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Chair

Mr. Leon Benoit

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● (1530)

[*English*]

The Chair (Mr. Leon Benoit (Vegreville—Wainwright, CPC)): Good afternoon, members.

This is meeting number 19. We're dealing with Bill C-11, An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings.

We have as witnesses today, from the Royal Canadian Mounted Police, Sergeant Brian Flanagan and Sergeant Norm Fleming, for the first hour.

Perhaps you can go ahead and make your presentation, and then we'll open it up to questioning.

Staff Sergeant Brian Flanagan (Representative, Staff Relations Representative Program, Royal Canadian Mounted Police): Thank you very much, Mr. Chair, for allowing me and Sergeant Fleming the opportunity to present to you and the other committee members.

My name is Staff Sergeant Brian Flanagan. I'm a member of the Royal Canadian Mounted Police, with more than 39 years of service. I spent my first 27 years as a general duty police officer in the province of Nova Scotia enforcing federal, provincial, and municipal laws.

The last 11 years of my service I spent as a staff relations representative for the RCMP members in the province of Nova Scotia. In the staff relations representative program, I spent all of my time on the internal affairs committee and was chairman of that committee for nine years. This committee deals with the RCMP Act and its regulations, as well as some other legislation that affects the working conditions of members of the RCMP. The staff relations representative program represents all 19,000 regular and civilian members of the force and has one or more representatives in every province or territory in Canada.

In addition to speaking on behalf of the staff relations representative caucus, I'm also speaking on behalf of the Mounted Police Members' Legal Fund. The legal fund is an independent body consisting of voluntary membership from within the ranks of the overall RCMP membership. However, it is completely separate and independent from the organization of the RCMP itself. There are approximately 12,000 current members within the legal fund, and they are from all provinces and territories across Canada. The objective of the legal fund is to provide outside and totally independent funding access for its members who find themselves needing legal assistance or advice when it's not available to them pursuant to a Treasury Board directive or RCMP policies.

On behalf of these two groups, I wish to tell you that we recognize and support the necessity and intent of Bill C-11. Further, we do believe the RCMP should be included in this legislation. However, the uniqueness of the force requires that certain amendments be made in order to meet the needs and expectations of the membership of the RCMP.

The RCMP is an evolving organization. Like other federal organizations, our members deserve whistle-blowing protection. The current RCMP policy does not afford us such protection. Present RCMP policy falls significantly short in doing anything to protect the identities of either a whistle-blower or an identified wrongdoer.

For your information, our present policy in this regard reads as follows:

> An employee will use the normal reporting relationships and exhaust all other avenues, e.g. the grievance or staff relations process including other resources, e. g. M/EAP coordinator, unions representatives, human resources coordinator, DSRR, before recourse to the Ethics and Integrity Advisor or to the Public Service Integrity Officer.

I'm here to tell you that if a member were to use the present grievance process in the Royal Canadian Mounted Police, an adjudication at level two could take a minimum of two years to resolve.

● (1535)

The Chair: Mr. Szabo.

Mr. Paul Szabo (Mississauga South, Lib.): Mr. Flanagan, the bill mentions wrongdoings. It defines certain activities. Could you indicate whether these level two grievances fall within the kinds of things we consider to be wrongdoings for purposes of this bill?

S/Sgt Brian Flanagan: It could, depending on what grievance was. A member has a legal right, pursuant to the act, to grieve anything for which the member feels aggrieved. That's a very, very broad spectrum and touches everything from a meal claim to whatever. So somewhere in whistle-blowing things, a member could grieve something, and if he's told to resort to the grievance process, he or she could be waiting two years to have it resolved at level two.

Mr. Paul Szabo: Thank you.

The Chair: Please continue.

S/Sgt Brian Flanagan: You may or may not appreciate the fact that the RCMP is a paramilitary organization where the chain of command is established and adopted from the day a member joins the organization until he or she leaves. Consequently, members learn that going up the chain is extremely difficult if you come across a link that is weak.

