle-blowing.

Mr. James McVay: Absolutely.

•(1615)

Mr. Guy Lauzon: Have you had the opportunity to read our proposed legislation?

Mr. James McVay: Yes, I read through the legislation. This morning I talked to your ethics office about it; I'm sorry, I've forgotten the formal name of the office. We talked about your legislation this morning also, and the proposals.

Mr. Guy Lauzon: Is there anything that jumps out at you, that makes you think, oh, that shouldn't be there, or they should change that?

Mr. James McVay: I think having independent prosecutorial authority is important. I think if you give them the responsibility, you should give them the authority. Just like any leadership position, whether it be civilian or military or government, if you're going to give somebody a responsibility to do something, you need to give them the authority to get it done. That would require independence, prosecutorial authority such as subpoena power, and things of that nature.

I know they also raised the fact that they were concerned about whether they were going to have the human resources decisions and abuses within their office. They want to make it very clear that, at least at this point, they only handle cases involving violations of law, rule, or regulation; substantial and specific danger to public health and safety; gross mismanagement; gross waste of funds. In that vein, if they had more authority to investigate and prosecute, and independence...which I have to agree with.

Mr. Guy Lauzon: Yes. And just to build on the point you made this morning here in this session, independence seems to be paramount in the whole process. You're just confirming that again.

Mr. James McVay: Absolutely. I'd like to reiterate that independence is important for us to do our job, to make sure that we're not pressured by individuals who may have a say over whether or not we keep our jobs. That's one thing we need independence from. But it's also very important that our independence be clear to those who we want to come forward to blow the whistle. If they do not have confidence in our independence, then we're not going to root out the fraud, waste, and abuse that we're there to root out.

Mr. Guy Lauzon: For your information, Mr. McVay, that's been the opinion of, I think, 13 of our 14 witnesses. The only person who didn't agree with that point of view was the person who is proposed to be the current commissioner, under the proposed legislation, who happens to be the president of our public service. You know, many witnesses have suggested that this just won't work, and I guess you've confirmed that by saying it has to be credible to the public servants. If it's not credible, it's just not going to work.

Mr. James McVay: I would agree that it has to be credible to the public servants. I haven't talked to this gentleman—I don't know who you're talking about—to see what his reasons were, or what his reasoning is, so I can't make any judgments about that. I can only say that, from my perspective, and being a student of our agency, of where it's come and where it's going, I don't think we would be able to carry on the responsibilities given to us by the Congress if we didn't have it.

Mr. Guy Lauzon: Thank you. I appreciate it.

The Chair: Thank you, Mr. Lauzon. Your time is up.

We'll go over to Monsieur Godbout, for ten minutes.

Mr. Marc Godbout (Ottawa—Orléans, Lib.): It will not take ten minutes, Mr. Chairman.

Mr. Ken Boshcoff: I'll share it.

Mr. Marc Godbout: You'll share it?

I'd like to follow up on one of Mr. Gagnon's questions about exclusion, about who should be excluded from the legislation or not. I realize you said that some of these agencies had their own legislation, but why would you think it would not be important for agencies or corporations such as the FBI or CIA—in this country, the RCMP or CSIS—or national defence not be included in the law? If there was wrongdoing there, the consequences could be far-reaching.

You did say that the powers that be thought it would not be a good idea, but you didn't really say why *you* would feel they should be excluded.

Mr. James McVay: This is probably the only time today I have been asked to give a personal opinion, and it would be outside of what the recommendations of the Special Counsel are. I am here at his behest. This is an area where we are leaving it up to those national security agencies to deal with those types of problems.

Therefore, I'm not giving an individual's opinion on that. I can only tell you that people have worked closely together, and a lot of different minds have come together, and have come to what they believe is an appropriate conclusion, that they are excluded from the legislation.

•(1620)

Mr. Marc Godbout: I respect that.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Godbout.

Mr. Boshcoff, do you want to finish up the time?

Mr. Ken Boshcoff: Please.

The Chair: Go ahead.

Mr. Ken Boshcoff: Thank you.

Again, what year was the Office of Special Counsel converted from the civil service commission mandate?

Mr. James McVay: It was 1979.

Mr. Ken Boshcoff: So it's been that long, and we've had these other organizations all there. We were talking earlier this morning about one-unit, one-stop shopping. In your mind, would there be an advantage to actually combining those operations into one organized unit as opposed to three separate?

