How to Improve British Columbia's *Public Interest Disclosure Act*

Lessons from the world's better whistleblower laws

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PETER A. ALLARD SCHOOL OF LAW
THE UNIVERSITY OF BRITISH COLUMBIA

International Justice & Human Rights Clinic

This report was written by Chris Seo of the International Justice and Human Rights Clinic at Peter A. Allard School of Law, University of British Columbia. Clinic Director Nicole Barrett and Junior Supervising Attorney Maria Sokolova reviewed and edited the report. We are grateful to Tom Devine and members of the Government Accountability Project in Washington, D.C. for their valuable input into this project.

Comments may be directed to:

International Justice and Human Rights Clinic
Peter A. Allard School of Law
1822 East Mall
Vancouver, British Columbia, Canada V6T 1Z1
Email: ijhrclinic@allard.ubc.ca
Telephone: +1-604-822-9298

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Introduction

This report examines the statutory scheme of British Columbia's Bill 28 – 2018: *Public Interest Disclosure Act*[1] (PIDA) and identifies and discusses how it could be improved. When this report was written, PIDA had passed Third Reading and its coming into force was imminent. It has since become law.[2]

PIDA was introduced for the purpose of encouraging employees to report serious wrongdoing by protecting them from reprisals in connection with such reporting. British Columbia is one of the last provinces and territories in Canada to adopt a stand-alone legislation to protect whistleblowers.[3] The development of PIDA is a major development in BC's commitment to improving the efficiency and efficacy of public systems, and serves to bolster public confidence in these systems. Indeed, following the tragic aftermath of the dismissal of several BC Ministry of Health employees in 2012,[4] the development of whistleblower legislation in BC has been long overdue.

In the international context, the development of PIDA is necessary pursuant to Canada's obligations under the United Nations Convention Against Corruption (UNCAC).[5] Having ratified UNCAC, Canada is obliged to "promote and strengthen measures to combat corruption efficiently and effectively, and to promote integrity, accountability, and proper management of public affairs and public property."[6] Canada must further "develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability."[7]

This report first discusses the legislative context and history that gave rise to PIDA and its statutory scheme, detailing how it operates. It will then discuss four specific areas of PIDA that require improvement: 1) the scope and the extent of coverage; 2) the process of making a disclosure and

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[1] Bill 28, *Public Interest Disclosure Act, 2018*, 3rd Sess, 41st Leg, British Columbia, 2018 [PIDA]
[2] *Public Interest Disclosure Act*, SBC 2018, c. 22
[3] The following provinces have enacted legislation to protect whistleblowers:
Alberta: *Public Interest Disclosure (Whistleblower Protection) Act*, SA 2012, c P-39.5;
Manitoba: *The Public Interest Disclosure (Whistleblower Protection) Act*, SM 2006, c. 35;
New Brunswick: *Public Interest Disclosure Act*, RSNB 2012, c. 112;
Newfoundland and Labrador: *Public Interest Disclosure and Whistleblower Protection Act*, SN 2014, c. P-37.2;
Nova Scotia: *Public Interest Disclosure of Wrongdoing Act*, SNS 2010, c. 42;
Nunavut: *Public Service Act*, SNu 2013, c. 26, Part 6;
Ontario: *Public Service of Ontario Act*, SO 2006, c. 35, Part VI;
Prince Edward Island: *Public Interest Disclosure and Whistleblower Protection Act*, SPEI 2017, c.11;
Quebec: *Anti-Corruption Act*, CQLR, c. L-6.1;
Saskatchewan: *The Public Interest Disclosure Act*, SS 2011, c. P-38.1;
Yukon: *Public Interest Disclosure of Wrongdoing Act*, SY 2014, c. 19;
[4] British Columbia, Office of the Ombudsperson, "*Misfire: the 2012 Ministry of Health Employment Terminations and Related Matters*" (British Columbia: Office of the Ombudsperson, 2017), online: <https://www.bcombudsperson.ca/sites/default/files/Referral%20Report%20-%20Misfire.pdf> [The *Misfire* Report]
[5] *United Nations Convention Against Corruption*, 9 December 2003, A/58/422, (entered into force 14 December 2005) [UNCAC]
[6] UNCAC, Art. 1
[7] UNCAC, Art. 5

its confidentiality protections; 3) the scope of the definition of reprisal and the burden of proof; and 4) its enforcement provisions.

This analysis will refer to four whistleblower laws from other jurisdictions, to illustrate the gaps in PIDA and how other states and provinces have addressed these gaps. The report specifically looks to whistleblower laws from the United Kingdom ("UK"), the United States ("US"), Serbia, and Ireland, drawing upon reports from the Government Accountability Project ("GAP")"[8] and Blueprint for Free Speech.[9]

The Legislative Context and History of PIDA

Before the introduction of PIDA and its predecessor Bill M216-2017: *Whistleblowers Protection Act, 2017*,[10] BC's legislative approach to dealing with public interest disclosure and protecting whistleblowers was a patchwork of statutes and policies that lacked a uniform reporting procedure and protections for those who have, or want to come forward with, information pertaining to misconduct or wrongdoings in their workplace.

For instance, the BC Public Service Agency's *Ethics and Standards of Conduct*[11] policy statement imposes a duty on its employees to report wrongdoings. It requires employees (depending on their union membership) to first disclose to their immediate supervisor and the "next level of excluded management not directly involved in the matter,"[12] or report directly to the Deputy Minister[13]. In addition, while the *Freedom of Information and Protection of Privacy Act* in BC conferred protection to whistleblowers against reprisals for reporting a contravention of that Act in their workplace,[14] the *Financial Administration Act* did not confer such protections to employees who were obligated to report financial wrongdoings in their workplace.[15]

The above policy statement and statutes, however, do not provide direction for those who receive such disclosures. Without a stand-alone whistleblower legislation that provides clear directions on how disclosures of wrongdoing are to be assessed, responded to or investigated, or a framework

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[8] Tom Devine, Government Accountability Project, *International Best Practices for Whistleblower Policies,* November 25, 2015, online: <https://www.whistleblower.org/sites/default/files/pictures/Best_Practices_Document_for_website_March_13_2013.pdf> [GAP International Best Practices Report]

[9] Wolfe et al, *Breaking the Silence, Strengths & Weaknesses in G20 Whistleblower Protection Laws*, online: <https://blueprintforfreespeech.net/wp-content/uploads/2015/10/Breaking-the-Silence-Strengths-and-Weaknesses-in-G20-Whistleblower-Protection-Laws1.pdf>

[10] Bill M216, *Whistleblowers Protection Act*, 6th Sess, 40th Parl, British Columbia, 2017

[11] BC Public Service Agency, *Ethics and Standards of Conduct Policy Statement*, pp 6-7, online: <https://www2.gov.bc.ca/assets/gov/careers/managers-supervisors/managing-employee-labour-relations/standards_conduct.pdf>

[12] Collective Agreement between the BC Public Service Agency and the BCGEU, Art. 32.13(b) online: <https://www2.gov.bc.ca/local/myhr/tools/salary_lookup_tool/fast_finder/content/15th_Master_Agr.pdf> ["BCGEU Collective Agreement"];
Collective Agreement between the BC Public Service Agency and the PEA, Art. 36.12(b), online: <http://www.lrb.bc.ca/cas/WWD32.pdf> ["PEA Collective Agreement"]

[13] BCGEU Collective Agreement, Art. 32.13(e);
PEA Collective Agreement, Art. 36.12(e)

[14] *Freedom of Information and Protection Act*, RSBC 1996, c. 165, s 30.3

[15] *Financial Administration Act*, RSBC 1996, c. 138

for assessing the merits of a disclosure of a wrongdoing, government actors are ill-equipped to deal with such disclosures.

