Legislative Summary **LS-482E**

BILL C-11: THE PUBLIC SERVANTS DISCLOSURE PROTECTION ACT

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LEGISLATIVE HISTORY OF BILL C-11

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	8 October 2004	First Reading:	18 October 2005
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Statutes of Canada S.C. 2005, c. 46

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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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.

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* 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.

As passed by the House of Commons on 4 October 2005, the bill contains significant amendments from the first reading version. Perhaps the most significant is the proposed creation of an independent Public Sector Integrity Commissioner who will report directly to Parliament, rather than reporting through the designated Minister. The Commissioner is to be appointed by the Governor in Council, subject to approval by the Senate and the House of Commons. In the original version of the bill, the official responsible for investigating wrongdoings was the President of the Public Service Commission, who reported to the Minister responsible for the Public Service Human Resources Management Agency of Canada. The Minister was responsible for tabling the President's annual report in Parliament. The President could report directly to Parliament only if a matter was of such urgency that it could not be deferred until the time prescribed for transmission of an annual report.

Another major amendment is the inclusion of segments of the Royal Canadian Mounted Police (RCMP) within the scope of the bill. In the original bill, the RCMP, along with the Canadian Security Intelligence Service and the Communications Security Establishment, was excluded from the definition of "public sector." In the current bill members of the RCMP, including special constables and those employed in a capacity similar to that of a member, are considered public servants. Special procedures are prescribed in the bill for RCMP members' complaints of reprisals. Notable among these is that reprisal complaints that relate to discipline, discharge or demotion investigations or proceedings under Parts IV and V of the *Royal Canadian Mounted Police Act* may be considered by the appropriate Board designated under the bill only after a member has exhausted all procedures under the Act. Leave of the Board is required before the complaint may be considered. Leave will be granted if the Board determines that the reprisal issue was not adequately addressed in the prior procedures and the time limits in the bill have been met (the application for leave must be made within 60 days after the prior procedures have been exhausted).

The Board must also establish separate procedures for dealing with complaints from RCMP members, in consultation with the RCMP, and taking into account that organization's security and confidentiality needs.

The current version of the bill enables public servants involved in disclosures, investigations and reprisal complaints to be assigned to other duties or other parts of the public sector if the public servant's continued presence would likely affect workplace operations. Public servants who may be reassigned include:

- **the public servant making the disclosure or complaint;**
- **any witnesses or potential witnesses in an investigation of a disclosure or witnesses in a proceeding involving a complaint;**
- **public servants who are the subject of a disclosure; and**
- **public servants who are alleged to have taken reprisal action.**

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.

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(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.

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.

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, **other than dangers inherent in the public servant's work;** a serious breach of the code of conduct; the taking of a reprisal against a public servant; **and knowingly directing a person to commit a wrongdoing;**
- 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 **Public Sector Integrity Commissioner** (hereinafter referred to as the **Commissioner**), to receive disclosures;
- empowers the **Commissioner** 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 **Commissioner** investigative powers equivalent to those of a commissioner under Part II of the *Inquiries Act*, and permits the **Commissioner** to set deadlines for chief executives to respond to recommendations;

- requires the **Commissioner** to report annually to Parliament and permits the **Commissioner** to make special reports to Parliament at any time;

- requires chief executives and the **Commissioner** to protect the identity of **persons** involved in the disclosure process and the confidentiality of information collected in relation to disclosures **and investigations**, 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 **Commissioner** 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;

- 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;

- **includes members of the RCMP in the definition of "public servant"; and**

- **provides for the reassignment of public servants involved in disclosures and reprisal proceedings.**

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 **made in good faith by a public servant:**

- in accordance with **the Act**;
- 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 **Schedule 1** to the bill.

Because of security concerns, the definition of "public sector" does *not* include the Canadian Forces, the Canadian Security Intelligence Service **and** the Communications Security Establishment. 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 "P. 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" **and includes members of the RCMP and every chief executive. Members of the RCMP include special constables and persons employed on terms and conditions substantially the same as those of a member.**

A chief executive is broadly defined and includes a deputy head, a chief executive officer of any portion of the public sector, or any person occupying a similar position.

