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**EVIDENCE**

## Thursday, November 18, 2004

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## Chair

**Mr. Leon Benoit**

# Standing Committee on Government Operations and Estimates

**Thursday, November 18, 2004**

● (1100)

[*English*]

**The Vice-Chair (Mr. Paul Szabo (Mississauga South, Lib.)):** Good morning, ladies and gentlemen. This is the eighth meeting of the Standing Committee on Government Operations and Estimates.

Our order today is to continue our review of Bill C-11, an act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings.

Today we have before us, from the Office of the Information Commissioner of Canada, the Honourable John M. Reid, Information Commissioner of Canada; Mr. Alan Leadbeater, Deputy Information Commissioner of Canada; and Mr. Daniel Brunet, general counsel.

Welcome, gentlemen. As you know, this is a bill that has been with us since the last Parliament. We are seized with some important debate on some issues on which consensus is yet to be established. We very much look forward to your input in helping us to better appreciate the nuances of the divergent views on some aspects of this bill. We welcome your comments. I know the members will want to ask you many questions.

Mr. Reid, please begin.

**Hon. John Reid (Information Commissioner of Canada, Office of the Information Commissioner of Canada):** Thank you, Mr. Chairman. It's nice to come back to my home committee from the last Parliament. I feel very pleased about having an opportunity to come back to the government operations committee, and I'm grateful for the opportunity to talk to you today about Bill C-11.

We have a lot of experience on the subject of whistle-blowing, or to use the words of Bill C-11, "disclosure of wrongdoings." Almost every case of whistle-blowing since 1983, when the access act came into force, has involved access requests for records relating to the alleged wrongdoing, and sometimes the requests are made by the whistle-blower in order to gain lawful possession of the records relevant to the wrongdoing. Some access requests are made by lawyers representing whistle-blowers who feel that they have suffered reprisals. Some access requests are made by members of the media or members of Parliament to whom the whistle-blowers have reached out for help. And when instances of wrongdoing are reported in government, the most frequent response from government is an attempt to keep wrongdoing under wraps.

The most current example of the relationship between whistle-blowing and the Access to Information Act is the sponsorship scandal, which has resulted in the establishment of the Gomery commission of inquiry. As we have learned, the problems with the management of the sponsorship program came to light in the first place when internal audits of the program were requested and released to the media and the opposition under the Access to Information Act. Once released, the troubling conclusions of these records were brought to the attention of Parliament and the Auditor General, and the rest, as they say, is history. These internal audits, as we now know, were conducted as a result of an internal disclosure of wrongdoing by Mr. Allan Cutler and others. Yet those audits and their troubling results were not made public until access requests were received.

What, you may ask, is the point? It is this. The provisions of Bill C-11, if they had been in force when Mr. Cutler made his internal disclosure, would have authorized PWGSC to refuse, under the Access to Information Act, to disclose those early audits of the sponsorship program. That is the effect of the subsection contained in clause 55 of Bill C-11. It will enable a government institution to suppress for 20 years instances of wrongdoing, especially those that are reported internally. Moreover, as I will show, the amendment contained in clause 55 of Bill C-11 will not, as the government maintains, ensure that the identities of whistle-blowers are protected.

I hold this view because clause 55 of Bill C-11 proposes to add an additional exemption to the Access to Information Act allowing the government to refuse to disclose any information obtained or prepared by any of the officials to whom a disclosure of wrongdoing may be made. Those officials are a whistle-blower's supervisor, the designated senior officer referred to in subclause 10(2) of Bill C-11, or the President of the Public Service Commission. This proposed exemption from the right of access does not contain an injury test, as does the existing exemption relating to investigations in paragraph 16(1)(c) of the Access to Information Act, and it would place a veil of secrecy over records relating to wrongdoing for 20 years.

As I said earlier, in my view, there is no merit in the government's argument that this new reason for secrecy is necessary to ensure that the identities of whistle-blowers are kept confidential. The Access to Information Act already contains, in section 19, a mandatory exemption from the right of access for personal information, including the identity of a whistle-blower. Moreover, other provisions of Bill C-11 make it clear that there are no guarantees of confidentiality to whistle-blowers. For example, clause 11 and paragraphs 22(d) and (e) state that the obligation to protect the identities of whistle-blowers is subject to obligations to disclose the identity contained in other statutes, such as the Privacy Act, the Access to Information Act, the Public Service Staff Relations Act, and the Criminal Code, and in the principles of natural justice.

● (1105)

In other words, on its face, Bill C-11 alerts potential whistle-blowers to the fact that allegations they make against others may be disclosed, along with the identity of the whistle-blower. That is in the act. This reinforces my view that clause 55 is not intended in any way to protect the identity of whistle-blowers, but is designed to keep the details about alleged wrongdoing secret, and secret for 20 years.

To summarize my first concern, then, I urge the committee to amend Bill C-11 by deleting clause 55. In so doing, the committee will ensure that government institutions must meet the injury test contained in paragraph16(1)(c) of the Access to Information Act or the requirements of one or the other of the act's exceptions before keeping details about alleged wrongdoing secret. Moreover, deleting clause 55 will not diminish the amount of protection under law for the identities of whistle-blowers. The Access to Information Act already gives strong mandatory protection to personal information, to the extent that such information merits protection under the Privacy Act or in the public interest. On this point I will leave it to the Privacy Commissioner, Jennifer Stoddart, to deal with the proposals in clauses 57 and 58 of Bill C-11, which propose to create additional reasons to deny individuals access to their own personal information.

My second concern arises from the provisions of clauses 15 and 29 of Bill C-11. Clause 15 authorizes public servants to disclose information in accordance with proposed sections 12 to 14 and the President of the Public Service Commission to be provided with information "despite... any restriction created by or under any other Act of Parliament on the disclosure of information." These provisions, if enacted, would seriously compromise the scheme for balancing the need for confidentiality and the need to ensure a mechanism for reporting of wrongdoing that Parliament set in place in the Access to Information Act.

The scheme in the Access to Information Act is this. First, the commissioner and all his employees are placed under a mandatory obligation not to disclose any matter that comes to their attention during an investigation. Second, if possible wrongdoing in another department comes to the commissioner's attention during an investigation under the ATIA, Parliament set out the nature of the disclosure that may be made by the commissioner and the processes for so doing. In particular, subsection 63(2) of the Access to Information Act reads as follows:

> The Information Commissioner may disclose to the Attorney General of Canada information relating to the commission of an offence against any law of Canada or province on the part of any officer or employee of a government institution if in the opinion of the Commissioner there is evidence thereof.