Mr. James McVay: As I understood the question this morning, you were talking to me about the three different units—the Merit Systems Protection Board, the Office of Special Counsel, and the Inspectors General throughout the federal executive agencies.

Mr. Ken Boshcoff: Correct.

Mr. James McVay: I believe we are functioning in the most efficient way right now by having all of those separate. One, as you've already pointed out, there is the view by some that there's a conflict of interest in that we have our investigators and our prosecutors in the same agency. If we had the court that we tried our cases in front of in the same agency, answering to the same person, I think that would go far beyond that concern. And that court is necessary to have their own independence, and we have our own independence from that court. So the Merit Systems Protection Board, which is our court, that we try our cases to, has to be separate and apart from the Office of Special Counsel.

The Inspectors General handle a lot of the same types of claims that we do, but they have a different role in policing their own agencies. They play a vital role in doing that.

Again, I don't see where it would be beneficial to the federal government to have it all in one.

Mr. Ken Boshcoff: You mentioned this morning adding on other responsibilities. At what pace does that accelerate? Is it a frequent legislative process, that more duties might be assigned to the Office of Special Counsel, or is this something that is just from time to time?

Mr. James McVay: In that discussion I was talking about the amendments to the Civil Service Reform Act and the amendments to the Whistleblower Protection Act. Those are periodic—not every year, and not even averaging every five years, but periodic. They have added new responsibilities for the Office of Special Counsel, as I gave an example, and even this past year added responsibilities on the Uniform Services Employment and Reemployment Rights Act for more of an active role in ensuring that federal executive agencies comply with that law.

So I haven't seen bureaucratic incrementalism as much as I have seen legislative changes requiring that our office expand to make sure we comply with the responsibilities given to us by Congress.

Mr. Ken Boshcoff: Is there a statutory or legislative requirement to review the standing legislation, or the policy as enacted, from time to time, in an every-five-year review? I'm not that familiar with that part of the United States process.

Mr. James McVay: The answer to that question is no, there is nothing within the statute that requires that it be reviewed, and substantively reviewed, whether there needs to be changes at any particular point. It really only comes about because groups find out about a court decision, or a policy of ours, and they decide that they would like to put it in the legislation to change that. They will then petition the Congress to make the change within the legislation itself.

So through the years, that has occurred, generally in response to court decisions, as currently is on the table before the Congress now, as I was explaining earlier today, where some people believe the courts have made proving a protected disclosure too high of a bar for employees to meet. They want to lower that somewhat, and change the language itself. It has not been passed by the Congress yet.

That generally is how it has occurred over the years.

• (1625)

Mr. Ken Boshcoff: Would that be specific to this legislation, or would it be the general approach of the government toward legislation?

Mr. James McVay: Well, I've practised law for 17 or 18 years now, and I know that occasionally they sunset, by their own terms. But that's pretty rare. The government usually passes a law and leaves it a law for many years, sometimes even after its useful purpose.

Mr. Ken Boshcoff: Right. Thank you very much.

The Chair: Thank you, Mr. Boshcoff.

Mr. Szabo, are you ready to go?

Mr. Paul Szabo: Yes, thank you.

I'd like to follow up on a couple of items, Mr. McVay. First, do you have a sense of whether those who are covered by your process on whistle-blowing have a favourable attitude towards the organization that's set up? Is there a confidence level that there is something they can be comfortable with?

Mr. James McVay: Again, the only way I can get a sense of that is talking about the particular cases I've handled, and just looking at the numbers that come in every year. Individual complainants, if we don't take their case, are generally unhappy.

Mr. Paul Szabo: Maybe I should explain to you why I asked the question. The bill currently says that the president of the Public Service Commission will be responsible for this, that this will be under the PSC, which has a lot of responsibilities in the bureaucracy. It would not be its only function.

Virtually all of the witnesses who came forward said this was not acceptable to them, because it wasn't viewed to be independent, viewed to be objective.

So I'm asking you about whether there has been any feedback from unions, from bargaining units, or from whoever it might be on whether or not they're comfortable that this arrangement will be objective and will deal with matters in a fair and prompt manner.

Mr. James McVay: To answer your question directly, there have been criticisms, but then again, there have been accolades. Generally speaking, it's an independent process, so people are happy about that. We have our own authority to investigate, independent of the executive. And not answering to those executive agencies obviously is the independence that we're talking about, that usually people are looking for, in this setting.

