

Whistle Blowing and the Canadian Forces: A New Departure or A
Confirmation of Principles?

By: Yves V. Raic

For: Col. Bernd Horn, Ph.D.

I- Introduction

On November 10, 2004, the author of this report and the Government of Canada have entered into a Contract for Services which stipulated that I would:

“Describe the new ‘whistle-blower’ legislation, specifically what it is, and its impact on the Canadian Forces and its leadership”

I propose to discuss this in three parts. First, I will proceed to describe the legislation. Then, I will compare it with existing legislation that applies to the Canadian Forces, namely the **National Defence Act** (NDA) and its supporting by-laws, the **Queen’s Regulations and Orders for the Canadian Forces** (QR&Os). This will allow us to determine what changes, if any, this new legislation has brought about to the current practice, laws or regulations affecting the Canadian Forces in matters pertaining to whistle blowing. Finally, I will discuss its impact on the leadership of the Canadian Forces.

II- Bill C-11: Public Servants Disclosure Protection Act

On March 22, 2004, the Government tabled Bill C-25 for First Reading to the House of Commons. This Bill was referred to the House’s Government Operations and Estimates Committee on April 20, 2004.¹ It died on the order paper because Parliament was dissolved and a new election was called for June 28, 2004.

The Government reintroduced this Bill after the election. It was reintroduced as Bill C-11 on October 8, 2004 and titled the **Public Servants Disclosure Protection Act**. It was debated at the Referral Stage on October 14, 2004 and referred to the House’s

¹ www.parl.gc.ca

Government and Operations and Estimates Committee on October 18, 2004 and debated in Committee on October 21, 2004, November 4, 18, 30, 2004, December 7, 9, 14, 2004, at which time the House adjourned for the Holidays.² It resumed work on January 31.

As it stands now, the Bill is not yet law and will probably not yet be law until the middle of the winter or the spring, unless the House decides to give it swift passage. Following this, the Senate also has to study the Bill. All the preceding assumes that the country will not be plunged into a new election in the meantime, as the Government is a minority government.

Bill C-11 includes significant revisions to Bill C-25 in response to concerns expressed by various stakeholders in the spring. I do not intend to go over these. Suffice it to say that it aroused a lot of public interest in response to the sponsorship scandal in which the auditor general accused the Government of squandering \$100 million in bogus payments to several Quebec advertising firms that allegedly did little or no work for the money.³

At the outset, it must be pointed out that **the Bill will not apply to the Canadian Forces**. Indeed, the Canadian Forces, the Canadian Security Intelligence Service, the Communications Security Establishment and the Royal Canadian Mounted Police have been excluded from the purview of the Bill for reasons of national security.⁴ However, the Bill provides that as soon as possible after the coming into force of its Section 52, the persons responsible for the excluded organisations (in the case of the CF, the CDS) **must**

² *ibid.*

³ www.cbc.ca, April 28, 2004

⁴ Bill C-11, Sec.2; www.parl.gc.ca

establish procedures, applicable to that organisation, for the disclosure of wrongdoings, including protection for persons in those organisations who disclose the wrongdoings. These procedures **must**, in the opinion of the Treasury Board, be similar to those set out in the Bill. Furthermore, the Governor in Council **has the power to direct that any provision of the Bill applies**, with any modifications that may be specified in the order, in respect of the Canadian Forces or any other excluded organisation.⁵ Thus a study of the Bill is still pertinent. I propose to study it by adapting its provisions to the Canadian Forces.

The Bill includes a preamble that recognizes that the public service of Canada is an important national institution that is a part of the essential framework of Canadian parliamentary democracy. Members of the CF owe a duty of loyalty to the Forces and enjoy the right of freedom of expression as guaranteed by the **Canadian Charter of Rights and Freedoms**, and the Bill strives to achieve a proper 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.⁶ The CF may be required to adopt an equivalent of such a Charter by order of the Government pursuant to Section 53 of the Bill.

Section 2 of the Bill contains a number of definitions that would be of interest to the CF, including those for “protected disclosure” and “reprisal”. A “protected disclosure” is

⁵ Bill C-11, Sec.52, Sec.53.

