

**BILL C-11: THE PUBLIC SERVANTS
DISCLOSURE PROTECTION ACT**

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LEGISLATIVE HISTORY OF BILL C-11

HOUSE OF COMMONS

Bill Stage	Date
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First Reading:	8 October 2004
Referred to Committee:	18 October 2004
Committee Report:	27 September 2005
Report Stage and Second Reading:	
Third Reading:	

SENATE

Bill Stage	Date
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First Reading:	
Second Reading:	
Committee Report:	
Report Stage:	
Third Reading:	

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print**.

Legislative history by Peter Niemczak

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BILL C-11: THE PUBLIC SERVANTS
DISCLOSURE PROTECTION ACT*

BACKGROUND

On 8 October 2004, Bill C-11, the Public Servants Disclosure Protection Act, was introduced in the House of Commons by the Hon. Reg Alcock, President of the Treasury Board of Canada. The bill establishes a legislative mechanism for the disclosure of wrongdoing in the federal public sector, including Crown corporations and other public agencies, and protects public servants in those departments and organizations who in good faith disclose wrongdoing.

A government press release issued on the same day the bill was introduced noted that the bill is an important part of the federal government's broader commitment to ensure transparency, accountability, financial responsibility and ethical conduct in the public sector.

The bill is the second government bill to deal with the subject of disclosures of wrongdoing (i.e., whistleblowing) by federal public servants generally, the earlier one, C-25,⁽¹⁾ having died on the *Order Paper* with the dissolution of Parliament. Bill C-11 includes many of the features of its predecessor bill, but it also includes significant revisions in response to concerns expressed by stakeholders about the previous bill. In addition to the two government bills, there have been numerous private Members' bills on the subject.⁽²⁾ Bill C-11 is the culmination of a number of events that have transpired over the past several years, as outlined below.

* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive royal assent, and come into force.

(1) For a Legislative Summary of Bill C-25, see: David Johansen, *Bill C-25: the Public Servants Disclosure Protection Act*, LS-476E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 2 April 2004.

(2) For examples of private Members' bills on the subject, see: David Johansen, *Bill S-6: Public Service Whistleblowing Act*, LS-430E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 8 October 2002.

A. Chronology

- December 1996 – The Task Force on Public Service Values and Ethics, in its report entitled *A Strong Foundation* (commonly referred to as the Tait Report) recommended that “the Government and Parliament of Canada should adopt a statement of principles for public service, or a public service code,” including a strong disclosure mechanism, to enable employees to voice concerns “about actions that are potentially illegal, unethical or inconsistent with public service values, and to have these concerns acted upon in a fair and impartial manner.”
- 30 November 2001 – The Treasury Board adopted a *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* (commonly referred to as the Internal Disclosure Policy),⁽³⁾ which requires that deputy heads of those government departments and organizations that are listed in Part I, Schedule I, of the *Public Service Staff Relations Act* (in respect of which the Treasury Board is the employer) designate a senior officer responsible for receiving information about alleged wrongdoing in the workplace. As well, the policy created the position of a Public Service Integrity Officer, a neutral third party available to deal with disclosures that an employee believes cannot be raised internally, or that have not been adequately dealt with by the department. Reprisals for disclosures in good faith are prohibited under the policy.
- 1 September 2003 – The *Values and Ethics Code for the Public Service*, previously announced by the President of the Treasury Board, came into effect and became a condition of employment in the federal public service. A breach of the Code was added as one of the grounds for disclosure of wrongdoing in the Internal Disclosure Policy.
- 15 September 2003 – The first Annual Report (2002-2003) of the Public Service Integrity Officer recommended a legislative regime for the disclosure of wrongdoing in the entire federal public sector, including Crown corporations. This recommendation was supported by the Auditor General in her 2003 Report, based on her Office’s own analysis of the current Internal Disclosure Policy.
- 29 September 2003 – The President of the Treasury Board announced the formation of a working group to examine the whistleblowing issue within the federal public sector, and the feasibility of enacting legislation on the subject.

(3) For further information (including references to appropriate Web sites) concerning the Internal Disclosure Policy and subsequent developments leading up to Bill C-11’s predecessor, Bill C-25, the Public Servants Disclosure Protection Act, see: David Johansen, *Protection for Federal Public Service Whistleblowers: Government Policy and Recent Developments*, PRB 01-21E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 February 2004.

- 7 November 2003 – The House of Commons Standing Committee on Government Operations and Estimates tabled its Thirteenth Report, entitled *Study of the Disclosure of Wrongdoing (Whistleblowing)*. The report recommended that the federal government enact legislation to facilitate the disclosure of wrongdoing by workers in the federal public sector and to protect them from employment reprisals.
- 30 January 2004 – The Report of the Working Group on the Disclosure of Wrongdoing recommended a new, legislated, regime for the disclosure of wrongdoing in the federal public sector, including Crown corporations.
- 31 January 2004 – The Hon. Denis Coderre, then President of the Queen's Privy Council and Minister responsible for the Public Service Human Resources Management Agency of Canada, welcomed the Working Group's report, saying that public sector whistleblowing legislation was a top priority and that he intended to take a proposal to Cabinet for approval.
- 10 February 2004 – As part of the federal government's response to the Auditor General's 2003 Report tabled in the House of Commons on the same day, Mr. Coderre announced that the government would introduce whistleblowing legislation no later than 31 March 2004.
- 22 March 2004 – Mr. Coderre introduced Bill C-25, the Public Servants Disclosure Protection Act, in the House of Commons.
- April-May 2004 – The House of Commons Standing Committee on Government Operations and Estimates heard testimony on Bill C-25.
- 23 May 2004 – Bill C-25 died on the *Order Paper* with the dissolution of Parliament.
- 8 October 2004 – The Hon. Reg Alcock, President of the Treasury Board of Canada, introduced Bill C-11, the Public Servants Disclosure Protection Act, in the House of Commons.