In other words, there is already in the Access to Information Act a mechanism for the reporting of malfeasance, criminal activities, and fraud to the proper authorities within the Government of Canada.

In summary, then, the wrongdoing disclosure scheme under the Access to Information Act works like this. It applies to any information collected during investigations of other government institutions. Second, it applies only to wrongdoings with the nature of offences under federal and provincial law. Third, it applies when the Information Commissioner decides that there is an evidentiary base for the suspicion that an offence has been committed. Fourth, it authorizes it to the Attorney General of Canada, but to no one else.

The whole basis of the investigatory scheme and powers of the Information Commissioner is that investigations be conducted in secret—section 35 of the act—and that the evidence collected by the commissioner may not be disclosed or used in any proceedings other than those stipulated in subsection 36(3) and paragraph 63(1)(b) of the Access to Information Act, that is, reviews by the federal court of refusals to disclose or in prosecutions for perjury, obstruction of the commissioner, or wrongful destruction of records. This very restricted regime for disclosure of information collected by the commissioner doing investigations is designed to encourage the candour of witnesses and cooperation by departments in providing information and to demonstrate the neutrality of the commissioner as an ombudsman. All that carefully crafted architecture is at risk of being wiped away by clause 15 of Bill C-11.

● (1110)

Clause 15 of Bill C-11 authorizes any public servant working for the Information Commissioner to disclose to the President of the Public Service Commission investigative records that he or she feels may disclose wrongdoing in another department. Moreover, clause 29 of Bill C-11 would give the President of the Public Service Commission power to intrude into the Information Commissioner's investigatory records, despite the carefully crafted confidentiality regime that applies to such records in the access to information regime described above.

I'm told that the government did not intend clauses 15 and 29 to have such effects with respect to the investigative records held by officers of Parliament and other investigatory bodies. But reading of the legislation makes it clear that this is the effect. I'm told by Treasury Board officials that the intention was to remove any legal impediment to a public servant's authority to report possible wrongdoing in his or her own organization. I support that goal. Regrettably, the broad wording used in clauses 15 and 29 authorize the investigatory records of the Office of the Information Commissioner to be used and disclosed in a process or proceeding unrelated to the purpose for which the information was collected or compiled. This is directly contrary to subsection 36(3) and sections 62 to 65 of the Access to Information Act.

The result of these two clauses strikes at the very foundation of the design and purpose of the Office of the Information Commissioner. It will be used as a reason by government to challenge the Information Commissioner's extraordinary powers to obtain sensitive or privileged records, and it will authorize employees of the commissioner to bypass the Information Commissioner's authority and to depart from their statutory duties of confidentiality under the Access to Information Act.

Complaints come to the Information Commissioner for help in getting records, but most have a grievance, a concern, or an agenda that motivates their access request in the first place. The commissioner's investigations maintain their neutrality and fairness as between the complainant and the government institution against which a complaint is made by concentrating solely on whether or not a refusal to disclose was lawful. They do not and should not become involved in righting other kinds of wrongs. They have enough on their hands as it is. Yet Bill C-11 not only would authorize, but might even require the commissioner and his investigators to become institutionalized whistle-blowers, and hence radically alter the mandates set out for them in the Access to Information Act.

I hasten to add that my suggestion for amending paragraph 15(b) and subsection 29(2) would not prevent any public servant working for the Information Commissioner from reporting any instances of possible wrongdoing that are alleged to have occurred in the Office of the Information Commissioner. My amendments wouldn't alter that responsibility at all. Neither would they reduce the powers of the president of the Public Service Commission, or whoever becomes the investigator, to investigate any such reports. My suggested amendments are designed solely to preserve the confidentiality of the information obtained or generated during our investigations of complaints against other government institutions.

What, then, am I proposing with respect to paragraph 15(b) and subsection 29(2)? I propose that the following words be added to each provision: “except those listed in schedule 1.” A schedule would then be required containing reference to the confidentiality provisions in the statutes of officers of Parliament and other investigatory bodies. In the case of the Access to Information Act, the relevant provisions are sections 62 to 65.

Thank you for your attention, Mr. Chairman.

● (1115)

**The Vice-Chair (Mr. Paul Szabo):** Mr. Reid, as usual, you have not let us down. We're delighted with the very constructive input you've given us.

Colleagues, before we start, there are a couple of items. As you may recall, as to recommendations from both the Information Commissioner and the Privacy Commissioner, the Privacy Commissioner indicated that she declined the invitation to appear on the basis that she was not sure there was much she could add. I can understand that, even though Mr. Reid has raised some issues with regard to the Privacy Act and matters related to his colleague the Privacy Commissioner. So with your concurrence, I will provide a copy of the blues to Ms. Stoddart and ask her to either respond to the committee in writing for circulation to all members or, at her discretion, choose to come and appear before us to address those matters more specifically.

Second, it would appear that there are some legal interpretations here before us as well that may be relevant, and I think it might be useful to also invite representatives from the Department of Justice responsible for the drafting of the legislation who know what the intent was, etc., and can provide us with some elaboration on the matters raised by Mr. Reid today, with your concurrence.

Okay, done. Thank you.

We'll go to questions. We'll begin with Mr. White.

**Mr. Randy White (Abbotsford, CPC):** Thank you, Mr. Chairman.

I do wonder how the Privacy Commissioner knows there's not much more she can add before she gets here, but I guess you must know that.

Thank you, John. It's good to see you again. It's always good to hear your forthright approach to things.

You mentioned experience in whistle-blowing. I have a fair bit of that myself in dealing a lot with corrections employees. I can't think of a group in this country that I have dealt with that is so concerned about even talking to members of Parliament or anybody else for fear of getting transferred to another prison they don't like or being effectively demoted or not sent on courses. You know the routine. They see this as very important.

I want to ask you a couple of things. I want to get it straight now. We have a Privacy Act, an information act related to access to information, and now one on whistle-blowing. I want to know where the conflict or where the priority resides in those acts.