⁶ Bill C-11, Preamble; Johansen, D., *Bill C-11: The Public Servants Disclosure Protection Act*, Parliamentary Information and Research Service, October 18, 2004.

defined to mean a disclosure that is “not frivolous, vexatious or made in bad faith” and that is made by a member of the CF:

- in accordance with Section 12 (disclosure to a senior officer); 13 (disclosure to the CDS); 14 (disclosure concerning the CDS may be made to the Minister of Defence); or 16(1) (disclosure to the public);⁷
- in the course of a parliamentary proceeding;⁸
- in the course of a procedure established under any other federal statute, including all laws and regulations that apply to the CF;⁹ or
- when lawfully required to do so, including by any law and regulation that apply to the CF.

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

- disciplinary measure;
- demotion;
- discharge;
- any measure that adversely affects the employment or working conditions of the member of the CF; or
- a threat to take any of the above measures.¹⁰

⁷ Bill C-11, Sec. 2; Johansen, D., *ibid*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

Section 4, by adaptation, would require the Minister of Defence to promote ethical practices in the CF and a positive environment for disclosing wrongdoings by disseminating information about the equivalent procedures to the Bill that the CDS would enact.¹¹ Note that this is an adaptation of the Bill to the circumstances of the CF. All of this will have to be adapted in a larger context and some provisions of the Bill might not be made applicable to the CF, either because it is not practicable to do so or because it might jeopardize national security. Everything in this paper is very tentative at best.

Section 5 of the Bill would require either the Minister of National defense or the CDS to establish a code of conduct applicable to the CF.¹²

Section 2 of the Bill defines a “wrongdoing” as any of the following wrongdoings referred to in Section 8:¹³

- a contravention of a federal or provincial Act or regulation, if the contravention relates to the activities of members of the CF or any public funds or assets;
- the misuse of public funds or assets; for the CF, that would presumably be linked to capital equipment in addition to public monies;
- a gross mismanagement in the CF;
- an act or omission that creates a substantial and specific danger to the life, health or safety of persons or to the environment;

¹¹ Bill C-11, Sec. 4

¹² Bill C-11, Sec. 5

¹³ Bill C- 11, Sec. 2, Sec. 8; Johansen, D., *ibid*

- a serious breach of a code of conduct established under the Bill or already in force in the CF; and
- the taking of a reprisal against a member of the CF.

Section 9 provides that, in addition to, and apart from, any other sanction provided by law, a member of the CF is subject to appropriate disciplinary action, including discharge, if he or she commits a wrongdoing.¹⁴

Section 10 provides that the CDS or the Deputy Minister of Defence (since this is brand new legislation, we do not yet know whether the “chief executive” the Bill refers to is the CDS or the Deputy Minister. I will refer to the CDS only in this paper but it may well be that the tasks described fall to the Deputy Minister of Defence) **must** establish internal procedures to manage disclosures of wrongdoing in the CF.¹⁵

According to Section 11 of the Bill, the CDS must:

- subject to any other federal statute and to the 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.¹⁶

Section 12 authorizes a member of the CF who believes that he or she is being asked to commit a wrongdoing, or who believes that a wrongdoing has been committed, to

¹⁴ Bill C-11, Sec. 9

¹⁵ Bill C-11, Sec. 10

¹⁶ Bill C-11, Sec. 11

disclose the matter to his or her superior or the senior officer (I understand that in the CF “senior officer” means “general officer” or “flag officer”. This is not what is intended by the Bill. Rather the Bill intends to refer to a “senior officer” as the officer in charge of a regiment, for example) designated for the purpose by the CDS.¹⁷

Section 13 allows a member of the CF to disclose a matter to the CDS if:

- the member believes on reasonable grounds that it would not be appropriate to disclose the matter to his or her superior, or the senior officer, by reason of the subject-matter of the wrongdoing or the person alleged to have committed it;
- the member of the CF has already disclosed the matter to his or her superior or to the senior officer **and** is of the opinion that the matter has not been appropriately dealt with.¹⁸

Section 16 allows a member of the CF who is entitled to make a disclosure under the previous Sections to make that disclosure to the public if there is not sufficient time to make the disclosure under the previous Sections and the member of the CF 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.¹⁹

¹⁷ Bill C-11, Sec. 12

¹⁸ Bill C-11, Sec. 13 (1)

¹⁹ Bill C-11, Sec. 16(1)

Furthermore, a member of the CF has the right to make to the public a disclosure that is not protected under the Bill, provided this disclosure is made in accordance with the law.²⁰

The above provisions relating to the disclosure of wrongdoings by members of the CF do not apply to a member that is 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.²¹ This refers to employees or former employees of CSIS, the RCMP, and Communications Intelligence employees when they perform work generally related to espionage, defence against terrorism and threats to the national security of Canada.