B. Highlights

The highlights of the bill are that it:

- contains a preamble that commits the government to establishing a Charter of Values of Public Service that should guide public servants in their work and professional conduct;
- generally applies to the entire federal public sector, including Crown corporations;
- requires the Treasury Board to establish a code of conduct applicable to the federal public sector;

- defines wrongdoing as: the contravention of relevant laws; the misuse of public funds or assets; gross mismanagement in the federal public sector; an act or omission that creates a substantial and specific danger to the life, health or safety of persons or to the environment; a serious breach of the code of conduct; and the taking of a reprisal against a public servant;
- defines a reprisal as any disciplinary action taken against a public servant because he or she made a wrongdoing disclosure in good faith, including: the demotion of the person; termination of employment; the taking of any measure that adversely affects the employment or working conditions of the person; or a threat to do any of those things;
- requires each chief executive responsible for a portion of the federal public sector to establish an internal disclosure mechanism, including the appointment of a senior officer to receive and act on wrongdoing disclosures;
- ensures that there is an additional avenue for disclosures, where necessary, by providing for a neutral third party, the President of the Public Service Commission (hereinafter referred to as the President of the PSC, or the President), to receive disclosures;
- empowers the President of the PSC to investigate alleged wrongdoings and make recommendations to chief executives concerning measures to be taken to correct wrongdoings, and to review reports on measures taken by chief executives in response to those recommendations;
- gives the President of the PSC investigative powers equivalent to those of a commissioner under Part II of the *Inquiries Act*, and permits the President to set deadlines for chief executives to respond to recommendations;
- obligates the President of the PSC to report annually to Parliament through the designated Minister, and permits the President to make special reports to Parliament at any time;
- requires chief executives and the President of the PSC to protect the identity of public servants involved in the disclosure process and the confidentiality of information collected in relation to disclosures, in accordance with other applicable federal statutes and in a manner that ensures that the right to procedural fairness and natural justice of all persons involved in investigations is respected;
- empowers the President of the PSC to investigate reprisal complaints from public servants and permits them to have their complaints dealt with by the appropriate board or tribunal that already has a mandate to address staff relations and workplace issues; and
- allows for appropriate disciplinary action, including termination of employment, for public servants who commit a wrongdoing; this is in addition to, and apart from, other sanctions provided by law.

DESCRIPTION AND ANALYSIS

A. Preamble

The bill includes a preamble that recognizes that the public service of Canada is an important national institution that is part of the essential framework of Canadian parliamentary democracy. Among other things, the preamble notes that public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms*, and that the bill strives to achieve an appropriate balance between those two important principles. The preamble commits the government to establishing a Charter of Values of Public Service that should guide public servants in their work and professional conduct. It is likely that the values will draw upon the value statement in chapter 1 of the existing *Values and Ethics Code for the Public Service*. However, the charter will apply more broadly in that it will cover employees not only in the federal public service but in all of the federal public sector. The charter is in addition to, and separate from, the code of conduct that the bill requires the Treasury Board to establish for the federal public sector.

B. Short Title and Interpretation

The bill is entitled the Public Servants Disclosure Protection Act (clause 1).

Clause 2 contains a number of definitions for purposes of the bill, including those for “protected disclosure,” “public sector,” “public servant,” and “reprisal.”

A “protected disclosure” is defined to mean a disclosure that is “not frivolous, vexatious or made in bad faith” and that is made by a public servant:

- in accordance with clause 12 (disclosure to supervisor or senior officer); 13 (disclosure to the President of the PSC); 14 (disclosure concerning the Public Service Commission may be made to the Secretary of the Treasury Board); or 16(1) (disclosure to the public);
- in the course of a parliamentary proceeding;
- in the course of a procedure established under any other federal statute; or
- when lawfully required to do so.

“Public sector” is defined to mean the departments and other portions of the public service of Canada named in Schedule I to the *Public Service Staff Relations Act*, the bodies named in Schedules I.1, II and III to the *Financial Administration Act*, and the additional Crown corporations and other public bodies set out in the schedule to the bill.

Because of security concerns, the definition of “public sector” does not include the Canadian Forces, the Canadian Security Intelligence Service, the Communications Security Establishment and the RCMP in relation to members and special constables and persons employed by the RCMP under terms and conditions substantially the same as those of a member. Accordingly, the procedures set out in the bill for the disclosure of wrongdoings do not apply to the above organizations. However, by virtue of clauses 52 and 53, these organizations are required to establish comparable procedures. The relevant clauses are discussed under heading “O. Obligation of Excluded Organizations.”