For instance, in regard to the Privacy Act, when you get access-to-information documents, you're lucky if there aren't less than three lines blacked out on any one page. When you go back on those on access to information, it's always, “Well, that's a matter of privacy, so we can't give you that”. You don't know whether or not you're going to get into that argument.

So where does the priority lie in these acts?

**Hon. John Reid:** The division between the Information Commissioner and the Privacy Commissioner is this: The Information Commissioner deals with privacy as it abuts up to access questions, so about a third to about 38% of my work deals with privacy issues. The Privacy Commissioner deals with your access to your private information within, and deals with access to your private information, your personal information.

The section in my act is section 19, which sets out the criteria for releasing information that comes under the Privacy Act, and then it's connected to section 8 of the Privacy Act, which sets out more criteria. The two acts are joined at the hip, as it were, on the privacy issues.

● (1120)

**Mr. Randy White:** So now we introduce Bill C-11, whistle-blowing. Where on the scale of things does that fit in with privacy and information?

**Hon. John Reid:** Part of the purpose of the bill is to protect the privacy of those people who blow the whistle. The government, in the bill, has argued that clause 55, which takes this material away from you and makes it an exception in the act, means it doesn't go out. That's designed to protect the identity of the whistle-blower.

In effect, what that means is that it has, in our judgment, no impact on the protection of the identity of the whistle-blower, because when you go on further into the act, it says it may come out. When you start dealing with the principle of natural justice as defined by the Supreme Court, it then becomes quite clear that the principle of natural justice means that if I am accused of having done something wrong by a whistle-blower, I do have the right, in law, to know who the person is who has made the accusation.

It's a positive obligation in the law to ensure that this information goes out at some point to the whistle-blower. That goes on independent of what happens in clause 55. The effect of clause 55 is to take the information that is involved in the whistle-blowing action away from people to see it, under any circumstance, for 20 years.

Observe what would happen in the case of Mr. Cutler. If this act had been in place and he had blown the whistle, all of the materials dealing with the sponsorship that had come out as a result of requests that were made by the media and members of Parliament later on would be denied by the department under this new clause 55. That's the effect of that clause.

I have looked at it and said that under the existing act there is protection for whistle-blowers. You are not adding any additional protection to the whistle-blower by this clause. In point of fact, any protection you may be gaining under this clause is taken away by the effect of the other clauses that provide a positive instruction to the people involved that natural justice has to be met.

**Mr. Randy White:** For the purpose of this committee, if this bill goes through the House unamended—and you mentioned clauses 15, 16, and 55—what is the consequence of this bill overall?

**Hon. John Reid:** For the Information Commissioner, it's very serious in terms of what it does to my staff. Breaching the confidentiality rules that are very explicit in the Access to Information Act, for the ordinary citizen, for the whistle-blowers themselves, it means they are denied access to this information at any time for twenty years. It means that if you blow the whistle, you have seen some pages and you have gone to your supervisor, and this means at that point that clause 55 is triggered. It means you can never go back and ask for the documents later on. They're out. It means that later on, if you get a hint that you would like to go there, the documents are out. This takes a big chunk of information away from citizens, whistle-blowers, and everybody.

**Mr. Randy White:** John, is provincial legislation regarding privacy or information superceded by federal legislation?

**Hon. John Reid:** No, they apply to each jurisdiction. The only connections that we have are the clauses that deal with the status of federal–provincial relations material that is shared between the two governments. Everything else, like the legislation in Alberta, British Columbia, or Saskatchewan, applies directly to that province. The federal legislation applies directly to the activities of the Government of Canada.

● (1125)

**Mr. Randy White:** Thank you.

[*Translation*]

**The Vice-Chair (Mr. Paul Szabo):** Go ahead, Ms. Thibault.

**Ms. Louise Thibault (Rimouski-Neigette—Témiscouata—Les Basques, BQ):** Thank you, Mr. Chairman.

Mr. Reid, I'd like to thank you and your colleagues for coming here this morning. I must say that I'm greatly reassured. After reading some of the notes handed out to us, I had some questions concerning clause 55. You've answered them for me. Since the Chair has also made some pertinent suggestions, I have no further questions on that subject.

Nevertheless, I do have one other question for you. We did broach with some of the other witnesses the matter of the chair's neutrality on the governance issue. Given your wealth of experience, I'm asking you if you feel this amended disclosure procedure is credible and would work well. Since this kind of a procedure hinges on the trust of whistle-blowers and of Canadians in general, do you think this will be a workable, legitimate and respected procedure? In your opinion, will the fact that the chair position is to be filled by the President of the Public Service Commission meet the criteria not only of the whistle-blowers but of the general public as well?

[*English*]

**Hon. John Reid:** I think whoever becomes the investigator under the act will respect the criteria. However, I think the criterion you want to think about is to use the example of Mr. Cutler and say that given what he went through to be the whistle-blower and given what happened to him in the way he was allegedly treated within the public service, does this act make his position better, is it neutral, or is it worse? I think you want to use hard cases like that.

On your other question, as to whether or not it is something the employees would accept and feel comfortable with, that is something you would have to ask of the union representatives and your own contacts within the civil service. I can't answer that question for you.

It is a difficult thing to find out where to place this office. There are no obvious answers, because there are two things that have to be done. The first thing that has to be done is to protect the whistle-blower from reprisals. The other thing is to make sure that there is an appropriate investigation. Whether you combine those two functions or not, that's another question, but those are the two things that go on. Maybe you have to think about how they can be either separated and then joined, or whether they should be all put in one place at a later point. I have not looked at that question.

[*Translation*]

**Ms. Louise Thibault:** I'd like to ask you another question, if I may. I've read the 2003-2004 report of the Public Service Integrity Officer. I found that Appendix E, which presents the recommendations issued on January 29, 2004 by the Working Group on the Disclosure of Wrongdoing, contained a number of very interesting ideas. Among other things, the Working Group recommended the creation of a new office which would be authorized to conduct proactive investigations.

I'd like your opinion of the following. When the Chair concludes, further to an investigation, that there is the possibility of repercussions in a certain area and that the matter needs to be investigated further, is it appropriate, in your opinion, to have the option of conducting a proactive investigation? Should the bill contain a clause to that effect?