Pursuant to clause 2.1, the Commissioner of the RCMP may authorize a Deputy or Assistant Commissioner to exercise the powers or perform the duties and functions of the Commissioner as a chief executive in respect of clauses 22(g) and (h), 26(1), 27(1) and (3), 28(1), 29(3), 36, and 50.

"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**, including a discharge or dismissal in the case of a member of the RCMP;**
- 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 **Schedules**

Three schedules are included at the end of the bill. The Governor in Council may by order amend the schedules by adding or deleting: the name of any Crown corporation or other public body; the name of any portion of the public sector that has a statutory mandate to investigate other portions of the public sector; and any provision of any Act of Parliament (clause 3).

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 **must** 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.

A code of conduct for the RCMP is established under the *Royal Canadian Mounted Police Act*. Clause 7(2) provides that in case of a conflict between the RCMP code and the code in the bill, the latter shall prevail, but only to the extent of the conflict.

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, **other than a danger that is inherent in the public servant's duties or functions;**
- a serious breach of a code of conduct established under the bill;
- the taking of a reprisal against a public servant**; and**
- **knowingly directing a person to commit a wrongdoing as set out in clause 8.**

G. Disciplinary Action

Clause 9 provides that, in addition to, and apart from, any **penalty** 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 **under the bill made by public servants** 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.

Clause 12 authorizes a public servant to disclose to his or her supervisor or a designate any information that he or she believes could show that a wrongdoing has been committed or is about to be committed, or that the public servant has been asked to commit a wrongdoing. The amended bill contains an additional ground for disclosing information: a belief that a wrongdoing is about to be committed.

2. Disclosure to the **Commissioner**

Clause 13(1) states that a public servant may disclose **information referred to in clause 12 to the Commissioner if:**

- the public servant believes on reasonable grounds that it would not be appropriate to disclose the **information** 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 **information** 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**(4)**.

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 **Commissioner**, if it is not appropriate to use the internal disclosure mechanism first.

Nothing in the bill authorizes a public servant to disclose to the **Commissioner** 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 **Commissioner** may not use the confidence or information if it is disclosed (clause 13(2)).

3. Disclosure to the **Auditor General of Canada**

A disclosure that a public servant is entitled to make under clause 13 to the **Commissioner** that concerns the **Office of the Public Sector Integrity Commissioner** may be made to the **Auditor General of Canada**. The **Auditor General of Canada** has, in relation to that disclosure, the powers, duties and protections of the **Commissioner** under the bill (clause 14).

4. Restrictions on Disclosures Affecting Schedule 2 Organizations

Clause 14.1 restricts the ability of a public servant working in portions of the public sector listed in Schedule 2 to the bill to disclose information. Schedule 2 to Bill C-11 lists the Office of the Auditor General of Canada, the Office of the Commissioner of Official Languages, the Office of the Information Commissioner of Canada and the Office of the Privacy Commissioner of Canada. These bodies already have statutory responsibility for investigating other portions of the public sector. Public servants in these organizations may disclose information involving wrongdoing only in respect of the organization in which they are employed.

5. 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;
- any restriction created by or under any other federal statute on the disclosure of information**, other than a restriction created by or under the following legislative provisions as set out in Schedule 3 of the bill:**
  - ***Canadian Security Intelligence Service Act,* section 18;**
  - ***DNA Identification Act,* section 6;**
  - ***Sex Offender Information Registration Act,* section 16;**
  - ***Witness Protection Program Act,* section 11; and**
  - ***Youth Criminal Justice Act,* section 129.**

Clause 15.1 provides that a disclosure under the bill must:

- **provide no more information than is reasonably necessary to make the disclosure; and**
- **follow established procedures and practices for the secure handling, storage, transportation and transmission of information, including, but not limited to, information or documents that the Government of Canada or any part of the public service is taking measures to protect.**

6. 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.

Information may not be disclosed to the public where that disclosure is subject to a restriction created by or under any Act of Parliament, including the *Personal Information Protection and Electronic Documents Act* (clause 16(1.1)).

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)).

7. Exception to Disclosure – **Special Operational Information**

The above provisions regarding wrongdoing disclosures by public servants (to their supervisors or senior officers or, in specified circumstances, to the **Commissioner**, the **Auditor General of Canada**, or to the public) do *not* apply **in respect of special operational information as defined in section 8(1) of the *Security of Information Act* (clause 17).**

8. 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).