Again, our present policy enables weak links wherein it states: A potential disclosure may be rejected if the Senior Officer determines the allegation:

a. to be trivial and vexatious;

b. fails to allege or give adequate particulars of a wrongful act;

c. was not given in good faith or on the basis of reasonable belief; or

—and the last and most troubling part— d. could be dealt with more appropriately by other means.

As you can see from the quotes of this policy, there are numerous flaws, weaknesses, and escape avenues available to management of the RCMP that seriously affect any credibility that could be given to such poor policy. There is clearly no comfortable or safe feeling that can come with such policy.

We believe we should have the ability to enable the membership to have access to a neutral or independent third party, external to the RCMP, to investigate and review whistle-blowing complaints and protect members who lodge them. This is essential to preserve the integrity and honour of the RCMP as a federal government institution.

National security would not be impaired by having whistle-blowing legislation. Our members recognize that, first and foremost, their duty is to protect Canada and its citizens. We feel that effective whistle-blowing legislation would give members another tool to do that.

Present RCMP policy on internal disclosure of information already identifies three specific programs within the force whose employees are permanently bound to secrecy. They are the criminal intelligence program, the protective operations program, and technical operations programs. We are of the view that this proposed whistle-blowing legislation can be crafted to include any parts of these programs that are deemed not be injurious to the defence of Canada; the detection, prevention, or suppression of subversive or hostile activities; or law enforcement.

It's a reasonable expectation that the RCMP and the body who would be responsible for overseeing this legislation will be able to reach the necessary compromises to allow for leeway on delicate or sensitive matters that clearly should not be made public.

The intent of this proposed legislation is to establish a procedure for the disclosure of wrongdoing within various federal government departments, of which the RCMP is one. That, as a general statement, usually means someone at a lower level who witnesses corruption, ethical misconduct, unsafe working conditions, or simply mistakes that the person felt should be reported.

Members of the RCMP are like many other government employees in that, if they fear being fingered, disciplined, or fired, they will not report wrongdoing. If a disclosure office and investigative service were set up completely outside and independent from the RCMP, we are sure members would avail themselves of that service.

That's about it from me for now. Again, I want to thank you for the opportunity to present to this committee. We fully support the spirit, intent, and principles of Bill C-11 and ask that the RCMP be included in the legislation, with the necessary amendments to accommodate the best interest of the organization and its membership.

I look forward to your questions.

● (1540)

The Chair: Thank you very much, Mr. Flanagan.

For the first round, we'll go to Mr. Lauzon for seven minutes.

Mr. Guy Lauzon (Stormont—Dundas—South Glengarry, CPC): Thank you very much, and welcome, gentlemen. We appreciate your being here.

I wonder if either or both of you gentlemen are familiar with Robert Read, who was a corporal in the RCMP.

S/Sgt Brian Flanagan: We're both familiar with him, and I've had some discussions with Corporal Read.

Mr. Guy Lauzon: If I understood your comments correctly, you feel it would be appropriate for the RCMP to be covered under Bill C-11, except where it would affect national security, of course. What would be the percentage of instances where whistle-blowing would affect national security so it wouldn't be appropriate? Is it 50% or 75%? Can you take a guess at that?

S/Sgt Brian Flanagan: That would be very difficult to guess.

This is my opinion based on my length of service. First and foremost, I want to tell everybody here that the RCMP is an excellent organization.

Mr. Guy Lauzon: Yes, there's no question of that.

S/Sgt Brian Flanagan: Don't for one minute think I'm here to badmouth them or say we can't do this. But the RCMP is made up of humans and horses. There are more frailties with the humans, I'm afraid to tell you, than with the horses.

Some hon. members: Oh, oh!

S/Sgt Brian Flanagan: However, being human, we do have situations. If I were to give the perfect example of where whistle-blowing legislation is needed, it would be the Robert Read case. At the end of the day he lost his job. But when you really delve into the circumstances surrounding that, you see that during that whole struggle, that man needed an option to go somewhere outside the organization to have his points addressed, rather than stay within the organization and get beaten up as he did.