In short, the definition of “public sector” for purposes of the bill means that Crown corporations and public agencies are brought within the ambit of the new disclosure regime set out in the bill. The existing Internal Disclosure Policy applies only to public servants working in departments and agencies listed in Part I of Schedule I to the *Public Service Staff Relations Act*, often referred to as the “core public service.” Those individuals and their institutions come under the purview of the Treasury Board as corporate employer.

A “public servant” is defined to mean every person employed in the “public sector” as defined above.

“Reprisal” is defined to mean any of the following measures taken against a public servant, by reason that the public servant has made a “protected disclosure” or has, in good faith, cooperated in an investigation carried out under the bill:

- disciplinary measure;
- demotion;
- termination of employment;
- any measure that adversely affects the employment or working conditions of the public servant; or
- a threat to take any of the above measures.

C. Amending the Schedule

A schedule is included at the end of the bill listing a number of Crown corporations and other bodies that, along with the departments, Crown corporations and public bodies that fall within other parts of the definition of “public sector” in clause 2, are also included within the definition for purposes of the bill. Clause 3 permits the Governor in Council to, by order, amend the schedule by adding or deleting the name of any Crown corporation or other public body.

D. Promoting Ethical Practices

Clause 4 requires the Minister responsible for the Public Service Human Resources Management Agency of Canada to promote ethical practices in the public sector and a positive environment for disclosing wrongdoings by disseminating information about the bill by appropriate means.

E. Code of Conduct

Clause 5 requires the Treasury Board to establish a code of conduct applicable to the public sector, and before the code is established, the Minister responsible for the Public Service Human Resources Management Agency of Canada must consult with the employee organizations certified as bargaining agents in the public sector. The previous bill did not include a requirement to consult bargaining agents in the development of a code of conduct. The Minister must cause the code to be tabled before each House of Parliament at least 30 days before it comes into force.

However, pursuant to clause 6, chief executives (defined in clause 2 to mean the deputy head or chief executive officer of any portion of the public sector) may go further and establish their own codes of conduct for that portion of the public sector for which they are responsible. The codes must be consistent with the Treasury Board code. The provision permits chief executives to adapt the code of conduct to the needs of their particular organizations.

F. Wrongdoings

Clause 2 defines a “wrongdoing” for purposes of the bill as any of the following wrongdoings referred to in clause 8:

- a contravention of a federal or provincial Act or regulation, if the contravention relates to the official activities of public servants or any public funds or assets;
- the misuse of public funds or assets;
- a gross mismanagement in the federal public sector;
- an act or omission that creates a substantial and specific danger to the life, health or safety of persons or to the environment;
- a serious breach of a code of conduct established under the bill; and
- the taking of a reprisal against a public servant.

G. Disciplinary Action

Clause 9 provides that, in addition to, and apart from, any other sanction provided by law, a public servant is subject to appropriate disciplinary action, including termination of employment, if he or she commits a wrongdoing.

H. Disclosure of Wrongdoings

1. Disclosure to Supervisor or Senior Officer

Each chief executive must establish internal procedures to manage disclosures of wrongdoings in the portion of the public sector for which the chief executive is responsible. He or she must also designate a senior officer to receive and act on such disclosures (in accordance with the code of conduct that must be established by the Treasury Board). The senior officer may be from another portion of the public sector. There is an exception in that the above does not apply if the chief executive has, after giving notice to the Public Service Human Resources Management Agency of Canada, declared that it is not practical to designate a senior officer given the size of that portion of the public sector (clause 10).

According to clause 11, each chief executive must:

- subject to any other federal statute and to the principles of procedural fairness and natural justice, protect the identity of all persons involved in the disclosure process; and
- establish procedures to ensure the confidentiality of information collected in relation to disclosures of wrongdoings.

The bill, in clause 12, authorizes a public servant who believes that he or she is being asked to commit a wrongdoing, or who believes that a wrongdoing has been committed, to disclose the matter to his or her supervisor or the senior officer designated for the purpose by the appropriate chief executive.

2. Disclosure to the President of the PSC

Clause 13(1) states that a public servant may disclose a matter to the President of the PSC if:

- the public servant believes on reasonable grounds that it would not be appropriate to disclose the matter to his or her supervisor, or to the appropriate senior officer, by reason of the subject-matter of the wrongdoing or the person alleged to have committed it;
- the public servant has already disclosed the matter to his or her supervisor or the appropriate senior officer and is of the opinion that the matter has not been appropriately dealt with; or
- the portion of the public sector in which the public servant is employed is subject to a declaration made by the chief executive under clause 10.

The language in clause 13(1) has been altered from the equivalent clause in the predecessor bill, C-25. Many felt that the language used in Bill C-25 required public servants to use their organization's disclosure mechanism first. The intent of the new wording in Bill C-11 is to clarify that public servants can choose to go directly to the President of the PSC, if it is not appropriate to use the internal disclosure mechanism first.