9. Other Obligations to Report

The provisions of the bill relating to the making of disclosures are not to be construed as affecting any other obligation of a public servant to disclose, report or otherwise give notice of any matter under any other Act of Parliament (clause 18.1).

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.

1. Complaint Procedures for Public Servants

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. **For public servants employed in the Public Service Labour Relations Board, or public servants whose complaint relates to a reprisal taken while so employed, the appropriate Board is the Canada Industrial 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 **Commissioner** in respect of the reprisal during the above 60-day period and the **Commissioner** has decided to deal with the disclosure, within 60 days after the **Commissioner** 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 the limitations set out in clause 20(3), a complaint may still be made to the Board if, considering the circumstances of the complaint, the Board feels it is appropriate to do so (clause 20(3.1)).**

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)).

2. Complaint Procedures for Members of the Royal Canadian Mounted Police

Pursuant to clause 20(2.1), members of the RCMP may not make a complaint under clause 20(2) in respect of a reprisal if the complaint relates to a matter under investigation under Part IV or V (discipline, discharge and demotion proceedings) of the *Royal Canadian Mounted Police Act,* unless:

- **the member has exhausted all the procedures available under that Act for dealing with the matter (clause 20(2.1)(a)); and**
- **the member has been granted leave to make the complaint by the Board (clause 20(2.1)(b)).**

Leave may be granted by the Board only if the application for leave is made within 60 days after the procedures under the *Royal Canadian Mounted Police Act* have been exhausted and, in the opinion of the Board, the reprisal complaint was not adequately addressed (clause 20(2.2)). It does not appear that this limitation period may be extended by the Board pursuant to clause 20(3.1). Should leave be granted, the member must make his or her complaint to the Board within 60 days after leave was granted (clause 20(3)(c). This limitation may be extended by the Board in accordance with clause 20(3.1).

The Board ceases to have jurisdiction over a complaint from a member of the RCMP if the member makes an application for judicial review in respect of the procedures under clause 20(2.1)(a).

3. Duties and Powers of the Board

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 **or pay damages in lieu of reinstatement if, in the opinion of the Board, the relationship of trust between the parties cannot be restored;**

- 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 **Commissioner** has standing in any proceedings **before the Board** under clause 20 for the purpose of making submissions (clause 20(7)).

4. Special Procedures for Members of the Royal Canadian Mounted Police

The Board is required to establish procedures for the processing and hearing of complaints relating to reprisals involving the RCMP after consulting with the organization and taking into account its security and confidentiality needs (clause 20.1(1)). Complaints relating to reprisals involving the organization shall be heard only by a full-time member of the Board (clause 20.1(2)).

Clause 20(6.1) provides that the Board may make an order in relation to a member of the RCMP despite subsections 42(4) and (6), 45.16(7) and 45.26(6) of the *Royal Canadian Mounted Police Act*. These provisions deal generally with the finality of the internal appeal processes for some disciplinary proceedings under that Act.

5. Retroactivity

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.

6. Power to Temporarily Assign to Other Duties

Clause 21.1(1) provides that a chief executive may temporarily assign a public servant who is involved in a disclosure or a complaint of a reprisal to other duties if the chief executive believes on reasonable grounds that the public servant's involvement in a disclosure or a complaint of reprisal has become known in the workplace and reassignment is necessary for the effective operation of the workplace.

A public servant who made a disclosure or a witness or potential witness in any investigation relating to a disclosure or in any proceeding relating to a reprisal complaint may be assigned to other duties only if that public servant consents to the assignment. If consent is given, the assignment is deemed not to be a reprisal (clause 21.1(5)).

