

Presentation to House Legislative Committee
BILL C-11, as amended by BILL C-2:
PUBLIC SERVANTS DISCLOSURE PROTECTION ACT

Remarks by Joanna Gualtieri, Director
Federal Accountability Initiative for Reform [FAIR]

May 10, 2006

About FAIR

FAIR (Federal Accountability Initiative for Reform) promotes integrity and accountability within government by empowering employees to speak out without fear of reprisal when they encounter wrongdoing. Our aim is to support legislation and management practices that will provide effective protection for whistleblowers and hence occupational free speech in the workplace. FAIR is a registered Canadian Charity.

29 Mason Terrace, Ottawa, ON K1S 0K8
Phone: (613) 569-4814
Web site: fairwhistleblower.ca

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Committee Members,

We are all familiar with the premise that understanding is best acquired through personal experience. Fortunately, most of us will be spared the experience lived by whistleblowers. But it is precisely this lack of experience that challenges us in understanding the depth of their sacrifices and losses, and the measures that are required to provide effective protection. Today I plan to share their stories hoping that this Committee, despite being spared their experience, will nonetheless understand that ironclad whistleblower protection comes not from rhetoric or illusory devices but rather from locking in fundamental civil and legal rights.

I hope that none of you will ever encounter retaliation like that directed against whistleblowers nor experience the tragedy that can result when no one speaks out. But this justifies neither complacency, nor politically motivated compromise. Twenty years ago, sixty thousand innocent Canadians were infected with HIV and Hepatitis C while the Government secretly debated what to do regarding our tainted blood supply. Thousands others kept bedside vigils as their loved ones suffered long and painful deaths while the Government engaged in cover up. We owe it to them today to ensure that above all else we will be guided by simple principles: the public's right to know, and an employee's right to tell.

History provides us with compelling profiles in courage. Dr. Michele Brill-Edwards, Dr. Pierre Blais, and Drs. Shiv Chopra, Margaret Haydn, and Gerard Lambert all departed from the unspoken conspiracy of silence and alerted Health Canada about dangers related to drugs and our food supply. Career diplomat Brian McAdam and RCMP corporal Robert Reid alerted the Prime Minister about Chinese espionage and threats to our national security. Linda Merk spoke out about corrupt union bosses, and Allan Cutler informed us about the contracting irregularities embedded in the Sponsorship Scandal. What they share in common is that their courage was rewarded with the destruction of their careers, and by persecution in our courts by the Department of Justice -- a tactic which continues even as we speak.

My knowledge regarding whistleblower rights and protection began when as an employee of DFAIT I spoke to management about extravagance and waste. While multi-million dollar homes sat vacant, diplomats were spending millions of taxpayers' dollars renting fancy accommodations more to their liking. Alerting the most senior management including the Minister, I was ignored, the wrongdoing covered up, and my livelihood destroyed.

As a lawyer, I could not ignore the horrific abuses directed against conscientious public servants who were doing their job ethically. We needed a voice, counsel and information; hence, the Federal Accountability Initiative for Reform (FAIR) was born. Today our operations as a non-profit, non partisan organization are made possible by a growing group of dedicated volunteers with the benefit of advisors including Mr. David Hutton, The Honourable David Kilgour, Dr. Gerard Seijts (Ivey Business School) and Dr. David Swann (Calgary MLA). Our mission is three-fold: to assist whistleblowers; to educate the public regarding the indispensable role of whistleblowers in challenging institutional wrongdoing; and to provide expertise and commentary about legislation that will provide real protection for whistleblowers.

What I have learned through my decade involvement with whistleblower rights is that we as a society are utterly dependent on the flow of reliable insider information to combat corruption and wrongdoing that threatens the public interest. While there is a tremendous amount of goodwill among our citizens to protect whistleblowers, the willingness of governments to institute real and effective legal protection is far more ambiguous. Today, we applaud our new Government for their election promise to provide real protection for whistleblowers. Encouraged by their consultative approach, we are particularly grateful for the openness of Mr. Pierre Poilievre, Parliamentary Secretary to the Treasury Board. This reflects a substantial change from the previous government when Lloyd Axworthy had his lawyers threaten me with libel for daring to suggest that anything was wrong.

