

# ASSESSING WRONGDOING

Section 7(1) of PIDA defines wrongdoing as:

7 (1) This Act applies to the following wrongdoings in or relating to a ministry, government body or office, including wrongdoings that occurred before the coming into force of this Act:

- (a) a serious act or omission that, if proven, would constitute an offence under an enactment of British Columbia 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;
- (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).

## Elements of wrongdoing

Section 7 sets out two main elements of wrongdoing:

- (1) The act or omission occurred in or relating to a ministry, office or government body ("public bodies")
- (2) The act or omission meets the test for at least one type of wrongdoing

### **Location of the wrongdoing**

PIDA applies to wrongdoings "in or relating to" a public body. The term "relating to" extends the term "in". It speaks to a real and substantial connection between the wrongdoing and the public body.

Usually, an alleged wrongdoing will be clearly "in" a public body. However, where it is unclear and/or a relationship to a public body is alleged, an assessment will be necessary to determine whether the wrongdoing relates to that public body. The test is whether there is a real and substantial connection between the wrongdoing and the public body.

An assessment of whether there is a real and substantial connection will be based on the specific context and facts, and in particular, on the nature of any relationship between the public body and other organization or actor and the nature of the alleged wrongdoing.

Factors that may assist in determining whether a wrongdoing occurred in relation to a public body include:

- Whether the organization or actor is an agent, delegate or service provider of the public body or otherwise contracted to perform a function of the public body
- Whether the public body provided all or part of the organization's operating budget
- Whether the organization is required to adhere to the public body's administrative or ethical rules
- Whether the public body has control of or audit responsibilities over the organization
- Whether the nature of the wrongdoing relates to the public body's assets, programs, services or employees
- Whether the wrongdoing was carried out in the course of exercising the public body's duty or authority

### Type of wrongdoing

An act or omission must also meet the test for at least one type of wrongdoing set out in section 7 to be considered a wrongdoing under PIDA. There are five types of wrongdoing and an act or omission may constitute more than one type.

Each of the following sections set out the type of wrongdoing, the essential components of that type (or the test to be met), and any considerations that may assist the assessment.

#### 1. Offences

Section 7(1)(a) – a serious act or omission that, if proven, would constitute an offence under an enactment of British Columbia or Canada.

Both **a** and **b**, below, must be met for the conduct to fall into this category.

- a.** The act or omission constitutes an offence under BC or federal law.
- b.** The act or omission is serious. Consider:
  - *Intention*: was it deliberate; an abuse of power; discriminatory, done in bad faith, for a malicious purpose or for personal gain?
  - *Gravity*: was it a marked departure from normally recognized and accepted standards of conduct or ethical obligations? Did it disproportionately impact persons, communities or groups that have been historically marginalized (such as indigenous peoples, racialized people, women, 2SLGBTQ2+ people, immigrants, etc.)?
  - *Position of alleged wrongdoer*: is the person in a position with a high level of seniority, authority, responsibility or trust? Is there any imbalance in a power relationship?

- *Consequences*: did the conduct adversely impact the public body's employees, those who use its services, or other persons? Did the conduct impact the public body's ability to carry out its mission or public trust in the organization?

#### 2. Substantial and specific dangers

Section 7(1)(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.

Parts **a** and **b**, below, must be met for the conduct to fall into this category. If **c** is met, then the conduct is excluded from this category even if it meets **a** and **b**.

- a.** The conduct creates a substantial danger. A substantial danger is a risk or situation that a similarly situated person/an ordinary person in the same context a reasonable person would consider to be serious in nature. It would likely result in a real harm to the life, health or safety of a person or persons. Consider:
  - Would it have clearly resulted or is it reasonably likely to result in real harm to life, health or safety of a person or persons or to the environment?
  - What is the nature, level or severity of the danger?
- b.** The conduct creates a specific danger. A specific danger is clearly identifiable, is an actual threat and has a reasonable expectation of occurrence within a foreseeable time. Consider:
  - What is the actual threat?
  - Who or what in particular is at risk?
  - Is it reasonably expected to occur? When?
  - How, in particular, was the danger created or did the harm occur?

**c.** The danger is inherent in the performance of an employee's duties or functions. Consider:

- What kind or level of danger is normally expected of, essential to or characteristic of the job?
- Is the danger a marked departure from what is normally expected or to what normally occurs?

### **3. Serious misuse of public funds/assets**

Section 7(1)(c) – a serious misuse of public funds or public assets.

Parts **a**, **b** and **c**, below, must be met for the conduct to fall into this category.

**a.** The funds or assets are public.

**b.** The funds or assets were misused. Consider:

- How were they used and how was the use unauthorized or irregular?
- What was normally expected or required in the circumstances?

**c.** The misuse was serious. Consider:

- Was it deliberate, an abuse of power, discriminatory, done in bad faith, for a malicious purpose or for personal gain?
- Is the person in a position with a high level of seniority, authority, responsibility or trust?
- Was the conduct recurrent, frequent or systemic?
- Did the conduct adversely impact the public body's ability to carry out its mission, its employees, those who use its services, or other persons or public trust in the organization?
- Was the dollar value high or otherwise significant? Did the conduct disproportionately impact persons, communities or groups that have been historically marginalized?

### **4. Gross/systemic mismanagement**

Section 7(1)(d) – gross or systemic mismanagement.

Parts **a** and **b** or **a** and **c**, below, must be met for the conduct to fall into this category

- a.** A public resource was mismanaged. A public resource may include a contract, project, time, human resource, etc.
- b.** The mismanagement was gross. "Gross" indicates a high or serious degree and something more than ordinary mismanagement. Consider:
- Is the person in a position with a high level of seniority, authority, responsibility or trust?
  - Was it deliberate, aggressive, reckless, an abuse of authority, unlawful, discriminatory, dishonest or in bad faith?
  - Was it for an improper purpose such as for personal gain or to promote private interests?
  - Did it disproportionately impact persons, communities or groups that have been historically marginalized?
  - Was it regarding matters of significant importance or involving significant government resources?
  - If there were errors, were the errors so serious that they are not debatable among reasonable people?
  - If there was negligence, was the conduct so reckless or indifferent to be considered gross?
  - Did it involve a serious or significant breach of a code of conduct or standard of ethics?
  - Did it create a substantial risk of significant adverse impact upon the ability of an organization, office, unit or staff member to carry out its mandate?

- c.** The mismanagement was systemic. “Systemic” indicates a broad, longstanding, social, cultural or organizational issue. Consider:
- the history, frequency or recurrence of the conduct
  - the number of people responsible for the conduct or affected by it
  - the knowledge or acceptance of the conduct within the public body
  - whether the conduct is inherent to the organization’s structure, policies or practices

### **5. Directing or counselling a wrongdoing**

Section 7(1)(e) - knowingly directing or counselling a person to commit a wrongdoing described in paragraphs (a) to (d).

Parts **a**, **b** and **c**, below, must be met for the conduct to fall into this category.

- a.** A person directed or counseled another person to do something, whether an act or omission
- b.** The act or omission constitutes a wrongdoing under 7(1)(a) to (d)
- c.** The direction or counsel was clear and purposeful

**Note:** *Counselling or directing someone else to do the act or omission is the wrongdoing. The person receiving the direction or counsel need not act, or intend to act, upon the instructions for this test to be met. The person directing or counseling the wrongdoing need not be in a supervisory role to the person receiving the direction or counsel.*