The public servants who are considered to be involved in a disclosure or a reprisal complaint are:

- **the public servant who made the disclosure, and every public servant who is the subject of the disclosure;**
- **the public servant who filed the reprisal complaint, and every public servant alleged to have taken the reprisal action that is the subject of the complaint; and**
- **every public servant who is a witness or potential witness in any investigation relating to the disclosure or in any proceeding dealing with the reprisal complaint (clause 21.1(2)).**

The public servant may be assigned to other duties for a period of up to three months. The assignment may be renewed one or more times if the chief executive believes that the conditions giving rise to the reassignment continue to exist (clause 21.1(3)). The duties to which the public servant is assigned must be in the same portion of the public service in which the public servant was employed and must be comparable to the public

servant's regular duties (clause 21.1(4)). However, clause 21.1(6) provides that a public servant may be assigned to another segment of the public service if the public servant and the chief executive of the other segment of the public service consent and the duties are comparable to the public servant's normal duties. Such an assignment is deemed not to be a reprisal if the public servant consents.

J. Duties of the Public Sector Integrity Commissioner

As will be seen subsequently, the **Public Sector Integrity Commissioner** has broader powers than those that he or she would have been given 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 **Commissioner's** recommendations; and the power to make special reports to Parliament at any time.

1. **Commissioner's** Duties

As specified in clause 22 of the bill, the duties of the **Commissioner** are to:

- provide advice to public servants who are considering **making a disclosure under the Act**;
- 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 **Commissioner** in accordance with clause 13, and investigations referred to in clause 33, 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 persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;
- establish procedures **for processing disclosures and** 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 **Commissioner's** Powers

The bill prohibits the **Commissioner** from dealing with a disclosure under the bill, **or commencing an investigation under clause 33 (power to investigate other wrongdoings),** 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)). **For the purpose of clause 23(1), a person or body dealing with a matter in the course of an investigation or proceeding under Part IV or V of the *Royal Canadian Mounted Police Act* is deemed not to be dealing with the matter as a law enforcement authority (clause 23(2)).**

3. **Commissioner's** Right to Refuse **to Deal With** Wrongdoing Disclosure **or Cease Investigation**

Clause 24(1) provides that the **Commissioner** may refuse to deal with a disclosure **or may cease an investigation** if he or she is of the opinion that:

- 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 disclosure is not **made in good faith or the subject-matter is not sufficiently important;**
- **given the length of time between the date when the subject-matter of the disclosure arose and the date when the disclosure was made, dealing with the disclosure would serve no useful purpose;**
- **the disclosure relates to a matter that results from a balanced and informed decision-making process on an issue of public policy; or**
- there is a valid reason for not dealing with the disclosure.

The Commissioner must refuse to deal with a disclosure or must cease an investigation if, in his or her opinion, the subject-matter of the disclosure relates solely to a decision made in the exercise of an adjudicative function under a federal statute, including a decision of the Commissioner of the RCMP under Part IV or V of the *Royal Canadian Mounted Police Act* (clause 24(2). If the Commissioner refuses to deal with a disclosure or

ceases an investigation, the person who made the disclosure must be so informed and reasons must be provided for the disclosure or cessation (clause 24(3)).

4. Delegation of **Commissioner's** Powers and Duties

Clause 25 permits the Commissioner to delegate any of his or her powers to any employee of the Office of the Public Sector Integrity Commissioner, except:

- the power to delegate under **this clause**;
- 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 **29(1)**, a subpoena or other request or summons to appear before the **Commissioner** or a person appointed to conduct an investigation;
- the power in clause **33** to commence another investigation;
- the power in clause **34** to refer a matter to another authority;
- the power in clause **35**(1) to remit information; and
- the duty or power in any of clauses **36** to **38** in relation to making a report.

Clause 25(2) prevents the Commissioner from delegating the conduct of an investigation that involves, or may involve, information relating to international relations, national defence, national security or the detection, prevention or suppression of criminal, subversive or hostile activities, except to one of a maximum of four officers specifically designated by the Commissioner for that purpose.

5. Purpose of **Commissioner'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 **26**(1)). The investigations are to be conducted as informally and expeditiously as possible (clause **26**(2)).

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

When commencing an investigation under the bill, the **Commissioner** must notify the chief executive concerned and inform him or her of the substance of the disclosure to which the investigation relates (clause **27**(1)). The **Commissioner**, 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 **27**(2)).

7. Opportunity to Answer Allegations

Although the **Commissioner** need not hold a hearing and no person is entitled as of right to be heard by the **Commissioner**, if at any time during the course of an investigation under the bill it appears 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 **Commissioner** *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 **27**(3)).