Let us consider now whether the Government's six election promises -- central to providing real protection -- have been instituted. As one benchmark, I have used the model whistleblower protection law recommended by the Organization of American States ("OAS Model Law") for all member nations, including Canada, to implement its *Inter-American Convention against Corruption*.

1. Give the Public Service Integrity Commissioner the power to enforce compliance with the Act.

Studies show that employees remain silent for two reasons: one, fear of reprisal; and two, the belief that nothing will change. For C-11, as amended by C-2 (hereinafter referred to as "C-11") to be effective, the Commissioner should have powers to both grant a remedy and order corrective action. C-11 fails on both accounts.

Regarding wrongdoing, the Commissioner, although promoted as an independent body, is authorized only to report and make recommendations to Parliament, and has no power to order corrective action. History shows that senior bureaucrats, Ministers and Prime Ministers have ignored the recommendations of other officers of Parliament, such as the Auditor General and the Information Commissioner. This leads us to fear that the Commissioner will end of being little more than a paper tiger.

Regarding whistleblower protection, the Commissioner has no power to order a remedy. Instead, the Commissioner has the exclusive power to refer the matter to the *Public Servants Disclosure Protection Tribunal* (the "Tribunal"), who may order the executive branch to provide a remedy. This two-step process is invariably long and onerous for the whistleblower who, with this Act, never has control of his or her case. Rights inherently include the authority to enforce them but this legislation offers promises whose enforcement is beyond the reprisal victim's control.

By contrast, the Ombudsman with an equivalent role in the OAS Model Law has the power to order and enforce temporary relief. Aggrieved whistleblowers can litigate directly in any relevant legal forum to enforce recommendations for remedies against confirmed retaliation. (OAS Model Law, Article 10, Sec.7; Article 11).

To meet this election promise, the Bill must be amended to provide that the Minister or Head of an offending department or crown corporation shall take prompt corrective action as recommended by the Commissioner or provide reason to Parliament why no such action will be taken. As well, the Commissioner should have remedial powers or the whistleblower should have direct access to a legal forum including the Tribunal.

2. Ensure that all Canadians who report government wrongdoing are protected, not just public servants.

There is ample precedent to base protection on what information the dissenter is disclosing, rather than the whistleblower's employment context. The OAS Model Law, Article 2(b), protects "any individual subject to the laws of the nation, and may be a public or private employee, private citizen, or non-profit or for-profit Non Governmental Organization..." The U.S. False Claims Act allows any individual or corporate whistleblower to file suit challenging fraud in government contracts, not just employees of the wrongdoer. 31 USC 3729 *et. seq.*

To meet this election promise, C-11 should at the very least provide that any time the Government retaliates against a citizen who exercises freedom of expression, it is a violation of human rights.

3. Remove the government's ability to exempt Crown corporations and other bodies from the Act.

Our position is that no government department, agency or crown corporation should be exempted. All are stewards of taxpayers' money.

4. Require the prompt public disclosure of information revealed by whistleblowers, except where national security or the security of individuals is affected.

In this regard C-11 fails dismally, obligating the Commissioner to *make secret forever all* information gathered in the course of the Commissioner's investigations. Information so gathered is exempted from Access to Information. This provision is more draconian than what the Liberal Government proposed.

Inexcusable and Orwellian, this provision turns C-11 into an anti-transparency proposal. Gag orders are an assault on whistleblowers rights, but in this sense the legislation is an Official Secrets Act, institutionalizing a gag on both retaliation and the alleged government misconduct. Any whistleblower acting under the law is gagging him or herself permanently, locking in secrecy when the public has the greatest need to know. Both the United States and the OAS Model Law [Article 6] contain anti-gag provisions.

To meet this election promise, C-11 must provide that any information acquired by the Commissioner must be accessible under access laws following the investigation.

Further, the investigation materials and reports should be deposited with a public registry for easier public access.

Regarding records covered by cabinet and solicitor/client privilege, C-11 should provide that information of wrongdoing contained in these confidences can be disclosed to Parliament and law enforcement, and those records and reports which evidence wrongdoing will be compellable under access laws and submitted to the public registry.

5. Ensure that whistleblowers have access to the courts and that they are provided with adequate legal counsel.

C-11 fails on both counts.