This lack of legislative guidance on handling disclosures of wrongdoings led to a series of incidents in the Ministry of Health in 2012, where several Ministry employees were terminated in the aftermath of a data breach in the Ministry. The Office of the Ombudsperson's report on the incident[16] ("*Misfire* Report") found that the disclosure received by the Deputy Minister of Health that sparked the investigations of the data breaches was almost entirely inaccurate, and that the Ministry and its investigators failed to assess the factual validity at the outset.[17] The investigators were also found to have employed undisciplined evidence-gathering procedures that lacked organization, effective senior management oversight, clear policy guidance in the process, and subject matter expertise.[18] The *Misfire* Report additionally found the Ministry did not possess sufficient evidentiary bases to terminate any of the employees for just cause, and the decision to dismiss was based on the results of an investigation that was fundamentally procedurally unfair for the employees involved.[19] Tragically, before the Report's findings were released, one of the employees who was fired during the incident committed suicide after enduring interrogations by government investigators in connection to the alleged data breach.[20]

The *Misfire* Report recommended the BC government create public interest disclosure legislation that establishes a clear and comprehensive scheme for handling whistleblower complaints.[21] More specifically, it recommended that the legislation:

1) strike an appropriate balance between encouraging individuals to come forward with disclosures and providing sufficient safeguards against inaccurate or misleading disclosures;
2) establish an external body responsible for receiving, assessing, investigating and reporting on public interest disclosures;
3) require the government to establish internal procedures for addressing public interest disclosures;
4) require the government to establish internal policies, procedures and standards of assessment for addressing public interest disclosures; and
5) require the government to publicize the procedures and standards of assessment it has developed, to foster confidence that public interest disclosures will be addressed appropriately.[22]

Considering the Ministry of Health incident in 2012 and with the recommendations of the *Misfire* Report arising from that incident, Bill 28-2018 (PIDA) was introduced in the BC Legislature on

[16] The *Misfire* Report
[17] The *Misfire* Report, pp 71-72
[18] The *Misfire* Report, pp 92-93
[19] The *Misfire* Report, pp 120-123
[20] Hunter, Justine. 'BC government misled public after 2012 Health Ministry firings: report', The Globe and Mail (2017), online: <https://www.theglobeandmail.com/news/british-columbia/bc-government-misled-public-after-2012-health-ministry-firings-report/article34615260/>
[21] The *Misfire* Report, p 383 "Recommendation 32"
[22] The *Misfire* Report, p 382

April 25, 2018 for first reading.[23] PIDA was introduced to encourage employees to report serious wrongdoing by protecting them from reprisals associated with such reporting, and as part of the government accepting recommendations of the *Misfire* Report.[24]

PIDA Statutory Scheme

PIDA supersedes any other Act in BC that prohibits the disclosure of information. Pursuant to section 3 of the Act, if there is another Act that prohibits employees from disclosing information, PIDA prevails to allow such disclosures to be made. Further, PIDA allows the legislature to make regulations that prohibit disclosures in circumstances where unintended circumstances arise.[25]

PIDA incorporates the recommendations of the *Misfire* Report by requiring the chief executives of ministries, government bodies and offices to establish internal procedures and mechanisms to receive, assess and investigate disclosures of wrongdoing,[26] and to make those procedures public.[27] Each ministry, government body and office must designate at least one senior official to be a "designated officer" ("DO") to receive and investigate disclosures by its employees.[28] Section 9 of PIDA requires chief executives to establish internal procedures to manage disclosures by their employees, and to include certain procedures[29] such as: reporting of the outcomes of the investigations including a finding of wrongdoing (if any), reasons to support the finding of wrongdoing, and recommendations to address the finding.

PIDA also authorizes the Ombudsperson[30] to receive and investigate disclosure from employees of ministries, government bodies and offices. The investigations of the Ombudsperson and the DO are "parallel tracks," in that an employee may disclose to either the DO or the Ombudsperson.[31] The DO may refer a matter to the Ombudsperson if the DO believes the broader investigative powers of an Ombudsperson are more appropriate for the investigation.[32]

Under PIDA, only employees of a ministry, government body or office[33] may, in good faith, make a disclosure of a wrongdoing to their supervisor (who must provide the disclosure to the DO), the

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[23] British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 125 (25 April 2018) p 4213 (Hon D Eby)
[24] British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 125 (25 April 2018) p 4213 (Hon D Eby)
[25] PIDA, s 3(1)(b). Section 2 of the *Public Interest Disclosure Regulation*, *BC Reg* 251/2019 currently provides that s 38 of the *Witness Security Act*, SBC 2019, c 21 prevails over PIDA;
British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 138 (15 May 2018) p 4837 (Hon D Eby)
[26] PIDA, s 9
[27] PIDA, s 4
[28] PIDA, s 10
[29] PIDA, s 9(2)
[30] Appointed under the BC *Ombudsperson Act*, RSBC 1996, c 340
[31] British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 138 (15 May 2018) p 4841 (Hon D Eby)
[32] British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 138 (15 May 2018) p 4841 (Hon D Eby);
PIDA, s 19(4)
[33] PIDA, s 1 "employee"

DO, or the Ombudsperson.[34] Although the disclosure must be made in a prescribed form,[35] disclosers are only required to provide as much information as they know, in a sufficient level of detail for the DO or the Ombudsperson to know which office should be seized of the investigation and what should be investigated.[36]

Pursuant to section 9(2)(i) of PIDA, if the disclosure is made to a DO, the DO must investigate the matter to make a finding of wrongdoing (if any), provide reasons to support the finding of wrongdoing, and make any recommendations to address the finding of wrongdoing. Similarly, if the disclosure is made to an Ombudsperson, the Ombudsperson must investigate the matter, and prepare a report containing their findings, irrespective of whether a wrongdoing was actually committed.[37] The report must contain reasons to support any findings, and any recommendations that the Ombudsperson considers appropriate.[38] The Ombudsperson must provide the report to the chief executive, and follow up with the chief executive within 30 days to see whether the recommendations were acted upon.[39]

If the Ombudsperson believes that the ministry, government body or office has not appropriately followed up on their recommendations, or did not appropriately cooperate with the Ombudsperson's investigation, the Ombudsperson may make a report on the matter and provide it to the minister, the chief executive, or the Speaker of the Legislative Assembly as applicable.[40] Under section 30, the Ombudsperson may issue a special report if he or she considers it is in the public interest to comment on operational matters relating generally to the exercise of the Ombudsperson's duties under PIDA or a particular case.[41]

Regardless of whether a disclosure was made to the DO or the Ombudsperson, the employee will be provided with a summary of the investigation.[42] The employee receives only a summary of the report (as opposed to the full investigation report) because a full investigation report may contain confidential or sensitive information and, as such, the DO or the Ombudsperson may exercise discretion to decide what ought to be provided to the discloser.[43]

PIDA prohibits a person from taking, counselling or directing any measures of reprisal against an employee solely by reason that the employee has, in good faith, sought advice about making a disclosure, made a disclosure, or cooperated with an investigation under PIDA.[44] If the employee

[34] PIDA, s 12
[35] S 15 of PIDA requires the disclosure include items such as a description of the wrongdoing, the name of the person alleged to have committed the wrongdoing, and the date of the wrongdoing
[36] British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 138 (15 May 2018) p 4840 (Hon D Eby)
[37] PIDA, s 27(1)
[38] PIDA, ss 27(1) and (2)
[39] PIDA, s 28
[40] PIDA, s 29
[41] British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 138 (15 May 2018) p 4842 (Hon D Eby)
[42] PIDA, ss 9(2)(j) and 27(5)
[43] British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 138 (15 May 2018) p 4842 (Hon D Eby)
[44] PIDA, s 31

suffers such a reprisal, they may make a complaint to the Ombudsperson.[45] The Ombudsperson will then investigate the complaint in the same manner as the investigation of a disclosure, and make recommendations to address the reprisal in a report on the investigation to the relevant ministry, government body or office.[46] If the recommendations relate specifically to individual employment matters regarding any employee who was subject to a reprisal, the Ombudsperson must consult the employee before making any recommendations in their report.[47]