[*English*]

**Hon. John Reid:** There are provisions within the Financial Administration Act that provide that the financial officers have a positive obligation to do proactive investigations wherever they find them, and they have an obligation to report in writing anything they find that they feel is not appropriate. And the Financial Administration Act provides, in a sense, a model for that kind of ongoing, proactive investigation.

I would point out that the process of internal audits within departments also provides a vehicle for proactive investigations within the departments. From the point of view of human resources, the Public Service Commission has always had a responsibility to look at grievances and to make sure the delegated authority that moves to heads of agencies is properly exercised. I think there is a possibility of proactive activity in that field by the Public Service Commission.

In the financial area, I would say that if you looked at the Financial Administration Act and looked at the obligations that are imposed upon the financial officers, there is proactive activity there. And if you look at the process of the draft audits and the final audits, there is also proactive activity there as well.

● (1130)

[*Translation*]

**The Vice-Chair (Mr. Paul Szabo):** Thank you, Ms. Thibault. Your research has been very helpful to the committee.

Go ahead, Mr. Kilgour.

[*English*]

**Hon. David Kilgour (Edmonton—Mill Woods—Beaumont, Lib.):** I'm a new member of this committee, but I'm extremely interested in this subject. Knowing Mr. Reid was to appear this morning, I wanted to be here and I want to congratulate him on what he said.

Your remarks seem to be self-explanatory. Did the Treasury Board consult with you over these issues before it presented us with this bill, which has a great deal of opposition among public servants?

**Hon. John Reid:** No, we were not consulted before the legislation came out.

**Hon. David Kilgour:** You heard our chairman ask for the Department of Justice to appear to give us legal advice.

Mr. Chairman, I used to work for the Department of Justice. Why on earth are we having the Department of Justice come to appear before the committee, which is *parti pris* in these matters? They are not going to say anything that's contrary to what their masters told them to do. Why don't we get independent counsel or the parliamentary counsel from the House of Commons to give us independent legal advice?

**The Vice-Chair (Mr. Paul Szabo):** I'm going to take that under advisement. It's a point well taken.

**Hon. John Reid:** May I suggest, Mr. Chair, that you also consider another factor, and that is that the legal advisers to the Public Service Commission will be lawyers from the Department of Justice?

**The Vice-Chair (Mr. Paul Szabo):** That's a point well taken. Everybody heard it.

Under the circumstances, we cannot afford a false start on this piece of legislation. We have to have a good piece of legislation, and if there are questions that may require a third-party, independent opinion, I'm sure the committee would like to pursue that. So thank you.

**Hon. David Kilgour:** Mr. Chair, I want to point out that we all know Joanna Gualtieri has been a leader on this issue. I am told the Department of Justice has asked for, I think, $4,000 in costs from her for one of the latest applications. This is really wearing her down. So, again, why do we want to have the Department of Justice come anywhere near this committee? It seems to me to be self-evident, given its track record with people like Joanna Gualtieri. I would strongly recommend that you not have them here.

Nobody has talked to you about this bill at all, then, I take it?

**Hon. John Reid:** After the bill came out and we had an opportunity to look at some of the papers prepared for cabinet, then we had discussions with them. But before the bill was prepared and before the cabinet documents were prepared, no, there was no discussion with us at all.

**Hon. David Kilgour:** Amazing.

Thank you, Mr. Chair.

**The Vice-Chair (Mr. Paul Szabo):** Madam Marleau, please.

**Hon. Diane Marleau (Sudbury, Lib.):** You're saying they didn't even consult with you on the prior bill either?

● (1135)

**Hon. John Reid:** That's correct. So they're very consistent.

**Hon. Diane Marleau:** Very consistent.

You mentioned Mr. Cutler's case, and the fact that they have internal and external audit procedures. I'm not sure that this particular piece of legislation, when you look at what happened there, would change very much of what happened there, except perhaps after the fact, when you look at Mr. Cutler's career and you realize he was red-circled.

What's your impression about a piece of legislation that should be in place to address that kind of issue? I mean, you're saying that if we don't do the changes you're bringing forward, all of the paper involved in the Cutler case would be non-acceptable?

**Hon. John Reid:** Non-acceptable, to the whistle-blower and to any citizen. That's the effect of the way in which that clause is written. And it would be behind curtains for 20 years.

**Hon. Diane Marleau:** For twenty years?

**Hon. John Reid:** That's correct. It would have the same status as cabinet papers.

**Hon. Diane Marleau:** And your amendment would do what?

**Hon. John Reid:** My amendment would be to simply remove clause 55 from the bill, and there would be no alteration in the protection provided to the whistle-blower.

**Hon. Diane Marleau:** Essentially, that's what we want.

**Hon. John Reid:** Essentially, that's what you want, but that's not what this amendment does.

**Hon. Diane Marleau:** In your discussions with Treasury Board since the bill was brought forward, have they agreed with your position, or...

**Hon. John Reid:** I think they have agreed with our second position, that there should be something done for investigatory bodies, that this was an unintended consequence. We have accepted that. If you don't know about seven different acts where you run into this thing, you have some problems.

So I think that was an unintended thing. I think, however, clause 55 was deliberate.

**Hon. Diane Marleau:** Why would that be?

**Hon. John Reid:** I can be charitable and say that it was because they didn't understand how the Access to Information Act and the Privacy Act work, but I suspect it had to do with taking material off the table. And that's the effect of it, to take that material off the table, not only the material that applies to the whistle-blower but also the material that applies to the actual cause that the whistle-blower is dealing with.

If you take a look at the clause as it applies also to the information in the hands of the investigator—in the act, now the Public Service Commission—and you look at what happens when the RCMP or CSIS does an investigation, or you look at what happens when the OPP does an investigation, into the public service of Canada, that material is available under the Access to Information Act. When the OPP or the RCMP does an investigation, you can ask for the investigatory file. Now, there's an exemption on that file while the investigation goes on, but it's under the act, and the Information Commissioner, if you appeal, can see that file and can judge whether or not the material in that file actually meets the requirement of the investigation.

When the investigation is completed, that file then comes back under the act and you can see it. However, the information that the RCMP had gathered from the government still continues to be available under the Access to Information Act. This clause, clause 55, means that you cannot see the investigatory file of the Public Service Commission for 20 years, and the material that led to the whistle-blowing is out of your control for 20 years.