Bill C-11 provides reprisal protection for **all** disclosures, including those made to the public and in accordance with the Bill.²² The disclosures are those referred to as “protected disclosures” and “reprisal” is any measure referred to in Section 2 discussed above.²³

There follows a set of sections dealing with the procedures for filing a complaint in case a reprisal is taken. The way they are framed have little relevance to the CF and that is probably why the Bill provides that it is not applicable to the CF. However, since Section 52 would oblige the CF to adopt procedures for the disclosure of wrongdoings, including

²⁰ Bill C-11, Sec. 16(2)

²¹ Bill C-11, Sec. 17; **Security of Information Act, Sec. 8(1)**

²² Bill C-11, Sec. 19

²³ See notes 7,8,9,10

the protection of persons who disclose the wrongdoings, similar to those contained in the Bill, I will review the most salient of them.

A member or former member of the CF who alleges that a person has taken a reprisal against him or her may make a **written** complaint, either himself or herself through a designated person, to the JAG's Office.²⁴ The complaint must be made within 60 days after the date on which the complainant knew, or in the JAG's opinion ought to have known, that the reprisal was taken.²⁵

A tribunal (I assume it would be a tribunal set up under military law) which has received a complaint **may** assist the parties to the complaint to settle it. This tribunal **must** hear and adjudicate the complaint **if** it decides not to assist the parties **or** the complaint is not settled within a reasonable period.²⁶

If the tribunal determines that the complainant has been the subject of a reprisal in contravention of Section 19, it may, by order, require the CF or the appropriate superior or senior officer to take all necessary measures to:

- permit the complainant to return to his or her duties;
- reinstate the complainant;

²⁴ Bill C-11, Sec. 20(2) adapted to our situation.

²⁵ Bill C-11, Sec. 20 (3) a) adapted to our situation

²⁶ Bill C-11, Sec. 20 (5) adapted to our situation

- pay compensation in an amount not exceeding the amount that, in the tribunal'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 tribunal'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.²⁷

Section 22 if adapted properly could convey additional powers to the CDS. According to this adapted Section, the duties of the CDS would be to:

- provide advice to the members of the CF who are considering disclosing a wrongdoing;
- receive, record and review wrongdoing disclosures made by CF members in order to establish whether there are sufficient grounds for further action;
- conduct investigations of disclosures made to him according to Section 13 (disclosure made directly to him because the complainant considers that because of the subject-matter, the disclosure could not be made to his superior or senior officer or because the disclosure has not been properly dealt with by the superior or senior officer), and investigations referred to in Section 34 (wrongdoing committed in the course of an investigation), including to appoint persons to conduct investigations on his or her behalf;

²⁷ Bill C-11, Sec. 20(6) adapted to our situation

- ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including CF members 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 CF members 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
- make recommendations to general officers (those who are in the procedural chain of the disclosure process) concerning the measures to be taken to correct wrongdoings and review reports on measures taken by superior officers in response to those recommendations.²⁸

Section 23(1) would prohibit the CDS 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.²⁹

The CDS may refuse to deal with a disclosure if he or she is of the opinion that:

²⁸ Bill C-11, Sec. 22

²⁹ Bill C-11, Sec. 23(1)

- the CF member 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 by 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.³⁰

If the CDS 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.³¹

Investigations conducted under the Bill are for the purposes of bringing the existence of wrongdoings to the attention of general officers (those who are in the procedural chain of the disclosure process) and making recommendations concerning corrective measures taken by them.³² The investigations are to be conducted as informally and expeditiously as possible.³³

When initiating an investigation under the Bill, the CDS must notify the general officer concerned and inform him or her of the substance of the disclosure to which the

³⁰ Bill C-11, Sec. 24(1)

³¹ Bill C-11, Sec. 24(2)