In respect of remedies available to employees, PIDA expressly states that employees' right to a remedy under a collective agreement, a contract or another enactment, or a civil remedy is not limited.[48] This means that an employee may decide to pursue their claim in respect of a reprisal they faced through any other means, be it in the courts or Administrative Tribunals in BC. However, if the Ombudsperson determines that the complaint is being or has been adequately dealt with under an employment contract or collective agreement, the Ombudsperson may cease their investigation.[49]

1) Scope of Coverage

1.1) Public vs. Private Sector

Section 12(1) of PIDA states, "If a discloser reasonably believes that he or she has information that could show that a wrongdoing has been committed or is about to be committed, the discloser, in good faith, may make a disclosure…". "Discloser" is defined in section 1 of PIDA as an employee who makes, or has sought advice in respect of making, a disclosure under PIDA, where "employee" is defined as an employee of a ministry, government body or office, or a member of a class of persons prescribed by regulation. The regulations were unavailable when this report was written and have not been significantly updated since that time. It thus remains unclear what class of persons would fall within the scope of PIDA – so the question of whether students, consultants, volunteers, or contractors are allowed to make disclosures under PIDA remains unanswered. What is clear however, is that PIDA will initially apply to the public service, including ministerial assistants, executive assistants in ministers' offices, and officers of the Legislature, and is intended to be applied to the broader public sector at a later date.[50] Nevertheless, it remains unclear whether the Legislature intends to extend the coverage of PIDA to include private sector employees, as the legislative drafting history (Hansard evidence) pertaining to PIDA indicates that such an extension was not discussed at all.[51]

The lack of available avenues for private sector employees to make disclosures of wrongdoing under PIDA is concerning considering the large proportion of private sector employees in BC.

[45] PIDA, s 33(1)
[46] PIDA, ss 35(1), (2) and (3)
[47] PIDA, s 35(4)
[48] PIDA, ss 36 and 37
[49] *Public Interest Disclosure Regulation*, *BC Reg* 251/2019, s 3(2)
[50] British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 131 (8 May 2018) p 4447 (Hon D Eby)
[51] *Ibid*

Between November 2017 and November 2018, approximately 24% of employees in BC were employed in the public sector, while 76% were employed in the private sector.[52] The private sector is far from immune to acts or omissions that create substantial and specific danger to the life, health, or safety of persons in Canada. This is best illustrated by the listeriosis outbreak in Canada in the summer of 2008, which caused 22 deaths and required a recall of several Maple Leaf products.[53]

Without effective whistleblower protection for private sector employees, such as managers and workers on the production lines, the health and safety of Canadians may continue to be at risk due to avoidable failures that could have been disclosed through comprehensive whistleblowing avenues.[54] The likely possibility that disclosures from private sector employees are not covered under PIDA is especially concerning in light of the fact that approximately 47% of the disclosures under the Federal Public Servants Disclosure Protection Act[55] (PSDPA) – which also does not extend coverage to private sector employees – are not investigated for reasons including that the disclosures were made by a private sector employee.[56] In other words, almost half of disclosures made under the PSDPA that may pertain to important issues impacting the health, safety and security of Canadians are overlooked due to the lack of statutory jurisdiction to investigate them.

In addition to private sector employees, private contractors who contract with government bodies and ministries are not adequately covered under PIDA. Private contractors may cooperate with investigations under PIDA, and are protected from reprisal actions taken against them by reason only that they cooperated with an investigation.[57] However, private contractors themselves are not protected by PIDA if they disclose wrongdoing.[58] This reality creates an absurd gap in PIDA's coverage for individuals like Don Garrett, whose company contracted with the federal government to replace sinks and toilets in a prison and subsequently made a disclosure under the PSDPA of asbestos contamination in the prison.[59] Under PIDA, Don Garrett would not have been permitted to make a disclosure, and would only have been able to cooperate with an investigation of a disclosure that was made by a Correctional Service of Canada employee.

The need for whistleblower legislation to grant whistleblower protection to all employees, whether they are from the public or private sector, has been emphasized in the literature, with multiple

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[52] Statistics Canada, Table 14-10-0288-0,1 Employment by class of worker, monthly, seasonally adjusted and unadjusted, November 2017 to November 2018 (x 1,000)

[53] Canada, Agriculture and Agri-Food Canada, *Report of the Independent Investigator into the 2008 listeriosis outbreak* (Ottawa: Agriculture and Agri-Food Canada, 2009), p 9, online: <http://publications.gc.ca/collections/collection_2009/agr/A22-508-2009E.pdf>

[54] David Hutton, Ryerson University, Centre for Free Expression: "What's Wrong with Canada's Federal Whistleblowing System" June 14, 2017, online: <https://cfe.ryerson.ca/sites/default/files/whats_wrong_with_the_psdpa_0.pdf> [Ryerson Report]

[55] *Public Servants Disclosure Protection Act*, SC 2005, c 46

[56] OGGO, *Evidence*, 1st session, 42nd Parliament, 6 April 2017 (Mr. Raynald Lampron, Director of Operations, Office of the Public Sector Integrity Commissioner of Canada, As an individual), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-82/evidence#Int-9465044>

[57] PIDA, s 32

[58] PIDA, s 12 permits "disclosers" to make disclosures of wrongdoing, but the definition of "discloser" under s 1 does not include private contractors

[59] OGGO, *Evidence*, 1st session, 42nd Parliament, 21 March 2017 (Mr. Don Garrett, D.R. Garrett Construction Ltd., As an individual), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-77/evidence#Int-9432994>

reports advocating for an all-inclusive whistleblower legislation that captures all types of employment.[60] Furthermore, in the Canadian Parliamentary Standing Committee on Government Operations and Estimates' report ("Parliamentary Inquiry") on the PSDPA, one of the main recommendations was to grant whistleblower protection to all employees, whether they are from the public or private sector.[61] This particular recommendation arising from the Parliamentary Inquiry has not been incorporated into PIDA.

Many countries do provide protection to private sector employees in their whistleblower legislation. The UK's *Public Interest Disclosure Act*[62] ("UK PIDA), for example, allows protected disclosures by "workers," defined by the UK's *Employment Rights Act*[63] so that there is no distinction between public and private sector employees. The UK PIDA also expressly extends the meaning of "worker" to include contractors, co-op students and trainees.[64] Ireland's *Protected Disclosures Act*[65] ("Ireland PDA") allows "workers" to make protected disclosures, and "worker" is simply defined as an individual who is an employee or a contractor.[66] In Serbia, Article 2 of the *Law on the Protection of Whistleblowers Act* ("Serbian Whistleblower Law") expressly defines "whistleblower" as "any natural person who performs whistleblowing in connection with his employment…business dealings; and ownership in a business entity."[67] In short, the scope of PIDA's coverage should be expanded to include private sector employees, who account for a significant majority of employees in BC.