What you've done is you've given the whistle-blower legislation and the investigator a higher status to protect their information than CSIS has, than the RCMP has, or than any other investigatory body has. I think that's incredible.

**Mr. J. Alan Leadbeater (Deputy Information Commissioner of Canada, Office of the Information Commissioner of Canada):** Perhaps I could make one clarification, Commissioner, for the record.

Policing bodies, under the act, do have a twenty-year protection for their investigative records without an injury test, but only policing bodies. All other investigative bodies that do harassment investigations or other types of workplace investigations are required to meet an injury test. That is, if disclosure would be injurious to the conduct of the investigation or future investigations, then the exemption is available. If disclosure would release personal information about individuals, there are exemptions for that.

In a sense, then, clause 55 would treat whistle-blowing information at the same level as police investigation information.

**The Vice-Chair (Mr. Paul Szabo):** Thank you, Mr. Leadbeater.

We will move now to Mr. Lauzon, please.

● (1140)

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

Mr. Reid, thank you for being here. I'm not as familiar with you as some of my colleagues are, but obviously your reputation has preceded you. Welcome to your colleagues as well.

I am very heartened by your comments. From the moment I saw this legislation... or perhaps I should give you a bit of my background first. I spent 22 years in the public service. Over those 22 years, I worked in a number of offices. As a matter of fact, I started out as the president of a local union and as a counsellor with human resources development, and ended up being a manager in that situation. So I'm familiar with legislation, and I'm familiar with the interpretation of legislation, privacy information, and that kind of thing.

It really encourages me, when you talk about hard cases, because if we don't get this right, as I've said repeatedly, this legislation could conceivably affect 450,000 public servants. If this is flawed, we're going to blow it, and we'll lose our credibility for years and years to come.

I was really heartened when you said that the employees have to be comfortable with this. You struck right at my heart when you said that. They're the ones the legislation is there to serve. It's not to serve the masters; it's to serve the person who evidences wrongdoing.

At the top of page 7, you say that this is "not intended in any way to protect the identity of whistle-blowers, but is designed to keep the details about alleged wrongdoing secret", and I can say that about other parts of the legislation, too. This is, I believe, a poorly crafted piece of legislation, and it's so critical that we...

You might have some opinions on this. You mentioned the president of the Public Service Commission. I'm convinced beyond the shadow of a doubt, and to the best of my knowledge the unions are convinced, and anyone independent is convinced, that we cannot have the president of the Public Service Commission as the person who's in charge of this legislation. Although she insists that she should be, all evidence is to the contrary.

In view of the fact that you feel the legislation crafted as is... and as you said, it is "not intended in any way to protect the identity of whistle-blowers, but is designed to keep the details about alleged wrongdoing secret". I really like that, and I'm going to repeat it many times in the next 48 or 72 hours.

Do you feel that if we were to have the president of the... Perhaps you can give us your opinion on that. How do you feel about the president... I have always thought... and as I said, with my 22 years of experience—as a manager, by the way. First of all, as a union president, I used the Public Service Commission... and I used to argue with them, of course; they were an arm of management. Then when I became a manager, they were on my side; they were again my colleague, as a manager.

Do you feel the Public Service Commission is the right place to put this legislation?

**Hon. John Reid:** I haven't given too much thought to that. I do believe it's important that it be the Public Service Commission that protects long term the status of a public servant who has gone through the whistle-blowing exercise. I think that's the right place for that. As to whether that's the right place to do the investigation, that's another question, and I have not turned my mind to it.

A number of investigatory bodies are out there. My own office does investigations. The Privacy Commissioner does investigations. You have to think about what the capacity of the system is. And investigators are very tough to find.

**Mr. Guy Lauzon:** What I am referring to is obviously you have a lot of experience with the people this legislation is designed for—public servants.

**Hon. John Reid:** Yes.

**Mr. Guy Lauzon:** Do you feel that the Public Service Commission has the credibility to be independent with public servants?

● (1145)

**Mr. Guy Lauzon:** Although I'm inexperienced and a rookie, your candour is extremely refreshing. Thank you very much.

**Hon. John Reid:** Their legislation does not make them independent in the way that an officer of Parliament is independent. The Public Service Commission is a vehicle used by management for certain management purposes, and I think you have to look at it from the point of view of how the vehicle is established. It is a management vehicle.

[*Translation*]

**The Vice-Chair (M. Paul Szabo):** *Merci.*

Ms. Thibault and Mr. Gagnon, do either of you have any further questions for the witnesses? No?

[*English*]

Mr. Powers.

**Mr. Russ Powers (Ancaster—Dundas—Flamborough—Westdale, Lib.):** Welcome back, Mr. Reid, and indeed it is a pleasure to have you back. I was certainly impressed with your previous presentation to us, and we welcome your candour.

You referred to Mr. Cutler in the earlier things and you referred to whether he was worse off, better off, or neutral. In your opinion, and obviously knowing the case as well as you do, how would you evaluate the situation the way things have played out now?

**Hon. John Reid:** I would say that if this act were in place with clause 55 in, Mr. Cutler would have been in worse condition because there would be no way for him or anyone else to access that information on which his case was based.

**Mr. Russ Powers:** Thank you. Building on that, and I will take it further, taking Bill C-11 as proposed, does it indeed simplify the process? In other words, keeping with the intent of whistle-blowers, does it simplify the process or does it encumber it?

I think the biggest frustration for me, coming from a municipal background, and I will make a rhetorical comment here, is we tend to repeal various bills in order to blend them into one singular location where at a glance you can see everything. What I'm finding frustrating is unless you know the elements of all the different bills, you may act on one and end up cutting your throat because of a clause in another one. I think that is the biggest frustration. And perhaps sometime, and likely beyond my lifetime, we will repeal sections and legitimately blend them together so at a single glance you know what you have to do in order to move the process.

Going on that, do you see Bill C-11—and indeed your staff are welcome to participate—actually simplifying the process and moving the process forward, or would perhaps making the corrections that you suggest still allow it to move forward in a meaningful way?

**Hon. John Reid:** I think the first point to know is if you're a whistle-blower now, there is no legal protection for you. Sometimes you look at what you have to go through now and compare it to what may be in the bill and you ask whether this is better or worse. From the point of view of you as the whistle-blower being able to obtain the information that you require and need, clearly once you've blown the whistle it's worse.