Mr. Guy Lauzon: But the RCMP officer who gives me a ticket in Saskatchewan or Nova Scotia could be covered under the whistle-blower legislation.

S/Sgt Brian Flanagan: I'm of the view that everybody can, even in those three areas I mentioned—the intelligence program, protective operations, and technical operations. When you're talking about whistle-blowing legislation and you go to those areas where you're talking about corruption and ethical misconduct, you're not dealing with state secrets. I would hate to see the RCMP allowed to make policy with regard to those people being totally muted on what they would see as something that reasonably needs whistle-blowing.

Mr. Guy Lauzon: Robert Read sat in that very chair last week. I'm going to review the information I have on his case. If there's something you disagree with, maybe you can let me know. I understand it originated with a question about visas in China. Corporal Read was asked to investigate, and he reported this to his superiors. Apparently the superiors did not take action. Then he went to the RCMP Public Complaints Commission and alleged that his superiors obstructed justice. The commission ruled that such complaints were not within its mandate. As a last resort, Corporal Read went to the media, and he was prosecuted for doing so.

Up to 30 of the foreign service officers who were linked to the investigation were reprimanded for taking gifts from the wealthy and powerful Chinese families involved. The part that frustrates me, and obviously frustrated Corporal Read, is that some of these people were actually promoted subsequent to that, while he was persecuted, if that's the right term.

In September 1999 Corporal Read was suspended. In April 2002, after a service court trial by a tribunal of senior officers—all RCMP, I would assume—he was found guilty of discreditable conduct and ordered to resign within two weeks or be subject to a summary dismissal.

If these facts are right, I don't think Corporal Read did anything that could be construed as undermining or compromising national security. He did not make public any state secrets or reveal any weaknesses in Canada's security, if my information is right. In fact, he blew the whistle because he believed in good faith that not doing so was compromising Canada's national security. We all know what happened to Corporal Read.

I'd like both of your opinions on this. If the RCMP had been covered by good-quality whistle-blower legislation, do you think it would have gone this far?

● (1545)

S/Sgt Brian Flanagan: I'd like to think it wouldn't.

First of all, you have a very good synopsis, from my knowledge of the Robert Read matter. I would like to think that if an outside, independent whistle-blowing group were to look at that, at some point in time the alarm bells would have gone off to say that from our perspective in looking, and from what Robert Read is telling us, what Robert Read is saying is correct.

Now, from there, either the RCMP should be taken to task by this group and told that they have a problem here. This person has clearly identified a wrongdoing; it must be corrected. Don't focus your business now on persecuting, for want of a better term, Robert Read; address the issues that Robert Read has brought to you.

I quoted the RCMP policy to you earlier, and you can see what could happen if it stayed within the RCMP policy with respect to a member going to someone in the chain of command and reporting it. If, as in the Robert Read matter, I want to cap this here—some line management wants to cap that here—with our present policy, it's basically capped there. You have no recourse or other avenue to follow to get out of there.

Mr. Guy Lauzon: Except the media.

S/Sgt Brian Flanagan: Then, suddenly, you're like the scarlet letter; you're tattooed right here with, well, what's wrong with this guy? He can't be disturbing this thing. Either these are state secrets... he shouldn't be doing this, etc. Around and around we go, and he's caught by the tail; he's the one being spun.

Would something have been done with whistle-blowing? With good whistle-blowing legislation—effective in that if Robert Read's name had been kept secret while the investigation was going on, he most certainly would have fully cooperated with an outside, independent agency to investigate that—I'm optimistic that something else other than what happened to the man would have taken place. Otherwise, we're creating legislation that's of no value.

Mr. Guy Lauzon: We have a—

The Chair: Mr. Lauzon, your time is up. You may get another opportunity.

For seven minutes, Madame Thibault.