1.2) The Definition of Wrongdoing

Section 7(1) of PIDA permits disclosures of wrongdoing, which is defined as:

a) a serious act or omission that, if proven, would constitute an offence under an enactment of BC or Canada;
b) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of an employee's duties or functions;

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[60] International Justice & Human Rights Clinic, Peter A. Allard School of Law, "Recommendations for an effective British Columbia *Whistleblower Protection Act*," April 2018, pp 4-5;
GAP International Best Practices Report, p 4;
Ryerson Report, p 12

[61] Standing Committee on Government Operations and Estimates: "Strengthening the Protection of the Public Interest Within the *Public Servants Disclosure Protection Act*," June 2017, online: <https://www.ourcommons.ca/Content/Committee/421/OGGO/Reports/RP9055222/oggorp09/oggorp09-e.pdf> [Parliamentary Inquiry]

[62] *Public Interest Disclosure Act*, 1998 c. 23, ss 43(A) and 43(B), online: <https://www.legislation.gov.uk/ukpga/1998/23>; [UK PIDA]

[63] *Employment Rights Act*, 1996 c. 18, s 230(3), online: <https://www.legislation.gov.uk/ukpga/1996/18/section/230> [UK ERA]

[64] UK PIDA, s 43K

[65] *Protected Disclosures Act*, Number 14 of 2014, online: <https://www.per.gov.ie/en/protected-disclosures-i-e-whistleblowing/> [Ireland PDA]

[66] Ireland PDA, s 1

[67] *Law on the Protection of Whistleblowers Act*, No. 128/2014, online: <https://whistlenetwork.files.wordpress.com/2017/01/law-on-protection-of-whistleblowersfinal.pdf> [Serbian Whistleblower Law]

c) a serious misuse of public funds or public assets;
d) gross or systemic mismanagement;
e) knowingly directing or counselling a person to commit a wrongdoing described in paragraphs (a) to (d).[68]

The purpose in using the words "serious" in section 7(1)(a) and "gross or systemic" in section 7(1)(d) was to "ensure that people understood that this particular section of protections and the seriousness of disclosing confidential documents should be for serious acts or omissions… and [to prevent someone using PIDA] as a way for getting back at someone you [do not] like in the office."[69] While preventing frivolous and vexatious disclosures under PIDA is a valid objective, such a high threshold for an act or omission to constitute wrongdoing in PIDA raises concerns that the definition may be under-inclusive and can produce false-negative determinations.

As there is no data available for disclosures, investigations and findings of wrongdoings under PIDA, we analyzed data for disclosures under the PSDPA published in the annual reports of the Office of the Public Sector Integrity Commissioner of Canada ("the federal Commission").[70] The Parliamentary Inquiry found that in many instances where investigations were not deemed warranted for disclosures of wrongdoings, the disclosures did not meet the definition of wrongdoing in any shape or form.[71] In fact, in the 2017/2018 fiscal year, the federal Commission found that a mere 1.8% of the total number of disclosures that it received constituted wrongdoings under the PSDPA (Table 1).

Table 1: PSDPA Disclosures of Wrongdoing Statistics

Fiscal Year	2014/2015	2015/2016	2016/2017	2017/2018
Total Number of Disclosures of Wrongdoing Handled	125	125	141	166
Number of Investigations Launched	21	19	22	15
Finding of Wrongdoing	2	1	2	3

Federal Public Sector Integrity Commission of Canada, Annual Reports

While the miniscule number of findings of wrongdoings from 2014 to 2018 may be attributed to frivolous or vexatious reports, or to the fact that there were very few instances of wrongdoing, it is worth considering that this result is a direct consequence of an overly narrow definition of

[68] PIDA, s 7(1)
[69] British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 138 (15 May 2018) p 4838 (Hon D Eby)
[70] Canada, Office of the Public Sector Integrity Commissioner of Canada, *2014-2015 Annual Report* (Ottawa: Office of the Public Sector Integrity Commissioner of Canada, 2015);
Canada, Office of the Public Sector Integrity Commissioner of Canada, *2015-2016 Annual Report* (Ottawa: Office of the Public Sector Integrity Commissioner of Canada, 2016);
Canada, Office of the Public Sector Integrity Commissioner of Canada, *2016-2017 Annual Report* (Ottawa: Office of the Public Sector Integrity Commissioner of Canada, 2017);
Canada, Office of the Public Sector Integrity Commissioner of Canada, *2017-2018 Annual Report* (Ottawa: Office of the Public Sector Integrity Commissioner of Canada, 2018)
[the federal Commission annual reports]
[71] Parliamentary Inquiry, p 8

wrongdoing. In fact, a Commissioner at the federal Commission admitted that this low number of wrongdoings may have been caused by the level of seriousness required for "wrongdoing" under the PSDPA.[72] However, without a more formal empirical inquiry into whether a lower standard of "wrongdoing" is justified and without disproportionate adverse externalities, the question of whether a lower standard is in fact justified remains inconclusive.

In other countries, the definition of "wrongdoing" for public integrity law purposes is broader. For instance, the definition of "wrongdoing" in Ireland's PDA includes instances where a) a person has failed, is failing, or is likely to fail to comply with any legal obligation b) a miscarriage of justice has occurred, is occurring or is likely to occur c) the health and safety of any individual has been, is being or is likely to be endangered d) the environment has been, is being or is likely to be endangered and e) an unlawful or otherwise improper use of funds or resources of a public body, or of other public money has occurred, is occurring or is likely to occur.[73] The Irish PDA definition also includes more serious standards, including an act or omission by or on behalf of a public body that is oppressive, discriminatory or grossly negligent, or constitutes gross mismanagement.[74]

In Serbia's Whistleblower Law, "whistleblowing" is defined as "the disclosure of information regarding an infringement of legislation; violation of human rights; exercise of public authority in contravention of the purpose it was granted; or danger to life, public health, safety and the environment; or with the aim to prevent large-scale damage.[75] Given this breadth, there are some difficulties in gathering relevant data to ascertain the actual number of disclosures made under the Serbian Whistleblower Law. Unlike PIDA or the PSDPA, which employ a single external reporting and investigating body that collects relevant data on the number of disclosures of wrongdoing, (the BC Ombudsperson under PIDA and the federal Commission under the PSDPA), Serbia's law permits broader disclosure, not limiting the permissible receiving body to a single external body that both receives and investigates disclosures. Rather, Serbian whistleblowers can report internally to their employer,[76] externally to a "competent authority"[77] (defined as "any national, provincial, or self-government authority or holder of public authority competent to act upon information disclosed in accordance with the [Serbian Whistleblower Law]"[78]) or directly to the public at large.[79]

Nevertheless, according to the Serbian Ministry of Justice, the Serbia's Supreme Court of Cassation received 178 cases related to reprisal action against whistleblowers in the first year of the implementation of the Serbian Whistleblower Law, and 63.5% of those cases were resolved.[80] This statistic does not speak directly to the utility of a broader definition of "whistleblowing" under

[72] OGGO, *Evidence*, 1st session, 42nd Parliament, 21 March 2017 (Mr. Joe Friday, Commissioner, Office of the Public Sector Integrity Commissioner of Canada), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-78/evidence#Int-9440540>
[73] Ireland PDA, s 5(3)
[74] Ireland PDA
[75] Serbian Whistleblower Law, Art. 2(1)
[76] Serbian Whistleblower Law, Art. 14, 15 and 16
[77] Serbian Whistleblower Law, Art. 18
[78] Serbian Whistleblower Law, Art. 2, "Competent Authority".
[79] Serbian Whistleblower Law, Art. 19
[80] Serbia, Ministry of Justice, *Final Report on the Year of Implementation of the Law on the Protection of Whistleblowers Act* (Serbia, Ministry of Justice, 2016), p 7, online: <https://www.mpravde.gov.rs/tekst/14518/izvestaji-o-primeni-zakona-o-zastiti-uzbunjivaca.php>

the Serbian Whistleblower Law relative to a narrower definition under PIDA. However, Serbian whistleblowers must establish that they suffered reprisal actions in relation to whistleblowing to obtain judicial relief.[81] In addition, accounting for the fact that not all Serbian whistleblowers face actionable reprisals, one may reasonably infer from this statistic that there likely were more disclosures of wrongdoing under the Serbian Whistleblower Law in the first year of its implementation than the number of annual disclosures made under the PSDPA in the last four years.

