

Federal Accountability Initiative For Reform

FAIR

October 6, 2006

To: Members of the Senate Legal and Constitutional Affairs Committee

Re: Proposed Amendments to the Public Servants Disclosure Protection Act

Dear Committee Members,

The following are the amendments that are, in our view, most critical in order to restore any possibility of this bill being effective in its stated aim.

Throughout this document, the term "C-11" refers to the bill C-11 as amended by C-2, as passed by the House of Commons on June 21, 2006.

1. Duty to Obey the Law and to Disclose Illegality.

These provisions are fundamental: to help prevent wrongdoing and hence the need for whistleblowing, and to change the whistleblowing context from a personal initiative, to a public service duty to bear witness.

C-11 sets the context as being an attempt to 'balance' two principles: the duty of loyalty to the employer, and the Charter of Rights and Freedoms. It should be stated explicitly that the duty of loyalty to the employer does not extend to conducting illegal acts, even if ordered to do so, and that employees have a duty to disclose illegality when they encounter it. Section 4 (and the preamble to the Act) should be amended to enshrine the duty of public servants to report illegality, and their right to refuse to obey an order that they believe violates the law.

Section 4 is amended to include 4.1:

4.1 Every public servant has a duty to disclose wrongdoing, and the right to refuse to obey any order to commit what he or she reasonably believes to be a wrongdoing.

2. Full Free Speech Rights:

Whistleblowers must be able to blow the whistle on wrongdoing anywhere, anytime, and to any audience unless release of the information is specifically prohibited by statute, in which case disclosure must still be permitted to law enforcement and/or Parliament.

C-11 severely restricts the audiences that the whistleblower can disclose to. Section 16 should be amended to remove the restrictions it places on public disclosure. (Section 17 still restricts the right of public disclosure for security reasons.)

Section 16 is amended to read:

16. (1) A public servant may disclose information referred to in section 12 to any public body including:

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- (a) either House of Parliament or any committee of either or both of them, or any member of either House;
- (b) the Office of the Auditor General;
- (c) any court constituted under an Act of Parliament or of the legislature of a province, any public or judicial commission of inquiry established under such an Act or by order of the Governor in Council, or any member of such a court or commission of inquiry;
- (d) any federal, provincial or local regulatory, administrative or public agency or authority, or a creation thereunder;
- (e) the Royal Canadian Mounted police or any other law enforcement agency in Canada, or a peace officer;
- (f) any department or ministry of the government of Canada or a province;
- (g) a parent Crown corporation or Crown corporation as defined in the Financial Administration Act;
- (h) any division, board, bureau, office, committee, commission, agency or employee of any of the persons or bodies described in paragraphs (a) to (g); or
- (i) any publishing or broadcasting entity or other form of the media, or any person representing any of them.

(2) Subsection (1) does not apply in respect of information the disclosure of which is prohibited under any Act of Parliament, including the *Personal Information Protection and Electronic Documents Act*.

2. Right To Disclose All Illegality And Misconduct:

Disclosure must extend to any illegality, gross waste, gross mismanagement, abuse of authority, substantial and specific danger to public health or safety, as well as the contravention of any workplace policy including Treasury Board policies, guidelines, directions et cetera, regulation, rule, professional statement, directive, or code of conduct.

C-11 defines wrongdoing narrowly in a closed list that, for example, does not specifically include Treasury Board policies and guidelines. Section 8 paragraph (a) should be amended to specifically include rules such as Treasury Board policies and guidelines.

Section 8(a) is amended to read:

(a) a contravention, or an intended contravention, of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act, including a contravention of the Treasury Board Manual, and any rule, code of practice, policy, convention, professional statement or directive that applies to, or has been adopted by, the part of the public service of Canada about which the disclosure is made.

3. No Harassment Of Any Kind

Any retaliation taken because of the disclosure must be banned, whether active (such as termination) or passive (such as refusal to promote or to assign meaningful duties).

C-11 does not recognize the extensive range of techniques that have been used for harassment. In Section 2 the definition of “reprisal” should be broadened to include any of the techniques that are typically used.

In Section 2, the definition of “reprisal” is amended to add:

(d.1) Retaliation, discipline, discrimination of any kind, or abuse of authority, directed against the public servant including, but not limited to, psychological harassment, bullying, ostracism, smear campaigns, isolation, failure to inform, withholding of work, failure to promote or hire or take other favourable personnel action.

4. Forum For Adjudication, With Realistic Burden Of Proof And Appropriate Remedies

Access to the Courts

The whistleblower must have access to an effective judicial process including access to our regular courts of justice. Bill C-11 limits the whistleblower to a special-purpose administrative tribunal, an approach that has failed badly in other jurisdictions. In addition the right to go to court was expressly stripped from public servants by virtue of s. 236 of the *Public Service Modernization Act* passed in November 2003.

Coordinating Amendment:

Section 236 of the *Public Service Modernization Act* is repealed.