Nothing in the bill authorizes a public servant to disclose to the President of the PSC a Cabinet confidence in respect of which section 39(1) of the *Canada Evidence Act* applies or information that is subject to solicitor-client privilege. The President may not use the confidence or information if it is disclosed (clause 13(2)).

3. Disclosure to the Secretary of the Treasury Board

A disclosure that a public servant is entitled to make under clause 13 to the President of the PSC that concerns the Public Service Commission may be made to the Secretary of the Treasury Board. The Secretary of the Treasury Board has, in relation to that disclosure, the powers, duties and protections of the President of the PSC under the bill (clause 14).

4. Application of Clauses 12 to 14

Clause 15 provides that clauses 12 to 14 apply notwithstanding:

- section 5 of the *Personal Information Protection and Electronic Documents Act*, to the extent that that section relates to obligations set out in Schedule 1 to that Act relating to the disclosure of information; and
- any restriction created by or under any other federal statute on the disclosure of information.

5. Disclosure to the Public

Clause 16(1) permits a public servant who is entitled to make a disclosure under clauses 12 to 14 to make the disclosure to the public if there is not sufficient time to make the disclosure under those clauses and the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that:

- constitutes a serious offence under a federal or provincial Act; or
- constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.

Nothing in clause 16(1) affects the rights of a public servant to make to the public, in accordance with the law, a disclosure that is not protected under the bill (clause 16(2)).

6. Exception to Disclosure – Persons Permanently Bound to Secrecy

The above provisions regarding wrongdoing disclosures by public servants (to their supervisors or senior officers or, in specified circumstances, to the President of the PSC, the Secretary of the Treasury Board, or to the public do not apply to a public servant who is permanently bound to secrecy within the meaning of section 8(1) of the *Security of Information Act* in relation to any information that is special operational information within the meaning of that provision (clause 17).

7. Exception to Disclosure – Dissemination of News by Journalists with the CBC

A new provision not contained in the previous bill provides that nothing in the bill relating to disclosures is to be construed as applying to the dissemination of news and information by journalists with the Canadian Broadcasting Corporation (clause 18).

I. Protection of Public Servants Making Disclosures

Bill C-11 provides reprisal protection for all disclosures (including those made to the public) made in accordance with the bill (see definitions of “protected disclosure” and “reprisal” referred to earlier). This is in contrast to the predecessor bill, C-25, which provided reprisal protection for disclosures made through the internal mechanism or to the proposed Public Sector Integrity Commissioner, but not for authorized public disclosures.

Clause 19 prohibits any person from taking any reprisal (as that term is defined in clause 2 and earlier referred to) against a public servant.

A public servant (or former public servant) who alleges that a person has taken a reprisal against the public servant in contravention of clause 19 may make a written complaint (either himself or herself or through a designated person) to the appropriate Board (clause 20(2)). In relation to a complainant who is (or was) employed in the federal public service, the relevant Board is the Public Service Staff Relations Board. In relation to complainants employed in other portions of the federal public sector, the relevant Board is the Canada Industrial Relations Board (clause 20(1)).

The complaint must be made within 60 days after the date on which the complainant knew, or in the Board’s opinion ought to have known, that the reprisal was taken or, in the event that the complainant has made a disclosure to the President of the PSC in respect of the reprisal during the above 60-day period and the President has decided to deal with the disclosure, within 60 days after the President reports his or her findings to the complainant and the appropriate chief executive (clause 20(3)). The time periods have been increased to 60 days from the 30-day time periods set out in the previous bill, C-25.

Despite any law or agreement to the contrary, a complaint under clause 20 may not be referred by a public servant to arbitration or adjudication (clause 20(4)).

Once the relevant Board has received a complaint, it may assist the parties to the complaint to settle it. The Board must hear and determine the complaint if it decides not to so assist the parties or the complaint is not settled within a reasonable period (clause 20(5)).

If the Board determines that the complainant has been the subject of a reprisal in contravention of clause 19, the Board may, by order, require the employer or the appropriate chief executive (or a person acting on their behalf) to take all necessary measures to:

- permit the complainant to return to his or her duties;
- reinstate the complainant;
- pay compensation in an amount not exceeding the amount that, in the Board's opinion, is equivalent to the compensation that would, but for the reprisal, have been paid to the complainant;
- rescind any measure or action (including disciplinary action) taken in respect of the reprisal, and pay compensation to the complainant in an amount not exceeding the amount that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the complainant; and
- reimburse the complainant for any expenses and other financial losses incurred as a direct result of the reprisal (clause 20(6)).

The President of the PSC has standing in any proceedings under clause 20 for the purpose of making submissions (clause 20(7)).

In a new retroactive provision not contained in the predecessor bill, clause 21(1) provides that a public servant who alleges that a reprisal was taken against him or her by reason that he or she, in good faith disclosed a wrongdoing in the course of a parliamentary proceeding or an inquiry under Part I of the *Inquiries Act*, after 10 February 2004 and before the day on which clause 20 comes into force, may make a complaint under that provision in respect of the reprisal. The 10 February 2004 date is the date on which the Auditor General released her 2003 *Annual Report*, which included the chapters on the Government-wide Audit of Sponsorship, Advertising and Public Opinion Research.