The higher number of disclosures of "whistleblowing" in Serbia relative to the disclosures of "wrongdoing" under the PSDPA may be explained by other factors. For instance, while Canada was ranked 8th on Transparency International's Corruption Perceptions Index in 2017, Serbia was ranked 77th in 2017.[82] That is, the significant gap in the number of investigations of disclosures of wrongdoings under the PSDPA and the Serbian Whistleblower Law may be explained by the fact that wrongdoings may occur, or are perceived to occur, more frequently in Serbia than in Canada. Furthermore, the Serbian Whistleblower Law does not distinguish between the public and private sector, while the PSDPA only applies to public sector employees. This may mean that the number of disclosures of wrongdoing under the PSDPA (Table 1: PSDPA Disclosures of Wrongdoing Statistics) underestimates the number of disclosures that would have been made if the PSDPA applied to private sector employees. It is worth considering, however, that the flexibility inherent in Serbia's definition of protected "whistleblowing" may have contributed to the higher number of disclosures made in Serbia compared to those made under Canada's PSDPA.

Regardless of whether a high standard of seriousness in the definition of wrongdoing is in fact more efficient than a lower standard, there are good policy reasons for why a lower standard for wrongdoing may be warranted. Strong whistleblower laws can protect the integrity of public management systems by helping detect harmful wrongdoings and maintain the public confidence in the public system. But where the bar to safely disclose information is so high that wrongdoing is found only two percent of the time, whistleblowers may be dis-incentivized from coming forward with otherwise valid information, for fear their disclosure may be discarded for not meeting the strict standard for wrongdoing. For instance, the federal investigation into the federal government sponsorship program was not sparked by a whistleblower, but rather by a Globe and Mail article in 1999, which reported on the exorbitant amount the federal government had paid to rent a balloon to commemorate the 125th anniversary of the RCMP.[83] Further, as whistleblowers may see only an isolated piece of a larger problem, the ability to raise a broader range of wrongdoings, allows for investigations that can uncover higher level or broader systemic problems, which may exist beyond just one department or group.[84]

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[81] Serbian Whistleblower Law, Art. 23

[82] Transparency International, *Corruption Perceptions Index 2017*, 21 Feb. 2018, online: <www.transparency.org/news/feature/corruption_perceptions_index_2017#table>

[83] The Canadian federal government sponsorship program in the province of Quebec between 1993 and 2004 misused and misdirected millions of dollars of public funds intended for government advertising in Quebec. Leblanc, Daniel. 'Ottawa paid $324,000 to rent $100,000 balloon: 11-storey attraction marked RCMP anniversary', *The Globe and Mail* (1999).

[84] Ryerson Report;
Quebec, Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, *Report of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, vol 3 (Montréal: Commission of Inquiry on the Awarding and Management of Public Contracts in the

The floodgates argument in favour of keeping the standard of wrongdoing high in PIDA (e.g., a disgruntled employee disclosing someone's parking violations to "get back at them") does not hold up under scrutiny. Whistleblowers' disclosures most often come at great personal and professional risk, and more likely than not, are a last resort with a sincere belief that disclosure is required for the public good. Ms. Sylvie Therrien's experience through the PSDPA disclosure process illustrates the potential reality for whistleblowers who come forward with important information. As a former employment insurance ("EI") fraud investigator, she disclosed that her supervisors were giving explicit instructions to employees to not follow the *Employment Insurance Act* in performing their duties, and to intimidate EI applicants in order to trick them into making admissions that would later be used against them in denying their claim.[85] Following her disclosure, Ms. Therrien faced harassment at her workplace, was moved to a different office, and was eventually terminated from her job.[86] According to a CBC article in September 2018, Ms. Therrien recently declared bankruptcy, is unable to pay rent on her apartment, now suffers from depression and anxiety, and "[her] life is in chaos."[87] Ms. Therrien's experience illustrates the serious risks that can accompany whistleblowing; whistleblowers can lose everything. In contemplation of such great personal and professional risks, it is unlikely that whistleblowers take the decision to come forward with information lightly or are prone to making frivolous or vexatious claims.

In light of the fact that a generous disclosure regime may have the potential to uncover significant wrongdoings to advance the public interest, and given the unrealistic nature of the reasons for creating an under-inclusive regime, the current under-inclusive standard of wrongdoing under PIDA is problematic and warrants reconsideration.

2) Making a Disclosure

2.1) The requirement of good faith

Section 12(1) of PIDA states that "if a discloser reasonably believes that he or she has information that could show a wrongdoing has been committed or is about to be committed, the discloser, in good faith, may make a disclosure" to their supervisor, the DO, or the Ombudsperson. Furthermore, section 22(2)(b) of PIDA states that the Ombudsperson must refuse to investigate or must stop investigating a disclosure if the Ombudsperson believes that the disclosure: is frivolous or vexatious; has not been made in good faith; has not been made by a person entitled to disclose under PIDA; or does not deal with a wrongdoing.

Construction Industry, 2015), pp 80-81 "Recommendation 8", online: <https://icclr.law.ubc.ca/wp-content/uploads/2017/06/9503929_001_EN_Rapport_final_CEIC_Tome3-1.pdf>

[85] OGGO, *Evidence*, 1st session, 42nd Parliament, 22 March 2017 (Ms. Sylvie Therrien, as an individual), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-79/evidence#Int-9444038>

[86] OGGO, *Evidence*, 1st session, 42nd Parliament, 22 March 2017 (Ms. Sylvie Therrien, as an individual), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-79/evidence#Int-9444038>

[87] Johnson, Erica. 'Process is torturous': Federal whistleblower says Canada doesn't protect people who speak out', *Canadian Broadcasting Corporation* (2018), online: <https://www.cbc.ca/news/canada/british-columbia/delays-in-whistleblower-protection-system-1.4803588>

The definition of good faith is unclear under PIDA; indeed, the debates (Hansard) on PIDA are silent on the role of good faith, and PIDA does not define good faith either. Given the presumption that the legislature intended like words to possess like definitions, this report has examined how good faith has been interpreted under the PSDPA. In the PSDPA, the purpose of the good faith requirement was to prevent "vendettas and frivolous questions" in the proceedings under the PSDPA.[88]

The element of good faith in the PSDPA has received many criticisms. In particular, critics argue that the motives of the whistleblower should not matter if the information that they seek to disclose is otherwise valid information pertaining to a wrongdoing.[89] That is, if a disgruntled employee wishes to blow the whistle on an employer who is engaging in some wrongdoing, the employee's motivations should not factor into whether the disclosure is valid, or whether the Ombudsperson must refuse to investigate or cease their investigation of the disclosure. The good faith element incorrectly focuses the attention on the motivation of the whistleblower coming forward rather than the actual problematic actions being reported.[90]

Good faith is also redundant in PIDA given that under section 12, an employee must "reasonably [believe that they have] information that could show that a wrongdoing has been committed or is about to be committed."[91] This element requires that the employee have a reasonable belief that a wrongdoing has been committed, which defeats the purpose of the good faith element (to prevent "vendettas and frivolous questions").[92] In fact, retaining the good faith element would impose more complexity and an unfair evidentiary burden that may discourage or dis-incentivize potential whistleblowers. That is, imposing a good faith requirement would create a double test in which the whistleblower must disclose a wrongdoing with a reasonable belief in the truth of the information, and come forward in good faith.[93]

In light of the irrelevance, redundancy and unfairness of the good faith element in the PSDPA, the federal Commission itself has proposed that the good faith element be removed from the PSDPA.[94] In addition, the Commission even admitted that it has never rejected a disclosure of a wrongdoing

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[88] OGGO, *Evidence*, 1st session, 42nd Parliament, 20 March 2017 (Ms. Yasmin Ratansi, Don Valley East, Lib.), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-76/evidence#Int-9431344>

[89] OGGO, *Evidence*, 1st session, 42nd Parliament, 23 March 2017 (Mr. David Yazbeck, Partner, Raven, Cameron Ballantyne & Yazbeck LLP), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-79/evidence#Int-9444250>