[*Translation*]

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

Thank you, sirs, for being here. You began by stating very clearly that you support this bill, but that certain problems could arise if it were not amended in some way. You therefore feel that some changes are warranted. I'd like you to begin by telling me what kind of amendments you would like to see.

Secondly, you indicated to us that currently some recourse was possible, as is true elsewhere. You stated that the process could take as long as two years. Who then would be inclined to report wrongdoings if it's clear at the outset that the grievance process could take that long? I'm speaking hypothetically, but this could be a disincentive for some people. While I'm on the subject, I was wondering if, from a cultural perspective — and I'm being quite neutral - it's more difficult for Canadian Forces personnel, for women as well as for men, to blow the whistle, given the nature of their work and the training they undergo? In other words, given the type of work they do and their characteristic sense of loyalty, maybe it's more difficult for them to report any wrongdoing?

Thirdly, do you think responsibility for administering the legislation and for reporting back could be assigned to the President of the Public Service Commission, or do you think someone else should be made accountable? These are my first three questions.

● (1550)

[*English*]

S/Sgt Brian Flanagan: Merci.

I'm not qualified to respond in French to all that, but I'll try to see if I have some of these questions right.

The first question you had was with respect to what changes we would like to see in the present whistle-blowing legislation. The changes we've discussed and would like to see are what I've mentioned with respect to the creation of an outside, independent agency, totally separate from the RCMP. I think we—that's the RCMP and whoever ultimately ends up running the whistle-blowing legislation—can create some form of agreement, if you will, between the two parties such that when certain issues come up that are deemed to be of national significance and should not be subject to whistle-blowing, that is accommodated through some form of legislation.

I think the investigators should not be members of the RCMP in any of these matters. They should be outside, independent people. I certainly don't know or think for one minute that the necessity is there for peace officer powers.

While I'm thinking about that...there is some conflict at some point in time with exactly what takes place in some of these matters with respect to the seriousness of the allegation. I can tell you now that if a whistle-blowing matter comes to the attention of the RCMP and a determination is made that it belongs somewhere else—for example, if it's a statutory matter or a criminal matter that's alleged—any other investigation stops and the statutory or criminal investigation takes over, depending on what the allegation is. That's from my knowledge of the organization.

For example, suppose someone comes in and says, listen, I've had enough of watching this; this member is corrupt. And we have corrupt members. You're probably aware that last year in Nova Scotia we had a member convicted of drug trafficking. Well, I'm very confident in telling you that if someone suspected for a minute someone else of doing that and wanted to blow the whistle, it would be dealt with and handled by the RCMP in 99.9% of cases.

But other matters that are relative to and clearly within the whistle-blowing legislation should not be investigated by members of the RCMP.

[*Translation*]

Ms. Louise Thibault: I apologize for prefacing my remarks, but you've told us how the current process is very lengthy and not really very encouraging for people. I imagine you would like to see the whistleblower bring his or her concerns directly to a neutral, impartial and independent body, so as to bypass any internal procedures. In other words, you wouldn't want to see any kind of grievance process possible within the ranks of the RCMP. The matter would be taken directly to this new body, so to speak. Is that correct?

[*English*]

Sgt Norm Fleming (Representative, Staff Relations Representative Program, Royal Canadian Mounted Police): To an extent, I believe, you've captured it.

With respect to our grievance process, which is the lengthy process we're referring to, as an organization we have accepted in the last three to five years that it's not a user-friendly system. It does take a long time and we have been making efforts to change it.

Has it been a discouragement for members to launch grievances? I wouldn't say it has. The length of time it sometimes takes to adjudicate or resolve the grieved issues is a discouraging factor, but I don't know that I would say it's clearly been a deterrent in that respect.

I don't know that we have sufficient data to be able to adequately say what is.... In an issue of whistle-blowing, if someone is determined not to blow the whistle or to disclose information they feel is pertinent or relevant, I don't know that we're able to say why they have chosen not to do that. That's a tough one to answer.