³² Bill C-11, Sec. 27(1)

³³ Bill C-11, Sec. 27(2)

investigation relates.³⁴ The CDS 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.³⁵

Although the CDS need not necessarily hold any hearing and no person is entitled as of right to be heard by the CDS, if at any time during the course of an investigation under the Bill it appears to the CDS that there may be sufficient grounds to make a report or recommendation that may adversely affect any individual or any part of the CF, the CDS **must**, before completing the investigation, take every reasonable measure to give to that individual or the superior responsible for that part of the CF a full and ample opportunity to answer any allegation, and to be assisted or represented by counsel, or by any person, for that purpose.³⁶

A member of the CF cannot be excused from cooperating with the CDS on the grounds that the information given may tend to incriminate the member of the CF or subject him or her to any proceeding or penalty. However the information (or evidence derived from it) may not be used to incriminate a member of the CF in any criminal proceeding against him or her, other than a prosecution for perjury or as witness giving evidence contrary to his or her previous evidence (Sections 132 and 136 of the **Criminal Code**).³⁷

³⁴ Bill C-11, Sec. 28(1)

³⁵ Bill C-11, Sec. 28(2)

³⁶ Bill C-11, Sec. 28(3)

³⁷ Bill C-11, Sec. 33

The CDS may, in the course of an investigation, commence an investigation in **another** wrongdoing if he or she has reason to believe that another wrongdoing has been committed, subject to Sections 23 and 24 of the Bill (prohibition to deal with a disclosure if a person acting under another federal statute is dealing with the disclosure other than as a law enforcement authority and CDS' right to refuse to deal with a disclosure).³⁸

If the CDS is of the opinion that a matter under investigation involves the obtaining of information that is **outside** the CF, 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.³⁹

If the CDS 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 CDS 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.⁴⁰

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 according to the previous paragraph in relation to any matter, the CDS **may not**, except in accordance with a prior judicial authorization, remit any **further** information in relation

³⁸ Bill C-11, Sec. 34

³⁹ Bill C-11, Sec. 35

⁴⁰ Bill C-11, Sec. 36(1)

to that matter that the CDS obtains in the course of his or her investigation into the matter and in respect of which there is a reasonable expectation of privacy.⁴¹

Section 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 superior, a general officer, the CDS, or a person acting on behalf of or under the direction of any of them.⁴²

It is illegal for any person to wilfully obstruct a general officer (those who are in the procedural chain of the disclosure process) or the CDS, or any person acting on their behalf.⁴³

Section 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 that they do any of those things.⁴⁴

⁴¹ Bill C-11, Sec. 36(2)

⁴² Bill C-11, Sec. 40

⁴³ Bill C-11, Sec. 41

⁴⁴ Bill C-11, Sec.42

The CDS, and every person who acts on behalf of or under the direction of the CDS 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.⁴⁵

The CDS, and every person acting on his or her behalf or under his or her direction, is prohibited 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 is permitted by the Bill.⁴⁶

The Bill protects the CDS or any other person acting on his or her behalf or acting under his or her authority, 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 CDS.⁴⁷

The CDS or any person acting on behalf of or under the authority of the CDS is not a competent witness in any proceeding other than a prosecution for an offence under the Bill in respect of any matter coming to the knowledge of the CDS or that person as a result of performing any duties under the Bill.⁴⁸

For the purposes of libel and slander laws:

⁴⁵ Bill C-11, Sec. 43

⁴⁶ Bill C-11, Sec. 44

⁴⁷ Bill C-11, Sec. 45

⁴⁸ Bill C-11, Sec. 46

- 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 CDS is privileged; and
- any report under the Bill made in good faith by the CDS, and any fair and accurate account of the report made in good faith in the media, is privileged.⁴⁹

III- The National Defence Act and the QR&Os

The **National Defence Act**⁵⁰ and the **QR&Os** enacted there under make up the main legislation applicable to the CF. This legislation **already covers all that is covered** by Bill C-11 and more. All that would be needed in case of the adoption of a set of procedures similar to those provided in the Bill, should this ever be required, would be a separate section in the **QR&Os** streamlining all the pertinent sections in one chapter for better understanding. This legal work is best done by specialised lawyers trained in the application of the **National Defence Act** and the **QR&Os**.