Clause 21(2) provides that the public servant may make the complaint within 60 days after the later of:

- the day on which clause 20 comes into force; and
- the day on which he or she knew or, in the opinion of the Board, ought to have known, that the reprisal was taken.

J. President of the PSC

Whereas the previous bill provided for the appointment of a Public Sector Integrity Commissioner to act as the neutral third party for receiving disclosures and investigating and reaching findings on disclosures of possible wrongdoing, Bill C-11 assigns that task to the President of the PSC. As will be seen subsequently, the President has broader powers than those that would have been given to the proposed Public Sector Integrity Commissioner under the previous bill. The expanded powers include the investigative powers of a commissioner under Part II of the *Inquiries Act*; the power to set deadlines for chief executives to respond to the President's recommendations; and the power to make special reports to Parliament at any time.

1. President's Duties

As specified in clause 22 of the bill, the duties of the President of the PSC are to:

- provide advice to public servants who are considering disclosing a wrongdoing;
- receive, record and review wrongdoing disclosures made by public servants in order to establish whether there are sufficient grounds for further action;
- conduct investigations of disclosures made to the President in accordance with clause 13, and investigations referred to in clause 34, including to appoint persons to conduct investigations on his or her behalf;
- ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including public servants making disclosures, witnesses and persons alleged to be responsible for wrongdoings;
- subject to any other federal Act, protect, to the extent possible in accordance with the law, the identity of persons involved in the disclosure process, including public servants making disclosures, witnesses and persons alleged to be responsible for wrongdoings;
- establish procedures to ensure the confidentiality of information collected in relation to disclosures or investigations;
- review the results of investigations and report his or her findings to the persons who made the disclosures and to the appropriate chief executives; and
- make recommendations to chief executives concerning the measures to be taken to correct wrongdoings and review reports on measures taken by chief executives in response to those recommendations.

2. Restrictions on President's Powers

The bill prohibits the President of the PSC from dealing with a disclosure under the bill if a person or body acting under another federal statute is dealing with the subject-matter of the disclosure other than as a law enforcement authority (clause 23(1)). The bill also prohibits the President from dealing with a disclosure under the bill if the matter could be dealt with under the *Public Service Employment Act*, unless he or she is satisfied, on reasonable grounds, that the disclosure relates to conduct of a systemic nature or the taking of a reprisal (clause 23(2)).

3. President's Right to Refuse Wrongdoing Disclosure

Clause 24(1) provides that the President of the PSC may refuse to deal with a disclosure if he or she is of the opinion that:

- the public servant has failed to exhaust other procedures otherwise reasonably available;
- the subject-matter of the disclosure is one that could be more appropriately dealt with, initially or completely, according to a procedure provided for under another federal statute;
- the subject-matter of the disclosure is not sufficiently important or the disclosure is frivolous or vexatious or made in bad faith; or
- there is a valid reason for not dealing with the disclosure.

If the President decides to refuse to deal with a disclosure or to cease an investigation under the bill, he or she must inform the person who made the disclosure and give reasons for the decision (clause 24(2)).

4. Staff and Facilities

The Public Service Commission may provide the President of the PSC with the officers, employees, professional advisers and facilities that are necessary for the proper conduct of the President's duties under the bill (clause 25(1)). The Public Service Commission may appoint the persons, in the manner provided in the *Public Service Employment Act*, that are necessary for the proper conduct of the President's duties under the bill (clause 25(2)).

5. Delegation of President's Powers and Duties

Clause 26 of the bill permits the President of the PSC to delegate to any employee of the Commission any of the President's powers or duties under the bill except:

- the power to delegate under clause 26;
- the duties in clauses 22(g) and (h) to review the result of investigations, to report findings and to make recommendations;
- the power in clause 24 to refuse to deal with a disclosure and the duty in that clause to provide reasons for the refusal;
- the power to issue, in the exercise of any powers referred to in clause 30(1), a subpoena or other request or summons to appear before the President or a person appointed to conduct an investigation;
- the power in clause 34 to commence another investigation;
- the power in clause 35 to refer a matter to another authority;
- the power in clause 36(1) to remit information; and
- the duty or power in any of clauses 37 to 39 in relation to making a report.

6. Purpose of President's Investigations

Investigations under the bill are for the purpose of bringing the existence of wrongdoings to the attention of chief executives and making recommendations concerning corrective measures to be taken by them (clause 27(1)). The investigations are to be conducted as informally and expeditiously as possible (clause 27(2)).

7. Notice to Chief Executive and Others When Commencing an Investigation

When commencing an investigation under the bill, the President of the PSC must notify the chief executive concerned and inform him or her of the substance of the disclosure to which the investigation relates (clause 28(1)). The President, or the person conducting the investigation, may also notify any other person whose acts or conduct are called into question by the disclosure to which the investigation relates, and inform that person of the substance of the disclosure (clause 28(2)).