[90] OGGO, Evidence, 1st session, 42nd Parliament, 14 February 2017 (Mr. Joe Friday, Commissioner, office of the Public Sector Integrity Commissioner of Canada), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-70/evidence#Int-9369878>

[91] PIDA, s 12(1)

[92] OGGO, *Evidence*, 1st session, 42nd Parliament, 21 March 2017 (Mr. Tom Devine, Legal Director, Government Accountability Project, as an individual), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-77/evidence#Int-9432150>

[93] Canada, Office of the Public Sector Integrity Commissioner of Canada, *Review of the Public Servants Disclosure Protection Act: Proposal of the Public Sector Integrity Commissioner for Legislative Amendments* (Ottawa: Office of the Public Sector Integrity Commissioner of Canada, 2017), online: <http://www.ourcommons.ca/Content/Committee/421/OGGO/Brief/BR8780292/br-external/OfficeOfThePublicSectorIntegrityCommissionerOfCanada-e.pdf> [PSIC Proposal]

[94] OGGO, Evidence, 1st session, 42nd Parliament, 14 February 2017 (Mr. Joe Friday, Commissioner, office of the Public Sector Integrity Commissioner of Canada), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-70/evidence#Int-9369878>

on the basis of bad faith, and testified that it was an unnecessary disincentive.[95] The element of good faith is also absent in the whistleblower legislation in several jurisdictions around the world,[96] and, in fact, the good faith requirement was removed almost entirely from the UK PIDA in 2013 for this very reason.[97]

2.2) Confidentiality

Confidentiality is one of the key elements of a good whistleblower legislation. While strong confidentiality protections provide reliable protected channels to whistleblowers to maximize the flow of information necessary for accountability, lack of confidentiality protections can create a chilling effect in which individuals who become aware of wrongdoing may be dis-incentivized from coming forward with disclosures of such wrongdoings.[98] To illustrate, in the 2017 Public Service Employee Survey, 26% of federal public service employees who experienced harassment in their employment did not file a grievance or formal complaint because they were concerned about the lack of confidentiality protections and the length of the formal complaint process.[99] Furthermore, 24% of federal public service employees who experienced discrimination in their employment did not file such grievances or formal complaints for the same reasons.[100] In light of the above results, it is clear that even coming forward with information pertaining to common workplace problems like harassment or discrimination is an arduous and risky prospect for many public service employees. It is then likely that making disclosures of serious wrongdoings under PIDA or PSDPA is an even more daunting task for employees who fear that their confidentiality may not be protected, and that they may face reprisals against them as a result.

PIDA currently upholds confidentiality and allows for the protection of identity in several provisions. Individuals must not disclose personal information that is likely to identify the whistleblower,[101] though there are limited situations where the identity of a whistleblower may be revealed.[102] There are certain confidentiality protections specific for disclosures occurring in ministries, government bodies, and offices,[103] and there are additional rules regarding the conduct of an Ombudsperson during an investigation.[104]

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[95] OGGO, Evidence, 1st session, 42nd Parliament, 14 February 2017 (Mr. Joe Friday, Commissioner, office of the Public Sector Integrity Commissioner of Canada), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-70/evidence#Int-9370790>

[96] For example, the Ireland PDA and the Serbia Whistleblower Law do not contain a requirement of good faith.

[97] PSIC Proposal

[98] GAP International Best Practices

[99] Canada, Government of Canada, *2017 Public Service Employee Survey*, "Question 67j", online: <http://www.tbs-sct.gc.ca/pses-saff/2017-2/results-resultats/bq-pq/00/org-eng.aspx> [Public Service Employee Survey 2017]

[100] Public Service Employee Survey 2017, "Question 79j"

[101] PIDA, s 6(3)(b)

[102] Under s 6(4) of PIDA, the identity of the whistleblower may be revealed if the personal information of the whistleblower is used in connection with another lawful purpose, in connection with the performance of a function of the Ombudsperson, where the whistleblower has consented in writing to the release or use of their personal information, or where the personal information has previously been lawfully published.

[103] PIDA, ss 9(2)(c) and (e)

[104] PIDA s 25(2) states that s 9 of the Ombudsperson Act applies, which complements the confidentiality protections set out in PIDA. S 9 of the Ombudsperson Act states that the Ombudsperson must maintain confidentiality for all matters in his or her duties, and that he or she may disclose a matter that is necessary to further an investigation.

While it is true that protecting the confidentiality of the whistleblower's identity and his or her disclosure may not always be possible, PIDA does not provide sufficient safeguards for whistleblowers when such confidentiality is withdrawn. That is, PIDA allows the DO and the Ombudsperson to unilaterally revoke the confidentiality of the whistleblower's identity or his or her disclosure but does not provide any recourse for whistleblowers who suffer loss or damages as a result. This differs, for instance from the Ireland PDA[105] in which a failure to protect the identity of the whistleblower that results in losses for a whistleblower is legally actionable. Further, PIDA currently does not provide for any safety net mechanisms for whistleblowers in the event their identities are revealed, and significantly, there is no requirement that whistleblowers be notified of any such reveal. Conversely, the Serbian Whistleblower Law entitles whistleblowers to be notified before their identities are revealed and requires whistleblowers who are participants in criminal proceedings to be notified of the safeguards available to them.[106]

These specific guarantees that exist in the Ireland PDA and the Serbian Whistleblower Law are not present in the current version of PIDA. Without these protections, whistleblowers may face significant personal and professional risks, or may not come forward at all. This risk undermines the public system's ability to minimize the damages arising from wrongdoings by failing to detect and address wrongdoings at an early stage.

This shortcoming in PIDA could be addressed in various ways. For instance, PIDA itself, or its regulations could include specific procedures that the Ombudsperson or the DO must follow to protect the whistleblower's identity and the confidentiality of their disclosures. Alternatively, the Office of the Ombudsperson could update its guidelines to include specific procedures that the Ombudsperson must follow to protect a whistleblower's identity[107] and update its "Developing an Internal Complaint Mechanism"[108] report to include confidentiality protection procedures for DOs.

3) Reprisal Against Whistleblowers and the Burden of Proof

Section 31 of PIDA confers protection to whistleblowers from reprisal actions that arise solely because the whistleblower has, in good faith, made a disclosure or cooperated with an investigation.[109] In the event of a reprisal action, an employee may make a complaint to the Ombudsperson alleging that a reprisal has been taken or directed against the employee,[110] and the Ombudsperson may investigate and report with respect to the complaint in the same manner as a disclosure is investigated and reported under PIDA.[111]

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[105] Ireland PDA, s 16
[106] Serbian Whistleblower Law, Art. 10
[107] This information could be added to the existing "Fairness in Practice Guide": BC, The Office of the Ombudsperson, *Fairness in Practice Guide* (Victoria: Office of the Ombudsperson, 2018)
[108] BC, The Office of the Ombudsperson, *Developing an Internal Complaint Mechanism* (Victoria: Office of the Ombudsperson, 2001)
[109] PIDA, s 31; Actions that constitute reprisal under s 31 of PIDA are: disciplinary measures, demotions, terminations of employment, any measures that adversely affect the employee's employment or working conditions, and a threat to take any of these measures
[110] PIDA, s 33
[111] PIDA, s 35

The definition of reprisal in PIDA is identical to PSDPA's definition of reprisal.[112] There are concerns, however, that the PSDPA's definition of reprisal is too narrow, thereby precluding otherwise valid complaints of reprisals against employees who have made disclosures under the PSDPA.[113] In fact, the Parliamentary Inquiry into the PSDPA found that 55% of reprisal complaints were not investigated either because the allegations did not correspond to the definition of reprisals, the complainant was not deemed to have made a protected disclosure under the Act, or the complaint was not admissible because it did not pertain to the public sector under the PSDPA.[114] Indeed, in 2017, only 2.2% of reprisal complaints received by the federal Commission were referred to the Public Servants Disclosure Protection Tribunal (the specialized administrative body that adjudicates complaints of reprisals under the PSDPA) for adjudication on reprisal complaints in 2017.[115] [Table 2: PSDPA Complaints of Reprisals Statistics]

Table 2: PSDPA Complaints of Reprisals Statistics

Fiscal Year	2014/2015	2015/2016	2016-2017	2017-2018
Total number of reprisal complaints under the PSDPA	43	46	45	46
Total number of reprisal complaints referred to the Tribunal	3	0	0	1
Rate of referral of reprisal complaints	7%	0%	0%	2.2%

Federal Public Sector Integrity Commission of Canada, Annual Reports

This trend may be explained by the fact that the definition of reprisal is restricted to certain actions related to the employee's employment such as disciplinary measures, demotions, terminations, or measures that adversely affect employees' working conditions, and does not include other common workplace misconduct such as harassment or discrimination.