Without delving into the details of the NDA and the QR&Os, I propose to point out several sections of this legislation that already covers the situations envisaged by the Bill and more. For instance, while the Bill gives the right to a public servant to disclose wrongdoing, the legislation applicable to the CF (CF legislation) **makes it a duty** for an officer to disclose it.⁵¹ Furthermore, an officer shall promote the welfare, efficiency and

⁴⁹ Bill C-11, Sec. 47

⁵⁰ R.S., c. N-4

⁵¹ QR&Os, Vol.I, c. 4, sec. 4.02 e)

good discipline of all subordinates.⁵²Section 129 (1) of the NDA makes it an offence to prejudice good order and discipline through any act, conduct, disorder or neglect. An officer commanding a command must report any unusual incident to NDHQ and Regional Headquarters.⁵³

For non-commissioned members who wish to report wrongdoing and are adversely affected as a consequence, there is a possibility to have recourse to the grievance procedure provided in the NDA and the QR&Os. These procedures and the protection they afford are quite similar to the Bill.⁵⁴

The CF legislation contains an array of offences and procedures to deal with them which go far beyond what is already envisioned by the Bill. The NDA and the **Code of Service Discipline**⁵⁵ create a series of offences that include and go beyond what is provided by the Bill and a series of mechanism to deal with them that are also more encompassing.⁵⁶

In conclusion, there is nothing in the Bill that is not already covered by the CF legislation. Thus, **it is safe to conclude that the obligation it imposes on the CF to adopt procedures similar to its provisions in its section 52 will have no significant impact on the CF and its leadership. Likewise, should the government decide to**

⁵² *Ibid*, sec. 4.02 c)

⁵³ *Ibid*, sec. 4.11

⁵⁴ Sec. 29-29.28 of the NDA and QR&Os, Vol.I, c. 7.

⁵⁵ QR&Os, Vol. II.

⁵⁶ An offence against any Act of Parliament can be a “service offence” (NDA, sec. 2). It is possible to be relieved from duty pending an inquiry into an offence against any federal or provincial law (QR&Os, Vol.II, sec. 10108 (3) e). The NDA provides the possibility, in its sec.45 and 45.1, of setting up a Board of Inquiry to investigate any matter connected with the government, discipline, administration or functions of the CF or affecting any of its members.

extend the application of Bill C-11 (or some of its parts) to the CF, no significant impact should ensue for the CF and its leadership. It will remain for the legal specialists trained in military law to work in concert with the appropriate authorities to ensure a smooth integration of the Bill's provisions with the existing legislation to avoid legal pitfalls. Of course, this assumes that the Treasury Board is of the view that the existing legislation does not meet the standards set out in the Bill. This is highly unlikely. **Thus, it is quite possible to conclude that the CF will have nothing, or close to nothing, to add to the current legislation.**

IV-The impact of whistle blowing legislation on the CF and its leadership

Bill C-11 will have almost no impact on the CF and its leadership. In fact, whistle blowing has been legally embedded with the CF for a long time and the CF has learned to live with it. Whistle blowing can be seen as a means to sustain a viable military culture or ethos⁵⁷ and a viable Command and Control (C2)⁵⁸.

A) Military Culture and Ethos

Military culture and ethos are often used interchangeably. The *Compact Oxford English Dictionary* defines *ethos* as “the characteristic spirit of a culture, era or community.” One issue that is currently debated is the gap that is desirable between the military and civilian

⁵⁷ English, Allan D., *Understanding Military Culture: A Canadian Perspective*, (Montreal & Kingston, 2004) 60-70, 98-102, 109-10.

⁵⁸ G.E. (Joe) Sharpe and English, Allen D., *Principles for Change in the Post-Cold War Command and Control of the Canadian Forces* (Ottawa: DND, 2002); Pigeau, Ross and McCann, Carol, “What is a Commander?” in Bernd Horn and Harris, Stephen J., ed., *Generalship and the Art of the Admiral*, (St. Catherines, 2001), 79-104.

ethos in a nation.⁵⁹ History has shown that military culture is based on both the society from which it springs as well as the specific nature of an armed force. Civil-military relations and the ethos of both a society and its military provide the background from which the values, attitudes and beliefs of both a society and its armed forces are informed.⁶⁰