8. Opportunity to Answer Allegations

Although the President of the PSC need not necessarily hold any hearing and no person is entitled as of right to be heard by the President, if at any time during the course of an investigation under the bill it appears to the President that there may be sufficient grounds to make a report or recommendation that may adversely affect any individual or any portion of the public sector, the President must, before completing the investigation, take every reasonable measure to give to that individual or the chief executive responsible for that portion of the public sector a full and ample opportunity to answer any allegation, and to be assisted or represented by counsel, or by any person, for that purpose (clause 28(3)).

9. Access to Facilities, Offices, etc.

If the President of the PSC so requests, chief executives and public servants must provide him or her, or the person conducting an investigation, with any facilities, assistance, information and access to their respective offices that the President may require for the carrying out of his or her duties under the bill (clause 29(1)). The above provision applies despite any restriction created by or under any other federal statute on the disclosure of information (clause 29(2)).

10. Powers of the President

Bill C-11 substantially increases the powers of the President of the PSC over those that would have been granted to the proposed Public Sector Integrity Commissioner under the predecessor bill, C-25. In conducting any investigation under Bill C-11, the President has all the powers of a commissioner under Part II of the *Inquiries Act* (clause 30(1)). The proposed Public Sector Integrity Commissioner under Bill C-25 would not have had those powers. Whenever the President issues a subpoena or other request or summons to a person in the exercise of any powers referred to in clause 30(1), he or she must allow that person to be assisted or represented by counsel, or by any person (clause 30(2)). Prior to entering the premises of any portion of the public sector in the exercise of the above powers, the President must notify the chief executive of that portion of the public sector (clause 30(3)).

11. Exception to Clauses 29 and 30

Clause 31(1) provides for an exception to clauses 29 and 30 in that they do not apply in respect of Cabinet confidences in respect of which section 39(1) of the *Canada Evidence Act* applies, or in respect of information that is subject to solicitor-client privilege. The President of the PSC may not use the confidence or information if it is nevertheless received under clause 29 or 30 (clause 31(1)). As well, clauses 29 and 30 do not apply to a person permanently bound to secrecy within the meaning of section 8(1) of the *Security of Information Act* in relation to special operational information within the meaning of that provision (clause 31(2)).

12. Canadian Broadcasting Corporation

With respect to the Canadian Broadcasting Corporation, in making a request referred to in clause 29 or in exercising the powers in clause 30, the President of the PSC must consider whether doing so will unduly disrupt the gathering and dissemination of news and information by the Corporation (clause 32).

13. Self-incrimination

According to clause 33, a public servant cannot be excused from cooperating with the President of the PSC on the grounds that the information given by the public servant may tend to incriminate the public servant or subject him or her to any proceeding or penalty. However, that information (or evidence derived from it) may not be used or received to incriminate a public servant in any criminal proceeding against him or her, other than a prosecution under section 132 (perjury) or 136 (witness giving evidence contrary to his or her previous evidence) of the *Criminal Code*.

14. President's Power to Investigate Other Wrongdoings

Clause 34 provides that if, in the course of investigating a wrongdoing disclosure under the bill, the President of the PSC has reason to believe that another wrongdoing has been committed, he or she may, subject to clauses 23 and 24 (outlined above), commence an investigation into that other wrongdoing. In this case, the provisions of the bill applicable to investigations commenced as the result of a wrongdoing disclosure apply.

15. Investigations Involving the Obtaining of Information
From Outside the Public Sector

If the President of the PSC is of the opinion that a matter under investigation involves the obtaining of information that is outside the public sector, he or she must cease that part of the investigation and may refer the matter to any authority that he or she considers competent to deal with it (clause 35)

16. Remittal of Information to Appropriate Authorities

If the President of the PSC reasonably suspects that information obtained in the course of an investigation may be used in the investigation or prosecution of an alleged contravention of a federal or provincial statute, the President may, in addition to or in lieu of continuing the investigation, remit the information, at that point in time, to a peace officer having jurisdiction to investigate the alleged contravention or to the Attorney General of Canada (clause 36(1)).

In order to maintain the separation of investigations carried out under the bill and those carried out for law enforcement purposes, once information has been remitted under clause 36(1) in relation to any matter, the President may not – except in accordance with a prior judicial authorization – remit any further information in relation to that matter that the President obtains in the course of his or her investigation into that matter and in respect of which there is a reasonable expectation of privacy (clause 36(2)).

17. Reports

Clause 37 provides that in the making of a report in respect of an investigation under the bill, the President of the PSC may, if he or she considers it appropriate to do so, request that the chief executive provide the President, 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 reasons why no such action has been taken or is proposed to be taken. Under the previous bill, the proposed Public Sector Integrity Commissioner did not have the power to set deadlines within which chief executives would have to respond to recommendations.

In circumstances where the President of the PSC considers it necessary, he or she may report a matter to the Minister responsible for the portion of the public sector concerned or, if the matter relates to a Crown corporation, to its board or governing council, including, but not limited to, when the President is of the opinion that:

- action has not been taken within a reasonable amount of time in respect of one of his or her recommendations; and
- a situation that has come to the Commissioner's attention (in the course of carrying out his or her duties) exists that constitutes an imminent risk of a substantial and specific danger to the health and safety of persons, or to the environment (clause 38).