8. Access to Facilities, Offices, etc.

If the **Commissioner** 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 **Commissioner** may require for the carrying out of his or her duties under the bill (clause **28**(1)). The above provision applies despite any restriction created by or under any other federal statute on the disclosure of information (clause **28**(2)).

9. Powers of the **Commissioner**

Bill C-11 substantially increases the powers of the **Commissioner** over those that would have been granted to him or her under the predecessor bill, C-25. In conducting any investigation under Bill C-11, the **Commissioner** has all the powers of a commissioner under Part II of the *Inquiries Act* (clause **29**(1)). The proposed Public Sector Integrity Commissioner

under Bill C-25 would not have had those powers. Whenever the **Commissioner** issues a subpoena or other request or summons to a person in the exercise of any powers referred to in clause **29**(1), he or she must allow that person to be assisted or represented by counsel, or by any person (clause **29**(2)). Prior to entering the premises of any portion of the public sector in the exercise of the above powers, the **Commissioner** must notify the chief executive of that portion of the public sector (clause **29**(3)).

10. Exception to Clauses **28** and **29**

Clause **30**(1) provides for an exception to clauses **28** and **29** in that they do not apply in respect of Cabinet confidences to which section 39(1) of the *Canada Evidence Act* applies, or in respect of information that is subject to solicitor-client privilege. The **Commissioner** may not use the confidence or information if it is nevertheless received under clause **28** or **29**. **In addition, nothing in the bill is to be construed as limiting the application of the *Canada Evidence Act* to investigations conducted by the Commissioner under the bill (clause 30(2)).**

11. Canadian Broadcasting Corporation

With respect to the Canadian Broadcasting Corporation, in making a request referred to in clause **28** or in exercising the powers in clause **29**, the **Commissioner** must consider whether doing so will unduly disrupt the gathering and dissemination of news and information by the Corporation (clause **31**).

12. Self-incrimination

According to clause **32**, a public servant cannot be excused from cooperating with the **Commissioner** 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*.

13. **Commissioner's** Power to Investigate Other Wrongdoings

If, during the course of an investigation or as a result of information provided to the Commissioner by a person who is not a public servant, the Commissioner has reason to believe that a wrongdoing, or another wrongdoing, has been committed, he or she may commence an investigation into that wrongdoing if he or she believes that the public interest requires it (clause 33(1)). Clauses 23 (restriction where other body dealing with the disclosure or investigation) and 24 (right to refuse to deal with disclosure) continue to apply to the further investigation. The various provisions of the bill relating to investigations commenced as a result of a disclosure apply to investigations under this clause.

In the course of an investigation commenced under clause 33(1), the Commissioner may not use a confidence of the Queen's Privy Council for Canada under section 39(1) of the *Canada Evidence Act* or information that is subject to solicitor-client privilege if the confidence or information is disclosed to the Commissioner (clause 33(2)).

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

If the **Commissioner** 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 **34**).

15. Remittal of Information to Appropriate Authorities

If the **Commissioner** 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 **Commissioner** 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 **35**(1)). **Information relating to the RCMP may be remitted only to the Attorney General of Canada (clause 35(1.1)).**

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 **35**(1) in relation to any matter, the **Commissioner** may *not* – except in accordance with a prior judicial authorization – remit any *further* information in relation to that matter that the **Commissioner** 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 **35**(2)).

16. Reports

Clause **36** provides that in the making of a report in respect of an investigation under the bill, the **Commissioner** may, if he or she considers it appropriate to do so, request that the chief executive provide the **Commissioner**, 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 **Commissioner** 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 **Commissioner** 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 **37**).

Clause **38**(1) *requires* the **Commissioner**, within three months after the end of each fiscal year, to prepare and transmit to **Parliament** an *annual report* on the **Commissioner's** activities during that fiscal 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 **Commissioner** has made and their status;
- any systemic problems that give rise to wrongdoings;
- any recommendations for improvement that the **Commissioner** considers appropriate; and
- any other matter that the **Commissioner** considers necessary (clause **38**(2)).

Clause **38(3)** permits the **Commissioner**, 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.