The grievance system we have right now works in conjunction with the policy we have, and it's getting better. I have to say it is getting better, and we are working towards streamlining the system so it's more efficient. But at the same time, it is still not at the level of efficiency we would like to see. I don't think, in a case of a whistle-blower going to an outside agency, that our grievance system at this time would be one that would fill them with confidence that their matter would be dealt with in an expeditious manner.

I hope that answered your question, Ma'am.

● (1555)

The Chair: Thank you, Madam Thibault.

Monsieur Godbout, for seven minutes, followed by Mr. Martin.

Mr. Marc Godbout (Ottawa—Orléans, Lib.): Thank you, Mr. Chairman.

My first question is for clarification. You referred to the lengthy process now in existence, but you referred to an integrity adviser within that process. Could you elaborate? What is his or her responsibility within the existing process under your precise act right now?

S/Sgt Brian Flanagan: That's the public service integrity officer that I was talking about.

Mr. Marc Godbout: It is? Okay.

S/Sgt Brian Flanagan: Yes, in that one. When you exhaust the chains of command in the RCMP, you go up to the ethics and integrity adviser, who is a senior officer in the RCMP at the assistant commissioner rank.

Mr. Marc Godbout: It isn't internal.

S/Sgt Brian Flanagan: It is internal to the RCMP. The public service information officer, of course, is not.

You must exhaust those avenues within the RCMP, and then if you're not completely satisfied with that, you can go outside. But bear in mind everybody in the Mounted Police knows what's going on by then. I use it as a joke often, but a secret between two Mounties means you have to kill one. There are no big secrets.

● (1600)

Mr. Marc Godbout: I won't ask you to elaborate on that.

Part of Madam Thibault's question you did not have time to answer, and I have the same question. Right now under Bill C-11 the responsibility would go to the president of the Public Service Commission. What are your feelings on that?

S/Sgt Brian Flanagan: It's my view that would not work for members of the RCMP. Most federal government departments in the public service are union oriented, union based, union driven, and they have all the collective bargaining rights that are associated with any union activities. Members of the RCMP do not have any union whatsoever. We have, as I just mentioned, a staff relations representative program that deals with issues relative to anything that the member has. To make it very specific, we treat our employees a little bit different from other federal government departments, particularly relative to what is....

When you're dealing with unions, the rules are A, B, C, D and E, and this is how we operate and how we function. There's not A, B, C, D and E in the Mounted Police. There are chains of command that you must follow, people you must go to. You can skip lengths and jump and be all over the place, and you have the right of access in the staff relations program that we work in to go to any level of management with any matter. If at some point in time you have a disagreement, then you resort to this not very well functioning grievance process that we have. Again, it is very much different from any public service union. That has to be done by this date. We have none of that legislated, other than the requirement to have it presented within 30 days of being agreed. After that it hits the track and away it goes, unfortunately.

Sorry for my long-windedness on that, but to get back to it, I really don't think that is the organization that should be handling whistle-blowing matters for members of the RCMP.

Mr. Marc Godbout: Okay, another aspect is protection of the whistle-blowers. If you want to fall under Bill C-11—you did refer to the problems, and you're not the only one; many witnesses have—do you think the protections right now under the existing bill are sufficient, and if not, what would you recommend to avoid that famous tattoo that you were talking about?

S/Sgt Brian Flanagan: Yes, the scarlet letter. Having read the legislation several times, I don't think it's sufficient to offer the protection that's necessary for whistle-blowers.

My thoughts then go immediately to the hope that if it goes outside these federal government departments, including the Mounties, over to who's going to be directing and commanding that, it will at least offer the protection necessary to allow people to blow whistles—because if you have nobody to whistle to, what's the purpose of this thing?