This trend may also be explained by the requirement that reprisals only be recognized under the PSDPA if they arise "because the employee has made or cooperated with an investigation of a disclosure" under the PSDPA. That is, the whistleblower must demonstrate that they were the victim of reprisals, and that the reprisal was a direct consequence of them making a disclosure under the PSDPA. In this respect, the definition of reprisals in PIDA is more exclusive since PIDA only recognizes reprisals where reprisal actions are taken, counseled or directed "solely by reason"

[112] PSDPA, s 1 defines "reprisal" as a disciplinary measure, demotion, termination of employment, any measure that adversely affects the employment or working conditions, and a threat to take any of these measures "because the public servant made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure."
[113] Parliamentary Inquiry, p 44;
OGGO, *Evidence*, 1st session, 42nd Parliament, 9 February 2017 (Mr. David Yazbeck, Partner, Raven, Cameron Ballantyne & Yazbeck LLP), online: < http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-69/evidence#Int-9360417>;
OGGO, Evidence, 1st Session, 42nd Parliament, 4 April 2017 (Tom Devine, Legal Director, Government Accountability Project, As an Individual), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-81/evidence#Int-9455882>;
OGGO, Evidence, 1st session, 42nd Parliament, 21 March 2017 (Anna Myers, Director, Whistleblowing International Network, As an Individual), online: < http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-77/evidence#Int-9432934>
[114] Parliamentary Inquiry, p 45
[115] The federal Commission annual reports

that the employee has made a disclosure under PIDA. While investigations into reprisal complaints can be launched under PIDA on the basis that there are sufficient facts being alleged, the burden of proof for a finding of reprisal is on a balance of probabilities.[116]

The "sole reason" requirement imposes a very high evidentiary burden on the whistleblower to prove that their disclosure was the sole reason for the reprisal action taken against them and allows employers to be vindicated of taking reprisal action against an employee as long as they are able to establish that the employee's disclosure under PIDA was not the sole reason in their reprisal action. That is, if the employer demonstrates that the disclosure is among one of a variety of other reasons for taking reprisal action against an employee, the employer will be able to take reprisal action against an employee for making a disclosure under PIDA. Reprisals can be subtle, insidious, and difficult to prove because it is rare to have direct evidence of them[117] and the evidence can be hidden by those who take reprisal action against the whistleblower. The high evidentiary burden on the whistleblower under PIDA may create a chilling effect in which whistleblowers who possess valid information concerning wrongdoings may not disclose such information due to fears that they will not be adequately protected from reprisal actions against them by their employer.

This notion is already illustrated by employees' reluctance to file grievances or formal complaints of discrimination or harassment in their workplace due to fears of reprisals against them in their workplace. In the 2017 Public Service Employee Survey, 45% of federal public service employees who experienced harassment in their employment did not file a grievance or formal complaint because they were afraid of reprisal,[118] and 44% of those who experienced discrimination in their employment did not file such grievances or formal complaints for the same reason.[119]

The high burden of proof imposed on whistleblowers under the PSDPA to demonstrate the reasons for reprisals against them has been criticized by all witnesses that spoke on this issue for the purposes of the Parliamentary Inquiry. In fact, each witness recommended that the PSDPA adopts a reverse-onus standard such that the employer would be required to demonstrate that disciplinary actions alleged to be reprisals were not related to an employee's disclosure of wrongdoing.[120] Even

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[116] British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 138 (15 May 2018) p 4843 (Hon D Eby)

[117] OGGO, Evidence, 1st Session, 42nd Parliament, 9 February 2017, 0957 (David Yazbeck, Partner, Raven, Cameron, Ballantyne & Yazbeck LLP, As an Individual), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-69/evidence#Int-9360417>

[118] Public Service Employee Survey 2017, "Question 67l"

[119] Public Service Employee Survey 2017, "Question 79l"

[120] OGGO, Evidence, 1st Session, 42nd Parliament, 9 February 2017, 0957 (David Hutton, Senior Fellow, Centre for Free Expression, As an Individual), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8752751#Int-9360296>;
OGGO, Evidence, 1st Session, 42nd Parliament, 21 February 2017, 0958 (Larry Rousseau, Executive Vice-President, National Capital Region, Public Service Alliance of Canada), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-72/evidence#Int-9388861>;
OGGO, Evidence, 1st Session, 42nd Parliament, 20 March 2017, 1806 (A.J. Brown, Professor, Griffith University, As an Individual), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-76/evidence#Int-9431385>;
OGGO, Evidence, 1st Session, 42nd Parliament, 21 March 2017, 0904 (Tom Devine, Legal Director, Government Accountability Project, As an Individual), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-77/evidence#Int-9432150>;

the Commissioner of the federal Commission argued that the reversal of the onus of proof would be "fair and just as it seeks to level what is otherwise an uneven playing field."[121]

The prevailing test in various international jurisdictions for complaints of reprisals reflecting a reversal of the burden of proof is:

1) the complainant makes a *prima facie* case by proving that their disclosure was a contributing factor in the reprisal action, and
2) the burden then shifts onto the employer to produce evidence to defend itself (e.g.: it would have taken the same disciplinary action alleged to be reprisal for independent, legitimate reasons in the absence of the disclosure).[122]

The benefit of reversing the burden of proof has been observed in countries like the UK and the US. In the UK, an employee who is dismissed is presumed to have been unfairly dismissed if the reason alleged for the dismissal is that the employee made a protected disclosure, which effectively requires the employer to rebut this presumption in its defence.[123] In the UK, approximately 27% of reprisal claims have been successful between 2000 and 2012, in comparison to 0% in Canada under the PSDPA.[124] In the US, the *Whistleblower Protection Act*[125] ("US WPA") was amended in 1989 such that the employee only has to demonstrate that their disclosure of wrongdoing was a contributing factor in the reprisal action. Then, the burden of proving that the reprisal action was not the result of whistleblowing is on the employer.[126] Since the amendment, the rate of success on the merits of reprisal complaints under the US WPA has increased from between 1-5 percent annually to between 25-33 percent.[127]

As illustrated above, a lower burden of proof for reprisal complaints has led to more complaints of reprisals in the UK and the US being established on the merits. The aftermath of the amendment of the US WPA is especially enlightening, as it illustrates a causation (or at least a correlation) between lowering the burden of proof for reprisal complaints, and the increase in the number of reprisal complaints succeeding. This suggests that a higher burden of proof may have erroneously precluded otherwise meritorious reprisal complaints from seeing the light of day in the US prior

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OGGO, Evidence, 1st Session, 42nd Parliament, 23 March 2017, 1617 (Anne Marie Smart, Chief Human Resources Officer, Office of the Chief Human Resources Office, Treasury Board Secretariat), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-79/evidence#Int-9442983>;
OGGO, Evidence, 1st Session, 42nd Parliament, 4 April 2017, 0910 (Duff Conacher, Co-Founder, Democracy Watch), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-81/evidence#Int-9455965>;