Under clause 38(4), all reports to Parliament made by the Commissioner are to be transmitted to the Speaker of the Senate and to the Speaker of the House of Commons for tabling in both Houses. After a report of the Commissioner has been transmitted for tabling, it stands referred to the appropriate committee of the Senate, the House of Commons or both Houses (clause 38(5)).

K. Office of the Public Sector Integrity Commissioner

Clauses 39 through 39.3 provide for the Office of the Public Sector Integrity Commissioner. The Commissioner shall be appointed by the Governor in Council under the Great Seal and approved by resolution of the Senate and the House of Commons (clause 39(1)). The Commissioner shall hold office during good behaviour for a term of seven years, and may be removed only by the Governor in Council on address of the Senate and the House of Commons (clause 39(2)). The Commissioner may be reappointed for a further term of not more than seven years (clause 39(3)).

In the event of the Commissioner's absence or incapacity, or a vacancy, the Governor in Council may appoint another qualified person in the Commissioner's place for a term not exceeding six months. That person shall have all the powers, duties and functions of the Commissioner, with his or her remuneration and expenses to be fixed by the Governor in Council (clause 39(4)).

The Commissioner has the rank and all the powers of a deputy head of a department (clause 39.1(1)). The Commissioner is not permitted to hold any other public sector office or employment or carry on any activity inconsistent with his or her powers and duties (clause 39.1(2)).

The Commissioner's remuneration is to be determined by the Governor in Council (clause 39.2(1)). If the Commissioner serves on a full-time basis, he or she is entitled to be paid reasonable travel and other expenses incurred in the course of his or her duties while absent from his or her ordinary place of work, or from his or her ordinary place of residence if appointed to serve on a part-time basis (clause 39.2(2)).

For purposes of the *Public Service Superannuation Act*, the Commissioner is deemed to be employed in the public service; and for purposes of the *Government Employees Compensation Act* and regulations made under section 9 of the *Aeronautics Act*, the Commissioner is deemed to be employed in the federal public administration (clauses 39.2(3) and (4)).

The officers and employees necessary to enable the Commissioner to perform his or her duties and functions are to be appointed under the *Public Service Employment Act* (clause 39.3(1)). The Commissioner may, however, engage the services of persons with specialized or technical knowledge related to the work of the Commissioner or who may assist him or her in performing his duties and functions, on a temporary basis. Treasury Board approval is required for such appointments. The Commissioner may establish and pay the remuneration and expenses of those persons (clause 39.3(2)).

L. 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 **Commissioner**, 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 **Commissioner**, 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 **Commissioner** (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.

M. Confidentiality

Clause 43 requires the **Commissioner**, and every person acting on behalf of or under the direction of the **Commissioner** 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 **Commissioner**, and every person acting on behalf of or under the direction of the **Commissioner**, 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. **Nothing in the bill is to be construed as limiting the application of the *Canada Evidence Act* to disclosures or proposed disclosures by the Commissioner or those acting under the direction or on behalf of the Commissioner (clause 44.1).**

N. Legal Protection

The bill protects the **Commissioner**, and any person acting on behalf of or under the direction of the **Commissioner**, 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 **Commissioner** (clause 45).

The **Commissioner** or any person acting on behalf of or under the direction of the **Commissioner** 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 **Commissioner** 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 **or supplied** in good faith in the course of an investigation under the bill by or on behalf of the **Commissioner** is privileged; and

- any report under the bill made in good faith by the **Commissioner**, and any fair and accurate account of the report made in good faith in the media, is privileged (clause 47).

O. General Provisions

The disclosure of information to the **Commissioner** 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), when referring any matter under clause 34 (obtaining information outside the public sector) or making a special or annual report, clause 49(1) prohibits the Commissioner from disclosing information that the Government of Canada or any portion of the public service is taking measures to protect. That information includes, but is not limited to, information that:

- **is a confidence of the Queen's Privy Council for Canada to which section 39(1) of the *Canada Evidence Act* applies;**

- **is subject to solicitor-client privilege;**

- **is special operational information as defined in section 8(1) of the *Security of Information Act*;**

- **is subject to any restriction on disclosure created by or under any other Act of Parliament;**

- **could reasonably be expected to cause injury to international relations, national defence or national security, or to the detection, prevention or suppression of criminal, subversive or hostile activities;**

- **could reasonably be expected to cause injury to the privacy interests of an individual; or**

- **could reasonably be expected to cause injury to commercial interests.**

Clause 49(2) permits the Commissioner to disclose any information of the kind referred to in clause 49(1) if it has already been disclosed following a request under the *Access to Information Act* or with the consent of the relevant individual or an authorized person in the organization that has a primary interest in the information.