Again, there are groups that represent complainants, there are groups that represent whistle-blowers, who are not always happy with our cases or our referral rates, things of that nature. However, it goes back and forth, I believe, historically.

Mr. Paul Szabo: I can imagine that matters involving breaking the law, where the proper authorities are brought in and those things, are probably handled fairly expeditiously.

Mr. James McVay: Criminal violations?

Mr. Paul Szabo: Yes, breaking the law, any law where there are jurisdictional responsibilities and it's not you. Charges are laid and they go through the courts and all this other stuff.

But on those others, where people are talking about whistle-blowing being about mismanagement, about people being put in harm's way, about those things that are not breaking the law but are in fact wrongdoings as defined other than breaking the law, what would you say would be the average length of time it takes to dispose of an allegation of wrongdoing, leaving all the criminal stuff out?

Mr. James McVay: It can vary. There are some complaints that we find do not meet the elements and that may be resolved within weeks.

• (1630)

Mr. Paul Szabo: Give it to me in years.

Mr. James McVay: If in fact there is a claim that we believe is meritorious, and it takes either litigation or an investigation, sometimes it can take up to two or three years.

Mr. Paul Szabo: Do you have an idea of the average cost to your agency per case?

Mr. James McVay: The only study I've shown, on the cost per case, were cases that went through litigation, so very expensive.

Mr. Paul Szabo: That's the law thing, yes.

Mr. James McVay: There's no way to really get a cost per case. Keep in mind, we resolved last year approximately 1,700 cases, or if you look at all the cases, over 2,000 cases. If you took our budget and what we resolved, you could probably come to a figure on that. But it would be a very small amount.

Mr. Paul Szabo: Do you have any idea of what percentage of cases ultimately have a reprisal associated with them?

Mr. James McVay: Reprisal as far as just the allegation, or whether or not—

Mr. Paul Szabo: No, I'm talking about somebody who made an allegation and all of a sudden got demoted, or cold-shouldered, or whatever.

Mr. James McVay: Well, people get demoted and get cold-shouldered, and oftentimes it's not related to an allegation or disclosure.

Mr. Paul Szabo: I'm talking about real reprisals, provable reprisals.

Mr. James McVay: Okay. So where we can actually prove the elements of a reprisal, what's the percentage of those that we get in?

Mr. Paul Szabo: Of the total cases.

Mr. James McVay: Of the reprisal cases, somewhere between 10% and 20% a year.

Mr. Paul Szabo: Okay.

Finally, I find the terminology kind of interesting. You referred to "lamplighter" versus "whistle-blower". Whistle-blower is a pretty cool term. Everybody can associate with it. Lamplighter didn't hit me as being—

Mr. Joe Preston: I take offence to that. I like lamplighter.

Mr. Paul Szabo: Well, that's okay, but I mean, we should find out what both sides are so that we can see what they imply.

This says to me that we sort of want to soften it, which to me would tend to invite even a broader range of allegations, or maybe

information—as in, "I'm not sure, but this doesn't look right to me. Could you look at it?" To me, whistle-blower would tend to be a little bit more specific, and certainly more consistent with wrongdoings defined as breaking a law, putting people at serious personal risk, environmental risk, and gross mismanagement.

I mean, those are tough things. This is stuff where termination should be one of the most prevalent results.

Mr. James McVay: The terminology, to be frank with you, is more from my opening remarks, because really, where the rubber meets the road is the statutory language on how you prosecute it. Whistle-blower, lamplighter—neither one is in the actual statute on what we do to prosecute, and seek corrective action, and discipline.

I do kind of understand what you're saying, that whistle-blowing sounds like somebody really has it clear in mind that there's a violation and they're blowing the whistle, and they want the police to show up and arrest this person, whereas lamplighter is just picking up the lamp and shining it over there saying, "Hey, look into that". I can see where you're coming from on that.

As far as what you should call your statute, or the philosophy of your statute, I'm not sure it would make a difference.

Mr. Paul Szabo: If I may, I'd like to sneak one more in, Mr. Chairman.

This has to do with an issue we dealt with right at the beginning that hasn't come up in a long time, and that is an employee's oath of duty of office. They're supposed to protect the assets and do all these good things. If someone becomes aware of something, they actually have, with regard to non-legal matters, a duty to report, because that's protecting the assets or the well-being of the organization.