Clause 39(1) requires the President of the PSC, within three months after the end of each fiscal year, to prepare and transmit to the designated Minister an annual report on the President's activities during that financial year. The annual report must include the following information:

- the number of general inquiries relating to the bill;
- the total number of disclosures received, and of that total number, the number that were acted on and the number that were not;
- the number of investigations begun;
- the number of recommendations that the President has made and their status;
- any systemic problems that give rise to wrongdoings;
- any recommendations for improvement that the President considers appropriate; and
- any other matter that the President considers necessary (clause 39(2)).

Clause 39(3) requires the designated Minister to cause the annual report to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the Minister receives it.

Clause 39(4) permits the President, at any time, to make a special report to Parliament referring to and commenting on any matter within the scope of his or her powers and duties under the bill if, in his or her opinion, the matter is of such urgency or importance that a report on it should not be deferred until the time provided for transmission of the annual report.

The power to make a special report to Parliament was not given to the proposed Public Sector Integrity Commissioner under the previous bill. Instead, the proposed Commissioner would have been given the power to submit a special report to the designated Minister to bring to the Minister's attention any matter that, in the proposed Commissioner's opinion, should not have been deferred until the time provided for submission of the next annual report.

Clause 39(5) provides that the Governor in Council may designate a member of the Queen's Privy Council for Canada to be the Minister for purposes of Clause 39.

K. Prohibitions

Clause 40 prohibits a person, in a wrongdoing disclosure or in the course of an investigation of a wrongdoing, from knowingly making a false or misleading statement, either orally or in writing, to a supervisor, a senior officer designated under clause 10, the President of the PSC, or a person acting on behalf of or under the direction of any of them.

Clause 41 prohibits a person from wilfully obstructing a senior officer designated under clause 10 or the President of the PSC, or any person acting on behalf of or under the direction of either of them, in the performance of the duties of the senior officer or the President (as the case may be) under the bill.

Clause 42 prohibits a person who knows that a document or thing is likely to be relevant to an investigation under the bill, from:

- destroying, mutilating or altering the document or thing;
- falsifying the document, or making a false document;
- concealing the document or thing; or
- directing, counselling or causing, in any manner, any person to do any of the things mentioned above, or proposing to any person that they do any of those things.

L. Confidentiality

Clause 43 requires the President of the PSC, and every person acting on behalf of or under the direction of the President who receives or obtains information relating to an alleged wrongdoing, to satisfy any security requirements applicable to persons who normally have access to and use of that information, and to take any oath of secrecy required to be taken by them.

Clause 44 prohibits the President of the PSC, and every person acting on behalf of or under the direction of the President, from disclosing any information that comes to their knowledge in the performance of their duties under the bill, unless disclosure is required by law or permitted by the bill.

M. Legal Protection

The bill protects the President of the PSC, and any person acting on behalf of or under the direction of the President, from civil or criminal proceedings in respect of anything done or omitted to be done, or reported or said, in good faith in the exercise of any power or duty of the President (clause 45).

The President of the PSC or any person acting on behalf of or under the direction of the President is not a competent or compellable witness in any proceedings other than a prosecution for an offence under the bill in respect of any matter coming to the knowledge of the President or that person as a result of performing any duties under the bill (clause 46).

For the purposes of libel and slander laws:

- anything said, any information supplied or any document or thing produced in good faith in the course of an investigation under the bill by or on behalf of the President of the PSC is privileged; and
- any report under the bill made in good faith by the President of the PSC, and any fair and accurate account of the report made in good faith in the media, is privileged (clause 47).

N. General Provisions

The disclosure of information to the President of the PSC under the bill does not, by itself, constitute a waiver of any privilege that may exist with respect to the information (clause 48).

Subject to clauses 49(2) and (3), clause 49(1) prohibits the President of the PSC from disclosing information of the kind referred to in sections 13 to 24 (regarding exemptions from access to information in government records), 69 (concerning the exclusion of Cabinet confidences that have been in existence for less than 20 years from the application of the Act) or 69.1 (certificate under section 38.13 of the *Canada Evidence Act*) of the *Access to Information Act*, when either referring a matter to another authority because the President feels that the matter under investigation would involve obtaining information that is outside the public sector (clause 35) or making a special or annual report under the bill.

Clause 49(2) permits the President to disclose any information of the kind referred to in sections 13 to 22 of the *Access to Information Act* if it has already been disclosed following a request under that Act or with the consent of the relevant individual or an authorized person in the organization with a primary interest in the information.

Clause 49(3) permits the President to disclose any information of the kind referred to in sections 14 to 22 of the *Access to Information Act* if, in his or her opinion:

- the disclosure is necessary to refer any matter under clause 35 or to establish grounds for any finding or recommendation in a special or annual report under the bill; and
- the public interest in making the disclosure clearly outweighs the potential harm from the disclosure.

Clause 49(4) requires the President to consult with the organization having a primary interest in the information before he or she discloses, under clause 49(3), any information of the kind referred to in section 15, 16 or 20 of the *Access to Information Act*.