Clause 49(3) permits the **Commissioner** to disclose any information of the kind referred to in **section 49(1)** if, in his or her opinion:

- the disclosure is necessary to refer any matter under clause **34 (obtaining information outside the public sector)** 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 Commissioner, before disclosing any information permitted by clause 49(3), to:

- **comply with section 38.02(1.1) of the *Canada Evidence Act* (non-disclosure of information related to international relations, national defence or national security unless notice to the Attorney General of Canada is given and no response is received within 10 days of the notice); and**

- **consult with the organization that has a primary interest in the information, except for information that affects only the privacy rights of an individual.**

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, **and despite any other Act of Parliament that restricts the disclosure of information,** a report by a chief executive in response to recommendations made by the **Commissioner** 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*.

P. 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 **and** the Communications Security Establishment.

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.

Q. 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.

R. Transitional Provisions

All employees of the administrative unit of the Public Service Human Resources Management Agency known as the Office of the Public Service Integrity Officer will assume a position in the Office of the Public Sector Integrity Commissioner when Bill C-11 comes into force (clause 54.1(1)). The status of those employees will be unaffected by reason of the above clause upon assuming their new positions (clause 54.1(2)).

Any unexpended appropriations in relation to the Office of the Public Service Integrity Officer are deemed to be amounts appropriated for defraying the charges and expenses of the Office of the Public Sector Integrity Commissioner (clause 54.2).

Upon the coming into force of the bill, any disclosures that are being dealt with under the Treasury Board Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace are continued as though they were made under the bill.

S. 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.

Section 16 of the *Access to Information Act* is amended by adding new subsection 16(1.1). That subsection provides that the head of a government institution may refuse to disclose any information requested under the Act if the information came into existence *less than five years before the request* and the information was:

- **prepared in connection with or as a result of a disclosure or investigation under the bill; or**

- **obtained by a supervisor, a senior officer designated by a chief executive officer as the person responsible for receiving and dealing with disclosures of wrongdoings pursuant to section 10(2), or the Commissioner, in connection with or as a result of a disclosure or an investigation under the bill, if the information identifies or could reasonably be expected to identify a public servant who made a disclosure or who cooperated in an investigation under the bill.**

Section 22 of the *Privacy Act* is amended by the bill by adding new subsection 22(1.1) to that section. The wording of that subsection is identical to the companion amendment to section 16 of the *Access to Information Act,* as noted above.

The *Personal Information Protection and Electronic Documents Act* is amended to have the same effect as the amendments to the *Access to Information Act* and the *Privacy Act.* That is, section 9(3) of PIPEDA is amended by adding new subsection 9(3)(e) to enable organizations that are subject to the Act to refuse to disclose personal information in the same situations as are proposed for the *Access to Information Act* and the *Privacy Act,* noted above.

The final version of the bill reduces the number of years within which information or records may not be disclosed, pursuant to the *Access to Information Act,* the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act,* where the information or document relates to investigations of disclosures under the bill. Under the original version of the bill, the responsible authority or person under those Acts was not required to disclose the record or information if they came into existence less than 20 years before the request. The final version of the bill reduces that period to five years.

Clause 56 amends the schedule to the *Canada Evidence Act* to add as item 20 "The **Public Service Integrity Commissioner**, 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.

T. 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 **Schedule 1** to the bill comes into force on a day to be fixed by order of the Governor in Council (clause 60(2)).

COMMENTARY

There was very little commentary in the media when the bill was introduced in the House of Commons on 8 October 2004. However, 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:
>
> - 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.

(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.

- 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."

Some of the concerns expressed by the union were subsequently addressed through amendments to the bill. Specifically, members of the RCMP are now considered "public servants." More importantly, the bill creates an independent Office of the Public Sector Integrity Commissioner who reports directly to Parliament rather than through the Minister.