Under our Criminal Code, and I assume in yours, there is a legal obligation to report. If you don't report a criminal act that you have knowledge of, you can be found to be equally culpable.

In your information to employees, are you reminding them of their oath and of their legal obligation to report?

Mr. James McVay: Under our statutory scheme that we're responsible for enforcing, there is no stated requirement that these individuals make a disclosure. It's purely based upon their belief and duty that there's been a violation of a law, rule, or regulation.

I'll tell you that this has been discussed widely. There is a concern that if there is, that if a manager doesn't do it in a timely fashion, and yet they're still willing to forgo potential reprisal and make a disclosure, then their hesitation may be used against them to reprise against them. So we don't want to get wrapped around the axle on those kinds of things.

I've heard it discussed, but it's not part of our legislation. I think our legislation works well. When you start requiring people to do it by law, you might ask for other issues to get mixed up in your litigation. As well, if you start giving incentives for financial reasons, then you start questioning the credibility of whistle-blowers, and then it doesn't make a credible case when it comes down to a close case. That's why I think our legislation is very good in that it doesn't have that, nor does it have a required duty to report.

I hope I've answered your question.

• (1635)

Mr. Paul Szabo: It was helpful.

The Chair: Thank you, Mr. Szabo.

Mr. Preston, just go ahead. If there's time left, I have a few questions.

Mr. Joe Preston: I'll be very quick.

No offence to Mr. Szabo, please, but I've learned to like the lamplighter terminology. Truly what we're after here is the elimination of wrongdoing, not either of the other two.

We were told earlier by another witness that the greatest reason people don't come forward is not fear of reprisal but fear that nothing will happen, that they honestly will waste the courage of coming forward to report wrongdoing, because nothing will occur. They won't go to their superiors because of that, and they won't go to your agency or any agency we set up because of the fear of nothing happening.

From what you're saying, your numbers are growing, so the fear is at least going away, and more people in your public service are coming forward. We hope we can establish a similar thing.

The last question I have is on not a reward system, but I recognize that under your government system, such as under the False Claims Act, if someone comes forward with a determination of a wrongdoing that includes an amount of money that's saved, they can achieve a portion of it in some way.

Is that true? Can you give us just a small explanation of that?

Mr. James McVay: First of all, I'm going to have to plead ignorance on this. It's not part of our statute. It's only something I've read about obliquely in the newspaper, and heard about around the water cooler. I can't give you any specifics on that. I can, however, go back and look into this specifically. I can get a more definite answer to your committee, through Ms. Burke, who has helped so well through this.

I will tell you that, from the discussions of the trier lawyers, we'd rather not have it. When a defence lawyer can start asking, "Isn't it true that you're going to make money because you came forward with this disclosure, and that's why you really wanted to go after my client, your manager?", it puts roadblocks in our case.

Mr. Joe Preston: Sure. It's a defence mechanism.

Mr. James McVay: That's correct.

Mr. Joe Preston: Okay. Thank you very much.

Mr. Benoit, over to you.

The Chair: Thank you, Mr. Preston.

I'll just continue with some questioning here. I have three main questions to ask you.

The first has to do with the Government Accountability Project. We had Louis Clark, president of the Government Accountability Project, before this committee, and he gave us some very helpful information.

First of all, are you familiar with that organization, with the Government Accountability Project?

Mr. James McVay: Yes, sir, I am.

The Chair: He said that he felt that either his organization or an equivalent organization, a non-profit organization, is a necessary part of the American system, to make it an effective system. Do you agree with that?

Mr. James McVay: In general I would agree with this, that any oversight of government is good, that anybody holding our feet to the fire to make sure we're doing our job—looking at our numbers, questioning them, even shedding the light on us—is good. We welcome it with open arms.

The Chair: So the work they've done, then, has been effective in maybe keeping the edge on your organization and other whistleblower organizations, let's say, in the United States?

Mr. James McVay: To the extent that you've just said, yes, it would keep us on our toes, just as they would for any organization that has some oversight capability and is dedicated to the oversight. Yes.

The Chair: Thank you.

The next question has to do with the Sarbanes-Oxley Act, put in place in 2002, responding to corporate wrongdoing. That act, I've been told and I'm led to understand, is pretty effective in dealing with whistle-blowers in the corporate sector.