In the case of Canada, military culture has taken the form of a statement of espoused values that describe what “ought to be” rather than “what is”, based on both the nature of the CF and the society from which it springs.⁶¹ Canada’s latest statement about military culture and ethos is included in a publication issued by DND under the direction and command of its then CDS, General Raymond Henault, in 2003.⁶² *Duty with Honour* is meant to present the theoretical and philosophical underpinnings of the profession of arms, show how it serves Canada and Canadian interests and to codify what it means to be a Canadian military professional.⁶³

Two assumptions guided *Duty with Honour*. The first one was that the country’s military had to share a common understanding of the concept of military professionalism and how it applies to Canada and its citizens. It was needed to maintain the trust between the CF and the Canadian people and meet the challenges of the complex environment of armed

⁵⁹ English, *supra*, 57; see also Samuel P. Huntington, *The Soldier and The State: The Theory and Politics of Civil-Military Relations*, (Cambridge, Mass., 1959)

⁶⁰ English, *supra*, 57.

⁶¹ *Ibid*; see also Cotton, C.A., “A Canadian Military Ethos”, *Canadian Defence Quarterly* 12, no. 3 (Winter 1982/83), 10-18.

⁶² *Duty with Honour: The Profession of Arms in Canada*, (Ottawa:DND, 2003)

⁶³ *Ibid.*, 2.

conflict.⁶⁴ The second one was the need for CF members to have a common understanding of the military ethos and to embrace both a collective and individual identity as members of the Canadian profession of arms in order to ensure success for the CF in modern armed conflicts.⁶⁵

The military profession is characterized by four attributes: **Responsibility** acknowledges a special duty to society; **Expertise** describes the body of knowledge the profession acquired over time; **Identity** reflects the CF member's unique standing within society; **Military ethos** is associated with the particular values and obligations that make up the foundation of the profession.⁶⁶

Duty with Honour states that the core **responsibility** of the CF is the defence of Canada and Canadian interests. The CF is accountable to the government and the people of Canada for the successful accomplishment of this. Central to this responsibility is the need for accountability, acting in compliance with the law and maintaining the highest standards with respect to professional attributes.⁶⁷ **The whole body of current CF legislation is meant to honour and reinforce this.** Bill C-11 does not fundamentally add to or subtract from this.

Duty with Honour states that the **expertise** required from CF members is determined by the direction, operation and control of an organization dedicated to the organized application of military force. This includes a highly developed capacity for judging its

⁶⁴ *Ibid.*, 4

⁶⁵ *Ibid.*, 4

⁶⁶ *Ibid.*, 7

⁶⁷ *Ibid.*, 14

use and how it is employed, in agreement with legal principles and other values of the military ethos.⁶⁸ Again, **the current CF legislation is meant to sanction and reinforce this**. Its many provisions that give a right to any member to report wrongdoing, and on occasion, a duty to report wrongdoing (officers) are meant to enforce its essence. Bill C-11 neither adds, nor subtracts from any of this.

Duty with Honour states that CF members derive a collective unity and **identity** from the unique function they perform. This revolves around three concepts with which CF members identify: voluntary military service, unlimited liability and service before self.⁶⁹

Finally, the **military ethos** embodies the spirit that binds the profession. It clarifies how CF members view their responsibilities, apply their expertise and express their identity.⁷⁰ This ethos ultimately embodies fundamental Canadian values.

More specifically, *Duty with Honour* states that ethos is the foundation upon which the legitimacy, effectiveness and honour of the CF depend.⁷¹ There are four fundamental beliefs and expectations that are spoken to by the military ethos: **unlimited liability, fighting spirit, discipline and teamwork**.⁷² **The body of current CF legislation, including protection for whistle blower, reinforces this**. Bill C-11 neither adds, nor subtracts from this.

⁶⁸ *Ibid.*, 17

⁶⁹ *Ibid.*, 20

⁷⁰ *Ibid.*, 21

⁷¹ *Ibid.*, 25

⁷² *Ibid.*, 27-28

Finally, *Duty with Honour* explains how military values are understood and expressed within the Canadian military ethos. **Duty** entails, among other things, service to Canada and compliance with the law. It also compels members of the military to adhere to the law of international conflict and display dedication, initiative and discipline in the execution of their tasks.⁷³ It is clear that the **current body of CF legislation, including its protection of whistle blowers, is meant to enforce the essence of duty.** Bill C-11 neither adds, nor subtracts from this.