Despite the significant amendments to the bill, the reaction to its passage in the House of Commons was, initially, surprisingly muted. It was only after the release on 1 November 2005 of the Fact Finding Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities (headed by Justice Gomery) that media interest increased.

The Public Service Alliance of Canada (PSAC) supports the bill's overall thrust and has described the bill as "a real plus for people who work in Government." However, PSAC would like the Senate to recommend improvements. In particular, PSAC argues that the five-year ban on the release of information collected in the course of an investigation into a wrongdoing, as a result of consequential amendments to the *Access to Information Act*, the *Privacy Act* and PIPEDA, should be removed. If this is not possible, given time constraints, PSAC believes that the Senate should pass the bill in its current form, and deal with any deficiencies at the point of the five-year review mandated by the bill.[(5)]

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(5) Editorial, *Toronto Star*, 7 November 2005; on-line http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_PrintFriendly&c=Article&cid=1131145798817&call_pageid=968256290204 (accessed 7 November 2005).

The PIPSC considers the passage of the bill to be a "victorious step" in its call for whistleblower protection. The Institute was particularly pleased with the bill's proposed creation of an independent Office of the Public Sector Integrity Commissioner. The Institute has indicated that it looks forward to making submissions before the Standing Senate Committee on National Finance, which will be reviewing the bill.(6)

Favourable treatment has generally been given to the bill's creation of the Office of the Public Sector Integrity Commissioner and the inclusion of the RCMP among the public sector that is subject to the bill. In addition, it has been remarked that allowing public servants to make a disclosure directly to the Commissioner is a significant improvement over the bill as introduced in the House of Commons.(7)

Others, however, have been critical of the bill as passed, with some calling on the Senate to vote against the bill, arguing that it lacks any mechanism to authorize corrective action and includes no provision to punish wrongdoers. It should be noted, however, that the bill authorizes the Commissioner to remit any information gathered in the course of an investigation to a peace officer or to the Attorney General of Canada if the information may be used to investigate a breach of federal or provincial laws. Some have also argued that the bill, rather than promoting disclosures, closely restricts the kinds of disclosures that can be made. In an article jointly authored by a former whistleblower with the Department of Foreign Affairs and International Trade and an independent Member of Parliament, it was argued that:

> **C-11 is nothing more than a government-designed, government-controlled and government-executed device to rein in those who attempt to disclose wrongdoing. Rather than promote occupational free speech – a fundamental and constitutional right – it closely prescribes what you can blow the whistle on and to whom, giving the government ample time to engage in cover-ups of various kinds.(8)**

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(6) Professional Institute of the Public Service of Canada, "Another Victorious Step in the Institute's Quest for Whistleblower Protection," 6 October 2005, on-line http://www.pipsc.ca/english/labour/value-ethics/reading-oct0605.html (accessed 7 November 2005).

(7) H. Buzzetti, "Ottawa donne des dents au Project de loi sur les dénonciateurs: Le texte a été modifié sous la pression de l'opposition," *Les Actualités*, 4 octobre 2005, p. A1.

(8) J. Gualtieri and K. Kilgour, "Senate Must Defeat Whistleblower Legislation," *Windsor Star*, 4 November 2005, p. A6.

Another high-profile whistleblower, Alan Cutler, described the bill as "fatally and fundamentally flawed" after being vindicated by Justice Gomery in his report. Mr. Cutler argued that a major flaw in the bill is that a public servant must prove that a reprisal is related to the reporting of a wrongdoing.(9)

In response to Justice Gomery's fact-finding report, Treasury Board President Reg Alcock announced that a copy of the bill has been sent to Justice Gomery for review, presumably with a view to assisting him in the writing of his second report, in which he is to make recommendations to the government flowing from his inquiry.(10)

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(9) K. Harris, "New Law 'Flawed' – Whistleblower Claims: Measure Won't Protect Civil Servants," *Edmonton Sun*, 2 November 2005, p. 31.

(10) M. Den Tandt, "Scandal couldn't happen today, Alcock says. Tough new rules mean Treasury Board better able to control spending, he states," *The Globe and Mail* [Toronto], 1 November 2005, p. A14.