Section 5 (in Part 1, entitled “Protection of Personal Information in the Private Sector”) of the *Personal Information and Protection of Electronic Documents Act* (PIPEDA) obligates organizations involved in commercial activities to generally comply with the obligations set out in Schedule 1 to that Act regarding the collection, use and disclosure of personal information by those organizations. Part 1 of PIPEDA does not, however, apply in respect of personal information under the control of federal government institutions to which the *Privacy Act* applies and that are listed in the schedule to the latter. Clause 50 of the bill provides that despite section 5 of PIPEDA, to the extent that that provision relates to obligations set out in Schedule 1 to that Act relating to the disclosure of personal information, a report by a chief executive in response to recommendations made by the President of the PSC to the chief executive may include personal information within the meaning of section 2(1) of PIPEDA or section 3 of the *Privacy Act*, depending on which of those Acts applies to the portion of the public sector for which the chief executive is responsible.

Clause 20(4) of the bill provides that when a public servant complains to the appropriate Board under clause 20 alleging a person has taken a reprisal against him or her in contravention of clause 19, despite any law or agreement to the contrary, the complaint may not be referred to arbitration or adjudication. Clause 51 stipulates that, subject to clause 20(4), nothing in the bill is to be construed as prohibiting a person from presenting a grievance under section 91 of the *Public Service Staff Relations Act*, or an adjudicator from considering a complaint under section 242 of the *Canada Labour Code*.

O. Obligation of Excluded Organizations

For security reasons, the definition of “public sector” in clause 2 of the bill provides that, subject to clauses 52 and 53, the definition does not include the Canadian Forces, the Canadian Security Intelligence Service, the Communications Security Establishment and the RCMP in relation to members, special constables and persons employed by that police force under terms and conditions substantially the same as those of a member.

However, clause 52 provides that, as soon as possible after the coming into force of the clause, the person responsible for each of the above excluded organizations must establish procedures, applicable to that organization, for the disclosure of wrongdoings, including protection for persons in those organizations who disclose the wrongdoings. Those procedures must, in the opinion of the Treasury Board, be similar to those set out in the bill.

According to clause 53, the Governor in Council may, by order, direct that any provision of the bill applies, with any modifications that may be specified in the order, in respect of an organization excluded from the definition of “public sector” in clause 2.

P. Five-year Review

Clause 54 requires that five years after that clause comes into force, the Minister responsible for the Public Service Human Resources Management Agency of Canada must cause to be conducted an independent review of the Act, its administration and operation, and must cause a report on the review to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the review is completed.

Q. Amendments

Clauses 55 to 59 set out a number of consequential amendments to other Acts and coordinating amendments to the bill.

In provisions not contained in the predecessor bill, clauses 55, 57 and 58 of Bill C-11 amend section 16 of the *Access to Information Act*, section 9(3) of the *Personal Information Protection and Electronic Documents Act* and section 22 of the *Privacy Act*, respectively, in order to further strengthen the protection of the identity of parties in wrongdoing disclosures made within organizations.

Clause 56 amends the schedule to the *Canada Evidence Act* to add as item 20 “The President of the Public Service Commission, for the purposes of the *Public Servants Disclosure Protection Act*.”

Clause 59 contains a number of coordinating amendments to the bill that are dependent on the coming into force of certain provisions of the *Public Service Modernization Act* and the bill.

R. Coming Into Force

The provisions of the bill, other than the coordinating amendments to the bill set out in clause 59, come into force on a day or days to be fixed by order of the Governor in Council (clause 60(1)).

In accordance with section 114(4) of the *Canada Pension Plan*, the reference to the “Canada Pension Plan Investment Board” in the schedule to the bill comes into force on a day to be fixed by order of the Governor in Council (clause 60(2)).

COMMENTARY

To date, there has been little commentary on Bill C-11 in the press.

However, on 8 October 2004, the same day Bill C-11 was introduced in the House of Commons, the Professional Institute of the Public Service of Canada (PIPSC), a national union representing some 42,000 professional public employees, issued a press release⁽⁴⁾ saying that it was pleased to see the government acting quickly on introducing revised legislation to protect employees who disclose wrongdoing. “It’s the right thing to do,” said Steve Hindle, the union’s President.

Mr. Hindle further explained that:

While the government has sought to address some of the shortcomings of the previous legislation, it has fallen short in such areas as:

(4) “Reintroducing Disclosure Protection Legislation Is Right Thing to Do, Says the Professional Institute,” News release, Professional Institute of the Public Service of Canada, 8 October 2004.

- It is too restrictive in its coverage – the Royal Canadian Mounted Police, the Canadian Security Intelligence Service, the Communications Security Establishment and the Canadian Forces are exempted from the legislation.
- The role of unions in representing their members is unclear. Can unions play the role of surrogate if employees themselves do not wish to make a disclosure?
- The role of the independent third party being given to the President of the Public Service Commission is questionable. The President of the Public Service Commission is still perceived by employees as being part of the Deputy Minister community, and as a result, not fully independent.

Mr. Hindle went on to state: “We believe these shortcomings would have been addressed if the government had taken the opportunity to sit down over the summer months and have discussions with the stakeholders before tabling this legislation. I now encourage Parliament to work diligently to make improvements to ensure Canadians are well served by effective disclosure protection.”