Loyalty entails personal allegiance to Canada and faithfulness to comrades across the chain of command. For it to endure, it must be reciprocal and based on mutual trust.⁷⁴ I am of the view that trust cannot exist between members of the CF across the chain of command if the organization is riddled with corruption and criminality. The **current body of CF legislation is designed to create mechanisms that support the concept of loyalty.** Bill C-11 neither adds to, nor subtracts from this.

Integrity demands a commitment to a principled approach to meeting one's obligations while being responsible and accountable. Actions must be consistent with established codes of conduct and values. It requires transparency in actions, speaking and acting with honesty and candour, the pursuit of truth, regardless of the circumstances, and a dedication to fairness and justice.⁷⁵ The **current body of CF legislation is designed to create mechanisms that support the concept of integrity.** Bill C-11 neither adds to, nor subtracts from this.

⁷³ *Ibid.*, 30

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, 31

Courage is described as a set of qualities that allows a person to disregard the cost of action in terms of physical difficulty, risk, advancement or popularity. It is also a renunciation of fear that must be made sometimes more than once. It⁷⁶ is thus both moral and physical. The **current body of CF legislation supports and sanctions courage. It is possible for a member and obligatory for an officer to report lack of courage, especially if it affects the mission or the safety of the troops.** Bill C-11 does not add to, nor subtracts from this.

Military values or military ethos constitute a manner of conducting oneself and operations that earn for members of the CF the highly regarded military quality of **honour.**⁷⁷

In conclusion, as regards this section, it can be stated that whistle blowing legislation, whether contained in the current CF legislation or in Bill C-11 supports and reinforces the current Canadian ethos of duty with honour in the Canadian Forces.

B- Command and Control

Whistle blowing is also a means to sustain a viable Command and Control. Pigeau and McCann have offered a model of Command and Control that has been recommended to

⁷⁶ *Ibid.*, 31

⁷⁷ *Ibid.*, 32

NDHQ by Brigadier-General G.E. (Joe) Sharpe and Allan D. English. Pigeau and McCann had conducted their study in 2000.⁷⁸

Command was defined as *the creative expression of human will necessary to accomplish the mission*, while Control was defined as *those structures and processes devised by Command to manage risk*. Finally, Command and Control is defined as *the establishment of common intent to achieve coordinated action*. Here, the concept of Command is distinguished from the concept of Control. Both are linked through the definition of Command and Control. It is in the concept of Command that the impact of whistle blowing legislation will be measured.

Pigeau and McCann argue that every human being has the potential to command but that command capability has to be differentiated.⁷⁹ They propose that command capability includes three dimensions: competency, authority and responsibility.

Competency in turn includes four dimensions: *physical competency, intellectual competency, emotional competency* and *interpersonal competency*. The ethos of courage discussed above is necessary for *emotional competency* defined as a competency associated with resilience, hardiness and the ability to cope under stress. Likewise, the ethos of courage is a necessary element of *physical competency*.⁸⁰ We have discussed

⁷⁸ *Supra*, note 58. For the Pigeau and McCann study, see R. Pigeau and C. McCann, "Redefining Command and Control" in R. Pigeau and C. McCann, eds., *The Human in Command*, (New York, 2000) 163-84. I will use the concepts and definitions as quoted in both works cited in note 58 by Pigeau and McCann in *Generalship and the Art of the Admiral* and by Sharpe and English in *Principles for Change in the Post-Cold War Command and Control of the Canadian Forces*.

⁷⁹ *Supra*, note 58.

⁸⁰ *Ibid.*

above how the current CF legislation was designed to support the ethos of courage and we have also discussed how Bill C-11 did not add to, nor subtract from it. The ethos of loyalty is necessary for the *interpersonal competency* of a commander because the latter relies on trust and respect.⁸¹ We also have discussed above how the current CF legislation was designed to support the ethos of loyalty. Bill C-11 neither adds to, nor subtracts from it. Thus whistle blowing is a means designed to support Command and Control.