Mr. Kilgour gave the example of someone who had blown the whistle and was still attempting to get information from the government under the Access to Information Act. She would not have that right under this legislation.

Clearly, from the point of view of being able to obtain information to back your charge before you could go to the investigator, you're not going to be as well off as you are now.

**Mr. J. Alan Leadbeater:** Could I just add one thing? In our experience, the employees know that promises of confidentiality are meaningless. Employees in an organization like the Government of Canada know that when you come forward especially to report wrongdoing on the part of superiors, your identity is going to be known. The challenge, it seems to me, for this bill is not to camouflage the reality of the vulnerability that these people are going to be in, but rather shine enough light on the system that when there are reprisals you can find out the reprisals and that there is some avenue of remedy.

Clause 55 takes away the spotlight to find out what actually happens. So once reprisals happen, the whistle-blower gets his lawyer, the lawyer makes an access request to find out what the department did to this guy after he blew the whistle, and there is a twenty-year exemption now.

I don't think it does any good to tell employees that they are going to have their identities protected, because they don't believe it.

**Mr. Russ Powers:** I'm frustrated with clause 22, as ultimately, when the thing plays out, in my opinion, there is absolutely no protection if indeed the employee comes back into the workforce. In other words, they're required to report back. I think there's a movement in the right direction, but I think we still have a long way to go.

● (1150)

**Mr. J. Alan Leadbeater:** In our own investigative work, we do not accept anonymous complaints. Everyone who complains and is investigated, their identity is known, and known to the department. If the complainant is an employee of a government institution and fears reprisal, then we just take it on as a part of our duties to follow the career of that individual and make sure we are always available to re-enter the picture. We will report to departments when we fear that there is a career possibility.

Does that work? I don't know, but that's really the level of ongoing, constant scrutiny. If people are prevented from following the records, the paper trail, the what happened, there will never be any possibility of a remedy.

**The Vice-Chair (Mr. Paul Szabo):** Mr. Boshcoff, please.

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

Has your office received formal documentation from any employee group or individuals regarding this legislation and their concern about it?

**A voice:** No.

**Mr. Ken Boshcoff:** Mr. Kilgour mentioned the widespread discontent. I'm just wondering if there's any way for you to gauge or measure or quantify the public service employees with this.

**Hon. John Reid:** No, there's no way for us to do that. As I said in my statement, we do a lot of work in terms of dealing with these grievances and the like, whistle-blowing. The Access to Information Act is the only vehicle they have, outside of theft, to be able to get the data they need to back up their position—that and I might also add the Privacy Act in terms of giving you access to your own files.

**Mr. Ken Boshcoff:** In the previous formation of this legislation, it was discussed that you hadn't been consulted. Is that correct?

**Hon. John Reid:** That's correct.

**Mr. Ken Boshcoff:** So we go into the phoenix of this one, and you again were not asked directly.

**Hon. John Reid:** No.

**Mr. Ken Boshcoff:** So what is the onus? If you knew you didn't get consulted the first time around, did you register some form of saying you have things to offer that would make this legislation better and make it easier for proponents of the legislation? Did you do any form of civil protest?

**Hon. John Reid:** We do this all the time. Whenever we hear there may be legislation that impacts on us, we are very happy to talk to them about what its impact may be. We're always ready to go. My recollection is that we never get called.

**Mr. J. Alan Leadbeater:** Well, on this particular bill, after we were informed that there would be these confidentiality provisions in the original bill, we expressed our concern that this was merely an attempt to cover up the wrongdoing rather than the identity and we indicated that we would be coming before the committee to make that known.

Of course, that possibility departed with the election and with the introduction of a new bill. At the time when the new bill was just... on the eve of its introduction, we received a phone call from the Treasury Board to tell us,"Thank you very much for your previous representations, but we're going to make the confidentiality even stronger. We're going to widen it. We're going to spread it to all those records when they're in departments, not just when they're in the hands of the investigator." That was a *fait accompli* told to us, and here we are.

**Mr. Ken Boshcoff:** So this is your opportunity, essentially, to say you want some input. I guess my concern is that as a responsible agency, you maybe should have sent some poisoned pen letter saying you were miffed at the fact that you weren't consulted the first time around, and here, members of committee, is where you felt you should be consulted in the next round.

**Hon. John Reid:** Well, we have no right to be consulted. The people who draft legislation and the department that drafts legislation consult whom they choose. There's no inherent right that we have to be consulted on any piece of legislation. They choose to consult whom they wish.

● (1155)

**Mr. Ken Boshcoff:** But you are a fairly knowledgeable source of information. In the normal course of activity in human life you would go to places where there is some expertise.

**Hon. John Reid:** My judgment is that when they decide to put a big exemption into the Access to Information Act, they know exactly and precisely what our opinion will be.

**Mr. Ken Boshcoff:** Can your office do the job that's intended in this legislation better than the president of the Public Service Commission?

**The Vice-Chair (Mr. Paul Szabo):** We're referring to the post, not the person.

**Hon. John Reid:** Yes, thank you, Mr. Chair.

Our work is investigation into documentation, and we're very good at that. We have 21 years of expertise in doing that kind of investigation. Doing this kind of investigation is more complex, because we would be called on to make judgments quite different from the ones we make at the present time. But we do have an investigatory capacity that is almost unique within the Public Service of Canada.

**Mr. Ken Boshcoff:** But can you do it more cost-effectively and more efficiently?

**Hon. John Reid:** As I say, we don't do forensic investigation, so we don't have any experience in doing that. But we do have a capacity to do investigations. It seems to me that no matter where this is placed, there is the Integrity Officer's office that exists with some capacity to do this kind of investigatory work. So if you were to say that it should go to a new office of Parliament or to an existing office, there is a team already in place that has some expertise in dealing with these things.

**The Vice-Chair (Mr. Paul Szabo):** Thank you.

Mr. Poilievre.

**Mr. Pierre Poilievre (Nepean—Carleton, CPC):** I'll be sharing my time with Mr. Preston.

I don't think the enormity of your testimony can be overstated here. This bill was supposed to be in response to the ad scam, but what I think you're telling us in light of clause 55 is that had this bill been in place when the ad scam was occurring, not only would the whistle-blowers of that time not have been protected, but the scandal might not have come to public light at all. In other words, with this bill in place, we might never have had the public accounts committee looking into this scandal, we might never have had the Gomery commission, we might never have known the enormity of the scandal that was going on. Is that really what you're telling us?