[121] OGGO, *Evidence*, 1st session, 42nd Parliament, 21 March 2017 (Mr. Joe Friday, Commissioner, Office of the Public Sector Integrity Commissioner of Canada), online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/meeting-70/evidence#Int-9369878>

[122] *Whistleblower Protection Act*, 5 U.S.C. 2302(b)(8)-(9), Pub.L. 101-12, s 1221(e) [US WPA];
UK PIDA, s 5; Serbian Whistleblower Law, Art. 29

[123] UK PIDA, s 5

[124] Kim, D. (2015). *Report on Whistleblower Protections in Canada*. Transparency International Toronto, Ontario, p 11 online: <http://www.transparencycanada.ca/wp-content/uploads/2015/06/TI-Canada_Whistleblower-Report_Final1.pdf>

[125] US WPA

[126] US WPA, s 1221(e)

[127] GAP International Best Practices Report, p 9

to the amendments to the US WPA. Imposing an unfairly high burden of proof that makes obtaining justice a nearly impossible task for whistleblowers has very significant policy ramifications. When the public system fails to deliver justice when it is deserved, and when individuals are not afforded justice due to an arbitrarily high standard of proof that is contrary to international best practices, we risk losing the public's confidence in our public system and the exercise of public authority. In light of these reasons, the burden of proof for reprisal complaints in PIDA ought to be reconsidered.

4) Enforcement of PIDA

Sections 36 and 37 of PIDA state that the Act does not limit an employee's right to a remedy that may be available to the employee under a collective agreement, a contract or another enactment or under civil law. Unlike the PSDPA that expressly confers power to the Tribunal to grant specific remedies such as reinstatement and compensation for pain and suffering caused by reprisal actions of the employer,[128] PIDA does not provide for any specific remedies for whistleblowers.

Assuming Sections 36 and 37 of PIDA mean that whistleblowers may seek remedies through the courts or administrative tribunals, PIDA does not preclude whistleblowers from taking legal action without the leave of a filtering body such as the federal Commission under the PSDPA. For instance, a whistleblower may choose to pursue a civil action through the BC Supreme court, where they may receive monetary compensation for damages, seek interim injunctive relief, be indemnified for legal costs arising from their action, and participate in settlement conferences with opposing parties. In addition, the whistleblower may choose to pursue dispute resolution proceedings through the Employment Standards Branch (ESB) where they may seek to enforce rights and obtain remedies for employees. Nonetheless, recent regulations appear to undermine these commitments by providing that an Ombudsperson may refuse to investigate or stop an investigation if it is determined that a complaint is being or has been dealt with appropriately under a collective agreement or employment contract.[129]

Although PIDA appears to offer at least some flexibility to whistleblowers in their pursuit of civil remedies for reprisal actions taken against them, it is unclear how exactly whistleblowers' rights under PIDA will be incorporated into the court and administrative tribunal processes. For instance, it is unclear in PIDA whether reprisal actions against whistleblowers may constitute actionable torts to be pursued through the courts. Ireland's PDA, on the other hand, expressly confers a right of action in tort to whistleblowers who experienced reprisals when making a disclosure under the law.[130] It is further unclear whether a reprisal action under PIDA, such as job termination, will constitute termination without cause so as to give rise to a claim in the ESB. This is unlike the Section 103A of the UK *Employment Rights Act*[131] which expressly states that "if the reason (if more than one reason, the principal reason) for the dismissal is that the employee made a protected disclosure," that employee shall be regarded as "unfairly dismissed."

[128] PSDPA, ss 21.7, 25.1(4), (5) and (6)
[129] *Public Interest Disclosure Regulation*, *BC Reg* 251/2019, s 3(2)
[130] Ireland PDA, s 13(1)
[131] UK ERA, s 103A

In this regard, it is important to note that the law is only effective if there is a proper mechanism for its enforcement. That is, without clearly defined actionable rights and entitlements, and procedures by which whistleblowers can enforce them, PIDA lacks teeth and is rendered useless. Without a clearly defined process to enforce PIDA, the purposes of PIDA may not be adequately advanced; whistleblowers may be disincentivized from making disclosures under PIDA due to the fact that there is not a designated forum in which they may enforce their rights, and employers may not be deterred from taking reprisal actions against whistleblowers.

4.1) Contractors

Section 32 of PIDA extends the protection against reprisals to private contractors who are contracting with a government body or ministry. More specifically, it prohibits the termination a contract or agreement, withholding of a payment that is due and payable under a contract or agreement, or the refusal to enter into a subsequent contract or agreement by reason only that the person contracting with government has, in good faith, cooperated with an investigation under PIDA.

However, a person contracting with a government body or ministry has no recourse to make a complaint to the Ombudsperson to initiate an investigation into reprisals they experience under Section 32 of PIDA. In fact, while employees' right to a civil remedy is not limited,[132] PIDA does not authorize a person contracting with a government body or ministry to pursue civil remedies in respect of a breach of Section 32 of PIDA.

The statutory scheme surrounding private contractors creates an obvious gap in the legislation. Contractors are not permitted to make disclosures under PIDA themselves, and further, are not permitted to make a complaint to the Ombudsperson or seek civil remedies concerning reprisal actions prohibited under PIDA. Whether the legislature intended this or not, the gap in the statutory protections afforded to private contractors contracting with public bodies may warrant reconsideration.

Conclusion and Recommendations

Although PIDA is relatively successful in incorporating the recommendations from the *Misfire* Report, there is still work to be done to improve its statutory scheme. PIDA is under-inclusive in several critical areas, places significant burdens on whistleblowers, fails to sufficiently protect whistleblowers against reprisals, and does not establish a clear process for enforcing its provisions. These deficiencies have broader policy implications as significant access to justice barriers remain for whistleblowers. These barriers deprive the ultimate beneficiaries of whistleblowing – the government and the general public – from realizing the enormous benefits of whistleblowing, including greater protection for the integrity of our institutions.

To improve the current version of British Columbia's PIDA, the following recommendations should be considered:

[132] PIDA, s 37

1. Expand the scope of coverage of PIDA to confer the same rights and entitlements to private sector employees

2. Lower the standard by which "wrongdoing" is measured for the purposes of disclosures under PIDA

3. Repeal the requirement of good faith in sections 12(1), 22(2)(b)(ii), 31(1) and 32 of PIDA

4. Include more express protections of confidentiality of disclosures and whistleblowers' identities such as:
    a. Requiring the DO or the Ombudsperson, or any person receiving disclosures from whistleblowers, to notify whistleblowers prior to waiving the confidentiality of their disclosure or the protection of their anonymity; and
    b. Providing whistleblowers the right to recover losses or damages that are incurred as a result of the confidentiality of their disclosures or their identities being taken away

5. Lower the burden of proof on whistleblowers to prove a reprisal by reversing the onus of proof such that:
    a. the complainant only needs to make a *prima facie* case by proving that their disclosure was a contributing factor in the reprisal action, and
    b. the burden then shifts onto the employer (or a person committing reprisal actions against the complainant) to demonstrate with evidence to defend itself or justify the disciplinary measures alleged to be reprisals

6. Clarify what remedies, if any, whistleblowers are entitled to under PIDA, and the appropriate channels for whistleblowers to obtain those remedies

7. Confer the same rights and protections provided to employees of ministries, government bodies and offices to private contractors.

While PIDA was based on a review of the best practices from around the world, it appears that most of its contents was derived from whistleblower legislations in Alberta, Manitoba, Ontario and Australia.[133] Going forward, it may be advisable to look beyond these specific jurisdictions to those that have already addressed, or can assist with resolving, the significant limitations of British Columbia's Public Interest Disclosure Act. Incorporating the recommendations above would position British Columbia as a leader in whistleblower protection and help Canada begin to meet its obligations under UNCAC to effectively fight corruption.[134]

[133] British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 131 (8 May 2018) p 4447 (Hon D Eby)
[134] UNCAC, Art. 1