Authority refers to Command's domain of influence. It is the degree to which a commander is empowered to act, the scope of this power and the resources available for enacting his or her will. This in turn is divided into *legal authority* and *personal authority*.⁸² It is in the latter domain that the impact of whistle blowing can best be measured.

Personal authority is given informally to an individual by peers and subordinates. It is earned over time through reputation, experience, strength of character and personal example. It emerges when an individual possesses the combination of competencies described above, which yields leadership behaviour.⁸³ Thus whistle blowing, whether protected by the current CF legislation or by Bill C-11, serves to enhance this dimension of authority needed for command capability.

Finally, **responsibility** addresses the degree to which an individual accepts the legal and moral liability of Command. It is both *extrinsic* and *intrinsic*. *Extrinsic responsibility*

⁸¹ *Supra*, note 58

⁸² *Ibid.*

⁸³ *Ibid.*

involves the obligation for public accountability and it involves personal authority as discussed above.⁸⁴ We have seen how whistle blowing can serve to support the dimension of personal authority essential for Command.

Intrinsic responsibility is the degree of self-generated obligation that one feels towards the military mission. It is a function of the amount of ownership taken and commitment expressed and is thus associated with the concepts of honour, loyalty and duty, those timeless qualities associated with military ethos.⁸⁵ We have seen how the current CF legislation and Bill C-11, which neither adds, nor subtracts to it contribute to the support and reinforcement of military ethos. So is whistle blowing, which is part of it, when necessary.

In conclusion to this section, we can say that whistle blowing is a means to support Command when necessary. As such, it is thus an essential ingredient of Command and Control. It is also a means to support and reinforce the ethos of Duty with Honour, which our military deems necessary to best serve Canada, Canadian interests and the military profession.

V- Conclusion

Bill C-11 will not apply to the CF. However the CF must have or adopt a set of procedures that are similar to those contained in the Bill. The government may also

⁸⁴ *Supra*, note 58.

⁸⁵ *Ibid.*

decide to extend the application of the Bill, in whole or in part to the CF. In my view, the latter is unlikely, for the reason that the current CF legislation already contains similar provisions and more. The former would be a possibility only in the event that it is decided that provisions pertaining to whistle blowing and the protection accorded to whistle blowers be streamlined into a comprehensive chapter of the NDA or the QR&Os. In the event, this should not be insurmountable since the current CF legislation grants protections to whistle blowers in different ways through different procedures. It will remain for lawyers well trained in military law and procedure to make sure that military culture and cohesion, as well as national security are safeguarded, while protecting the right of CF members to disclose wrongdoings in a legitimate fashion that avoids frivolous disclosures.

Whistle blowing has at times had a pejorative connotation. This should not be the case. The Canadian Forces have been subject to legislation designed to support and reinforce cohesion, *esprit de corps* and a Canadian military ethos that distinguish the CF from rag-tag militias or groups of bandits currently encountered around the world. The protection the law grants to whistle blowers with legitimate complaints designed to see that the law and ethics are respected supports the obligation and the pride with which CF members serve their country with Duty and Honour.

Bibliography

- 1- Cotton, C. A., "A Canadian Military Ethos" *Canadian Defense Quarterly* 12, no 3 (Winter 1982/83).
- 2- *Duty with Honour: The Profession of Arms in Canada*, (Ottawa: DND, 2003).
- 3- English, Allen D., *Understanding Military Culture: A Canadian Perspective*, (Montreal & Kingston, 2004).
- 4- Huntington, Samuel P., *The Soldier and The State: The Theory and Politics of Civil-Military Relations*, (Cambridge, Mass., 1959).
- 5- Johansen, D., *Bill C-11: The Public Servants Disclosure Protection Act*, Parliamentary Information and research Service, October 18, 2004.
- 6- Pigeau, R. and McCann, C., "Redefining Command and Control" in R. Pigeau and C. McCann, eds., *The Human in Command*, (New York, 2000).
- 7- Pigeau, R., and McCann, C., "What is a Commander" in Bernd Horn and Harris, Stephen, J., eds., *Generalship and the Art of the Admiral*, (St. Catherines, 2001).
- 8- Sharpe, G. E. (Joe) and English, Allan D., *Principles for Change in the Post-Cold War Command and Control of the Canadian Forces*, (Ottawa: DND, 2002).