**Hon. John Reid:** Yes.

**The Vice-Chair (Mr. Paul Szabo):** Mr. Preston.

**Mr. Joe Preston (Elgin—Middlesex—London, CPC):** Thank you, and thank you for coming.

I'm with Mr. Lauzon. The clearness of your honesty today is great. Apparently, we needed some whistle-blowing from the access to information office in order to state the flaws of the whistle-blowing legislation. We've been discussing in two or three meetings now the amendments that may be needed to make this legislation work for us. The legislation is worth the paper it's printed on at the moment, but it needs some changes.

If we do what you said, take clause 55 out and amend the other two clauses with your suggestions, does that satisfy you from an access to information point of view?

**Hon. John Reid:** That's correct.

**Mr. Joe Preston:** Because I still have trouble with clause 3, where the Governor in Council can, by order, amend the schedule of what departments are covered by this legislation. In your opinion, would that not still make it possible after the fact for the Governor in Council or the cabinet of this land to state that a department is no longer covered by the whistle-blowing legislation, and therefore remove all the protection of people within that department?

**Hon. John Reid:** That has to do with clause 3: “by adding or deleting the name of any Crown corporation or other public body”. So it does give considerable power. You might want to think of putting a subordinate clause in there saying that it has to be referred to a parliamentary committee before it becomes final.

● (1200)

**Mr. Joe Preston:** Or we could simply remove it in a vote.

**Hon. John Reid:** I think you need to have a power, and maybe the power should be restricted only to adding, as there is a constant flow of new institutions created from time to time. But I have to tell you that they probably also need the power to delete, because when you start looking at the changes in the government structure that the new government brought in, you had to get rid of some departments that no longer existed.

**Mr. Joe Preston:** If they no longer existed, there would be no problem with those departments anyway.

**Hon. John Reid:** It would have to act. That's what I think the power is for.

**Mr. Joe Preston:** Great. That was the only answer I needed from you. Thank you very much for your frankness today.

**The Vice-Chair (Mr. Paul Szabo):** If I may just jump in, if there's a situation, say, in the new committee on public safety and emergency preparedness, there was an allegation, and the department, given the nature of its activity, said we can't go there, is there any recourse, or is there any threshold that has to be proven to sustain that opinion?

**Hon. John Reid:** There is a clause that says that those who are outside the act—and it lists a number of organizations that are outside the act—have to provide the necessary criteria on their own, but there is a problem as to who does the investigation and who looks after it. I think this is a question that is very difficult to grapple with.

**Mr. J. Alan Leadbeater:** Could I make just one point, Mr. Chair? The amendment we are recommending to add a schedule in which are listed some confidentiality provisions of other statutes that would still apply could also be used to add “concerning types of information from CSIS, CSE, RCMP”, and so forth, and they could therefore be part of this bill, still being subject to this regime, with the exception that their employees couldn't be disclosing the types of things that are listed in the schedule. That would be national security information, ongoing investigative information, and so forth. Most have statutory provisions in the same way we do. I think that's what we had in mind, that it could allow the bill to be more comprehensive, while still protecting those interests.

**Hon. John Reid:** That's why we suggested doing it by schedule.

**The Vice-Chair (Mr. Paul Szabo):** Which can be amended by Order in Council.

**Hon. John Reid:** That's correct.

**The Vice-Chair (Mr. Paul Szabo):** So you don't have to go through the legislative process.

Madame Thibault.

[*Translation*]

**Ms. Louise Thibault:** Thank you, Mr. Chairman.

With the exception of the type of work that you propose be included in a schedule, do you see any reason, Mr. Leadbeater, why certain groups of employees or organization might be exempted from the application of the act? At present, some are excluded, but you see no reason for that. Correct?

[*English*]

**Hon. John Reid:** It would not exclude employees. It excludes people who are doing particular kinds of things and security things.

[*Translation*]

**Ms. Louise Thibault:** Yes, you're right.

[*English*]

**Mr. Scott Reid:** And it protects the information; it doesn't stop them from proceeding with their complaints.

[*Translation*]

**Ms. Louise Thibault:** Mr. Leadbeater, you're not convinced that the identity of whistle-blowers can be protected, especially in some cases. I agree with you. I've said as much on several occasions and my pronouncement brought smiles to people's faces.

I asked some earlier witnesses about bringing in transitional measures, since the identity of the whistle-blowers is not likely to remain a secret. These transitional measures should be spelled out clearly in advance. Whistle-blowers could be granted paid leave, sent on a special assignment or some other such thing. If persons have the courage to disclose a wrongdoing for the greater good of the community, then we have a duty to protect them.

In your view, should the legislation contain a provision explicitly outlining how jobs and work will be provided for these individuals?

[*English*]

**Mr. J. Alan Leadbeater:** I absolutely agree. In fact, as you know, when a complaint is made about harassment in the workplace, the first obligation of managers is to take remedial measures to separate individuals from the workplace and make sure they're protected, and it seems to me that only goes doubly in this case of wrongdoing.

**The Vice-Chair (Mr. Paul Szabo):** Monsieur Gagnon.

[*Translation*]

**Mr. Marcel Gagnon (Saint-Maurice—Champlain, BQ):** First off, Mr. Chairman, I'd like to apologize for my tardiness. I was detained elsewhere.

I'm not a lawyer. As an ordinary citizen, when I first heard about Bill C-11, I though the aim of the proposed legislation was to protect the public from incidents such as the sponsorship scandal and to pave the way for the disclosure of reprehensible wrongdoing within a department, while at the same time protecting whistle-blowers. That was my understanding of the act's purpose.

However, I've now learned that contrary to what I believed, not only would this act not have prevented the sponsorship scandal, it would have prevented me from hearing about it at all. Am I right about that? It's rather like taking one step forward, two steps back. The public is asking us to take action to avoid another fiasco such as the recent sponsorship scandal.

I just want to make sure that I understand correctly, since I arrived late. Thank you for enlightening us. We'll certainly have to give this matter more thought.