The first part of this promise guarantees to restore access to our courts of justice which the Liberal Government stripped away. Embarrassed by lawsuits where public servants were suing for harassment and abuse of power, the previous government quietly outlawed this right in the *Public Service Modernization Act* passed in November 2003 [s. 236]. C-11 betrays the promise to restore this right. Instead, it sets up a special-purpose Tribunal to deal with whistleblower cases without also reinstating the right to sue in court.

A fair day in our courts -- with their history of openness, due process, public accessibility and court reporting -- is the bottom line for the validity of any remedial law. The net result of C-11 is that Canadian whistleblower rights are regressing, and this proposal institutionalizes the retreat. The OAS Model Law gives whistleblowers the choice of any relevant forum (Article 11), while a key factor in the evolution of U.S. whistleblower laws has been access to court. Last year's Energy Policy Act for government and corporate nuclear workers, and the 2002 Sarbanes Oxley corporate whistleblower law both give the right to have rights decided in federal court by a jury of the citizens -- the intended beneficiaries of the whistleblowing.

To meet this election promise, the right of access to the courts must be restored.

The second part of this promise guarantees legal representation. This is an important promise. Rights are a cruel delusion if victims cannot afford to enforce them. Those few who have in recent years attempted to enforce them tell of being "mowed down" by our Department of Justice Department who, with apparent impunity, seems intent on silencing and obliterating anyone who dares challenge the status quo. In 2000, Justice Lawyers requested that I be ordered to pay \$378,000.00 in court costs on one motion. Currently, I am being grilled over the span of seven weeks in pre trial oral examinations. In Washington, DC, viewed by us as far more litigious than Canada, whistleblowers generally face one day of examinations. I urge this Committee to invite Justice Minister Vic Toews to provide testimony on why he has taken no steps to end such abuse of whistleblowers. Further, while conscientious truth tellers finance their own legal cases, government wrongdoers are defended blindly by the Department of Justice.

C-11's provision of \$1,500 for legal advice [\$3,000 in 'exceptional circumstances'] is woefully inadequate against the Government's unlimited resources drawn from the taxpayers. By contrast, the OAS Model Law (Article 13) establishes eligibility for legal aid from a Public Defender.

To meet this campaign promise, the Bill must ensure equal access to legal counsel for both sides.

6. Establish monetary rewards for whistleblowers who expose wrongdoing or save taxpayers dollars.

There has been considerable discussion and controversy regarding this election promise. Some clarification is required. First, suing for damages is not to be confused with “monetary rewards”. Our position is that reprisal victims must have the right to sue for comprehensive compensatory and punitive damages. The idea is to be able to pursue “make whole” remedies to heal the scars of retaliation. Why blow the whistle if the reward of heroism is martyrdom?

The practice of permitting whistleblowers to take a cut of monies recovered against criminals who have defrauded the public purse is another issue. C-11 makes no provision for this type of recovery; however, the Government has signaled that it will consider a made in Canada version of the United States *False Claims Act* although there have been many detractors. Our position is that such an Act should be instituted. There is nothing the matter with doing well and doing good at the same time. Society benefits when the business of fighting corruption becomes more profitable than engaging in it.

To meet this election promise, the Government should pass a Citizens Protection Act or something analogous to the False Claims Act whereby the whistleblower is awarded a share of the stolen public monies. In the meantime, C-11 should unambiguously provide that victims of reprisals can sue for comprehensive damages for lost wages, loss of future earning power, defamation, pain and suffering etc. The \$10,000.00 cap in C-11 for pain and suffering displays a shameful under appreciation of the devastation and often permanent emotional scars that a whistleblower endures.

Conclusion

This Committee has an historic opportunity to provide meaningful protection for employees who through their individual acts of courage serve us the public. How are we to justify giving our first class public service the second class rights that C-11 provides? This is not the time for political expedience. The deaths from Walkerton, the Blood Scandal and Air India demonstrate powerfully what can result when we fail to promote and protect free speech.

Understanding the legal rights necessary to enshrine free speech is more difficult than appears at first blush. I urge the Committee to invite the testimony of Messrs. Louis Clark and Tom Devine, both lawyers, and the founding members of the Government Accountability Project (“GAP”) in Washington, DC. Long regarded as the expert in promoting whistleblower rights as the foundation of government accountability, GAP has provided invaluable counsel dozens of other governments and NGOs. This is the time to do it right, and not rush to adhere to arbitrary deadlines. Canadians deserve no less.