Section 19 is amended to insert the following prior to 19.1:

19. (1)

A public servant of former public servant who has reasonable grounds for believing that a reprisal has been taken against him or her has the right, in addition to any other process that may be available, to bring a civil action before a court of competent jurisdiction for relief, including appointment to an equivalent position, injunctive relief, retroactive payment of remuneration, lost seniority rights or other benefits including interest, compensation for any lost future promotions or economic earning power and related benefits, general damages, aggravated damages, exemplary damages, punitive damages, reasonable costs and legal fees incurred, and any other award that the Court deems to be fair and equitable to restore the dignity and well being of the plaintiff.

Reverse Onus

Employers can make it impossible for whistleblowers to prove that actions taken against him or her are in fact retaliation. The employer normally has most of the relevant information and the employee very little. The law must therefore provide a reverse onus whereby once the whistleblower has shown that the whistleblowing was a contributing factor in the action taken against them (ie., a short time frame between the whistleblowing and the retaliation), the burden shifts to the employer to show by clear and convincing evidence that the employer had other legitimate reasons for taking the action. C-11 does not do this. Reversing the burden of proof was the single most important reform in the United States in improving the success rate of whistleblower cases.

Section 19 is amended to insert the following prior to 19.1:

19. (2) In any forum, including administrative processes or a court, where a public servant of former public servant is seeking relief, once it has been established that the alleged reprisal action was in any way related to the public servant's or former public servant's making, or intention to make, a protected disclosure, the burden of proof is on the defendant to provide clear and convincing evidence that the reprisal was taken for legitimate, lawful reasons, and would have been taken regardless of the protected disclosure.

Legal Assistance

A procedure that on paper appears fair and straightforward may in reality consume so much time and money that the whistleblower's financial and emotional resources are exhausted long before the process can be completed. Giving rights without the means to enforce them is a cruel delusion. It is essential to seek an equitable playing field so that the individual who finds him or her self confronting the full legal resources of the government can have a chance of success.

C-11 does not recognize this reality, and the provisions that it makes for legal support of the whistleblower are derisory. Since the whistleblower is typically facing a government legal team that has no statutory limits on its resources, Section 25 should place no statutory limits on the extent of the legal support that the Commissioner can provide to the whistleblower, nor on the means of providing this support: these should be at the discretion of the Commissioner.

Section 25.1 is amended by deleting subsections (4), (5) and (6) and renumbering the subsequent subsections.

Comprehensive Relief

Finally, if the whistleblower prevails, the relief must be comprehensive to cover all direct, indirect, and future consequences of the reprisal. Very simply, the whistleblower should be able to claim all damages just like any other citizen. This may mean relocation, medical bills, compensation in lieu of salary, loss of economic earning power, pain and suffering and defamation. Compensatory and punitive damages must be available to "make whole" the whistleblower from the wounds of retaliation. C-11 severely restricts remedies that can be provided.

Section 21.7 should be amended to restore the right to claim all damages. The financial limit of \$10,000 for pain and suffering is unjustifiable and must be removed.

Section 21.7 (f) is replaced by:

(f) provide relief to the complainant, including appointment to an equivalent position, injunctive relief, retroactive payment of remuneration, lost seniority rights or other benefits including interest, compensation for any lost future promotions or economic earning power and related benefits, general damages, aggravated damages, exemplary damages, punitive damages, the reasonable costs and legal fees incurred by the complainant, and any other award that the Court deems to be fair and equitable to restore the dignity and well being of the complainant.

7. Taking Corrective Action

Research has demonstrated that the primary reason that employees remain silent in the face of wrongdoing is that they have no faith that anything will change if they speak up. Also, whistleblower protection becomes a futile exercise if the original wrongdoing is not corrected. C-11 permits the Commissioner only to report on wrongdoing, first to the chief executive and then to Parliament. The Act is silent on who is ultimately responsible for ensuring corrective action, thus perpetuating a lack of accountability

It should be stated explicitly that the ultimate responsibility for ensuring that corrective action is taken lies with the Minister concerned (or in the case of Crown Corporations, the board or

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governing council). To enable the Minister (or other body) to discharge this responsibility, they must also receive the Commissioner's reports.

Sections 22(g) and 22(h) are replaced by the following:

(g) review the results of investigations into disclosures and those commenced under section 33 and report his or her findings to the persons who made the disclosures and to the appropriate chief executives and to the appropriate Minister, board or governing council;

(h) make recommendations to chief executives, and to the appropriate Minister, board or governing council, concerning the measures to be taken to correct wrongdoings and review reports on measures taken in response to those recommendations; and

Section 36 is replaced by the following:

36. In making a report pursuant to s. 22(g) and (h), the Commissioner shall request that he or she be provided, within a time specified in the report, with notice of any action taken or proposed to be taken to implement the recommendations contained in the report or any other corrective action or reasons why no such action has been or is proposed to be taken.

Section 37 is replaced by the following:

37. The Minister, board or governing council shall ensure that effective corrective action is taken promptly.

All of this is respectfully submitted:

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