● (1205)

[*English*]

**The Vice-Chair (Mr. Paul Szabo):** Thank you.

There are a couple of quick questions, I believe, from Mr. White and Madam Marleau.

**Mr. Randy White:** I just want to summarize here what's going through my mind. We have had, among other things, a very serious scandal called sponsorship, which we all went through in the last Parliament—and this Parliament as well.

We get a bill from government that appears to enable such scandals to continue. We find that consultation with at least one critical agency—now I'm sure there are going to be questions asked of all other agencies, whether or not they were consulted. We know employees have a very large concern about this, in addition to politicians from virtually all parties.

You also said here today there are very serious consequences if the bill goes unamended. I'm making a statement more than anything. I guess I know why the bill has been presented in this form, and that is to keep the government safe and secure in the event scandals continue.

So I want to thank you very much for your enlightening presentation here today. It certainly convinced me what I already know about scandals in government and how to continue them.

Thank you.

**The Vice-Chair (Mr. Paul Szabo):** Maybe we could just move to Madam Marleau. Then I believe Mr. Poilievre also has a question.

**Hon. Diane Marleau:** I have a question. I mean, I'm not sure I agree with your statement that the sponsorship problems would not have come out if this piece of legislation had been in place, because of Mr. Cutler and whatever kind of protection. My understanding is that the Auditor General has the right to audit any kind of program.

I don't believe that the sponsorship program, as it became constituted, existed at the time of Mr. Cutler's complaints about whatever. So I'm not convinced that if this piece of legislation had been in place, the Auditor General would not have had the right to audit the sponsorship program, because basically that's how the whole thing came out. It was the Auditor General who did a complete audit on all of the things that were going on.

**Hon. John Reid:** I think that's an interesting point.

The Auditor General is not impacted by this legislation, and indeed, the Auditor General has the right and duty to do audits. It is possible that she would have picked this up in due course. However, as I outlined in my remarks, the Auditor General was called in as a result of the disclosures that came under the Access to Information Act after Mr. Cutler had made his complaints. So she was brought in after the fact, after the other material had come out in this particular case. But I think your main point is correct, that the Auditor General is out there as an accountability measure.

There's one thing I want to make absolutely clear in my presentation. I want to make sure that my office is covered under this legislation, so if my employees feel there is something being done that is incorrect or wrong, they will have the right to go to the investigator. I want to make it clear that I do not want to be exempted.

● (1210)

**Hon. Diane Marleau:** I beg to disagree with you on some points. There were many stories in the newspapers that came out that also triggered the audit of the Auditor General. So I'm not convinced it wouldn't have come out anyway.

**Hon. John Reid:** I think that's a legitimate position.

**Hon. Diane Marleau:** I just want to make sure. We may be government, but we don't want these kinds of things any more than anyone else. I certainly never want to see that kind of thing occur again. I'm sure there isn't anyone right now on our side who would want this to occur again. This legislation is made to ensure that whistle-blowers will come forward even more quickly.

**Hon. John Reid:** I hope that will be the end result when the committee finishes its work. But I can tell you that from the point of view of the citizens and whistle-blowers, clause 55 works against that. From the point of view of my office and what we do with the Access to Information Act, the other two clauses I referenced work against my jurisdiction and my ability to run my office. They work against my ability to see a lot of confidential documents.

I come here with two points of view: what happens to people outside who want to reference that material; and what will this bill do—by accident, I hope—to the operation of my office?

**The Vice-Chair (Mr. Paul Szabo):** Very briefly, Mr. Poilievre.

[*Translation*]

**Mr. Pierre Poilievre:** Thank you for meeting with the committee today.

I think everyone here is greatly surprised to learn that this bill would have kept the sponsorship scandal under wraps. When we first set eyes on the draft legislation, we were under the impression that its purpose was to protect whistle-blowers, but in fact the aim of the bill is entirely different. It's truly amazing.

Thank you for enlightening us.

[*English*]

I want to ask you a question that was brought to my attention by a member of the Public Service Integrity Officer's office. They have some concerns that, to be honest, I have not had a chance to study, but due to the fact you're here now, I'll ask you. They are concerned with subclause 49(1). It reads:

> Subject to subsections (2) and (3), when referring any matter under section 35 or making a special or annual report under this Act, the President of the Public Service Commission shall not disclose any information of the kind referred to in any of sections 13 to 24, 69 or 69.1 of the Access to Information Act.

I know that's a lot to digest in a short period of time. I'm not sure if you've had a chance to examine this particular wording. Can you give me an idea of your thoughts on it?

**Mr. J. Alan Leadbeater:** You'll notice that subclause 49(1) refers to sections 13 to 24. That would include section 16, which is being amended by clause 55 to create another new exemption for everything learned during the investigation.

This basically says that in making special or annual reports, the president can't report anything because they're subject to exemptions under the Access to Information Act. Subject to subsection (2), it involves a process—cleansing under the act by a request, consent of the individual, and so forth—that can't be, with respect to section 16, cleansed for 20 years. That's the new proposal.

So I can understand why the person who is charged with doing these investigations and reporting the results would be pretty concerned about this, especially in light of clause 55.

**The Vice-Chair (Mr. Paul Szabo):** I think this has been excellent use of the committee's time to advance the discussion and identify areas of further concern or work for us to do.

Earlier there was an issue with regard to the justice department and possible attendance. The minutes will show we're recommending that the Department of Justice do appear. That's what the committee concurred. But I want to just explain that the reason is that a witness has made direct reference to another department and has made some statements. As a general rule, that party should have the opportunity to respond. However, I think it's also going to be useful to have independent counsel to provide any amplification or clarification the committee may require.

To make all this happen, I've recommended to the clerk to contact our chair to have a steering committee meeting on Monday, at which time we will review our work plan until the Christmas break to make sure that our meetings are full, and that we have everybody scheduled in here so we can continue this work. We will advise the committee when we meet again on Tuesday.

Mr. White.

● (1215)

**Mr. Randy White:** I have no problem at all with the justice department coming here. In fact, I think I'm more interested in them coming here now than I was before. I think there are a lot of questions that should be asked of them.

**The Vice-Chair (Mr. Paul Szabo):** Okay. That's excellent.

No further matters?

Thank you, Mr. Reid, and your colleagues. Again, you've been very helpful.

The meeting is adjourned.

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