First of all, perhaps you could comment on that act and how effective you think it is in dealing with whistle-blowers in the private sector. Do you feel comfortable commenting on that?

• (1640)

Mr. James McVay: I feel comfortable commenting in a general way. Again, speaking just as somebody who has practised law and knows people who work in this field, it was a very good step in the direction of ensuring that securities fraud is in check, and that when people buy securities in any of the markets, they have a more equal footing with professionals. And I think it keeps them on their toes, just as I was saying about government oversight; this certainly does.

Now, the reason I think it probably is very effective is that we're talking about an area of law that is truly an art. There are a lot of nuances in securities regulations in law. There's not always a clear answer, kind of like taxation. So people coming forward and saying, "This is questionable", and having the protections of the Sarbanes-Oxley Act, is a very good thing, especially when we're talking about securing America's corporate structure by doing this.

The Chair: That's an interesting point. Is there anything to be taken from that act, do you think, that can be used to improve your system, or that we might use in our system? I know we are operating under two different systems of government, but are there some things you've seen there that have made you think, "You know, I would really like to take that and apply it to our office as well"?

Mr. James McVay: I haven't thought about that, to be frank with you. Sitting here today, I can't think of anything; I really can't.

The Chair: Okay.

I have just one more question. It may have been partially answered already. You've already said that your office can't investigate disclosures of wrongdoing, but it can require that the head of the agency or department under question investigate and then submit a report to your office on what they've done.

Is that actually a requirement, or is it just a request you can put in? What kind of teeth do you have to enforce any actions or to provide any kind of oversight to corrective actions they might take?

Mr. James McVay: Let me make sure one thing is clear. If there is reprisal for the whistle-blower's disclosure, then we have full investigative authority. That's when we go and look at getting protections for that employee as well as potential discipline for the manager who did the reprisal.

In the setting where there is no reprisal, there is a different statute. Let me just take a few minutes to lay that statute out, because obviously we're still getting questions on this, and I'd like to make it clear.

That statute indicates that we are a secure channel for whistle-blowers to come forward with violations of a law, rule, or regulation and the other elements that I laid out, all the way to specific and substantial danger to public health and safety. We then review and work with that whistle-blower on what those allegations are. If we find that there's a substantial likelihood that it's true, we then have the right to send a demand, which we have the full right to do by law, to the head of the agency and insist by law that the agency head investigate these allegations.

The agency head by law is required to answer our demand within 60 days. They can get extensions. However, they are required by law to answer our request for an investigation and have an investigation performed. When we receive the report of investigation, we are supposed to look at it, as the statute says, for reasonableness. It sets forth, I believe, seven things for how we look at it, such as what discipline was meted out, how it was investigated, and those kinds of things.

Once we do that, we then have an obligation to then write the President—his staff, obviously—and then write the government oversight committees over that particular agency to report on that

investigation. If in fact that investigation is not sufficient, we do not hesitate to make that clear in our report. I don't know of any case where the agency didn't go out of their way to ensure that their investigation met the appropriate standards we set forth to comply, so that we did not write the President and their oversight committee about the insufficiency of their investigation. They are usually very compliant.

So yes, there is a statutory mandate and a requirement for that. Again, it's not us doing it, but at the same time, we are looking over their shoulder about every step of the way.

• (1645)

The Chair: Right. And you do have an authority, right to the President, to take action if things don't occur in a way that seems reasonable.

No one else has questions?

I would like to give you an opportunity, Mr. McVay, to give us any further advice. We really do appreciate your help in answering questions and providing us with information to build better legislation here in Canada. Do you have anything else you'd like to add to that? It's a very open question, and meant to be that way.

Mr. James McVay: No, I don't. I think we've hit upon all the major subjects, the major concerns, the potential conflicts, the problems that can arise. You all very quickly sharpened the issues this morning to where we have had problems in the past with the legislation. I gave you both sides of the arguments with them, so I really don't have anything to add.

If we're done, I would only like to add that it's been my honour to really talk to you people here about this. I want to say again that the Special Counsel was about sick that he wasn't able to do this, because this is something he should have done. If it weren't for the personal commitment that I told you about today, he would be sitting here. But his loss, my gain.

Again, I very much appreciate it. Thank you, all.

The Chair: Thank you.

The meeting is adjourned.

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