If I fear, at any point in time, that someone is going to scarlet-letter me because I blew the whistle, I'm just not going to do it. I shouldn't say I'm not; there are some members who say, come hell or high water—the Robert Reads of the world—that they're reporting this, they're not happy here, they're going outside to the press...whatever. We have those types of people. Unfortunately, you see what happens to those types of people sometimes.

But we do have other male and female members who wouldn't mind knocking on anybody's door at any time to report wrongdoings within the organization. At the same time, you have people who simply won't, based on the fear that they're going to be tattooed or they're going to be hammered on this.

I guess it's human nature, more than anything, that if I'm fearing for the only job I have, and I've been around it.... You don't want an old bird like me to think about those things. I've been around too long, I guess, some will say. But if I'm fearing losing my job, my source of...it has a severe impact on members of the RCMP. We're not living in one place at one point in time for 25, 30, or 40 years like John Q. Public; we're a transient organization. We're subject to all kinds of moving, promotions, and discipline, and all those things affect our members. You'd have to be pretty solid on your feet if you were going to take them on and blow the whistle on something. You have your powder dry, and good luck.

Mr. Marc Godbout: Mr. Chair, I just would like to thank them for their honesty and frankness. I think that's very helpful.

[*Translation*]

The Chair: Thank you, Mr. Godbout.

[*English*]

Mr. Martin, seven minutes.

Mr. Pat Martin (Winnipeg Centre, NDP): Thank you, Mr. Chair, and thank you, witnesses.

I don't have a great deal to ask you, but I would like to say how pleased I am to hear your view that you, in fact, do believe the RCMP could be appropriate under a whistle-blowing regime. I'm really happy to have that as our starting point.

I understand you to say, though, that some special accommodations would have to be made because of the sensitive nature of a lot of the work you do. Would it be safe to say that the accommodation could be about the nature of the complaint more than the part of the agency? For instance, rather than exclude the whole—what's the terminology you used?—protection operations, for instance, could we say that complaints of a sensitive nature within protection ops aren't appropriate for whistle-blowing? Would that satisfy you?

Sgt Norm Fleming: Absolutely. I don't think there was ever any intent on our part, and I apologize if we did impart that. Clearly we weren't looking to exclude every member who is permanently bound to secrecy from making a complaint—or an allegation, or blowing the whistle, as the case may be—on an issue that doesn't revolve around a state secret or protected information.

Mr. Pat Martin: That's the point I was getting at, because there certainly could be maladministration of funds, for instance, within that part of the RCMP.

Sgt Norm Fleming: Clearly they should be allowed to forward that, and be protected under this legislation.

Mr. Pat Martin: Okay, we understand each other there. That's going to be a difficult, fine nuance to craft into our legislation, but I think it's certainly worth the effort.

S/Sgt Brian Flanagan: I don't want to interrupt you, but I gave that some thought, and I'm thinking the organization would go along with that. If an issue that is deemed—and who does the deeming is, I guess, the critical area—to be of national significance should not go through that process, then I think something can be crafted. You can craft whatever you want in these things, as you're well aware. It goes in there; how it's applied is the whole faith that we have in that particular thing.

If it can be created to say that whoever is handling the whistle-blowing stuff must consult with the RCMP with respect to such a matter, a determination could be then be made as to whether or not it was a whistle-blowing matter that would be allowed to go on. If it's determined to be something else, something that can be handled within the RCMP, I've been suggesting that would be an agreement between the commissioner of the RCMP, or his delegate, and whoever is responsible for the whistle-blowing legislation.

● (1605)

Mr. Pat Martin: Well, some matters are more properly dealt with as grievances within the existing structure; that's true. The initial adjudication is critical then. The first person who gets the complaint is going to have to make those judgment calls on appropriateness, national security, etc.

With what little time I have, I'm trying to get my mind around things within the RCMP that wouldn't be appropriate—for instance, with the internal mechanism you currently have, that incident about buying horses with sponsorship money. It's not criminal. Some would call it maladministration of money or not a good use of the taxpayers' money. Would you view that as a type of complaint that could properly have the whistle blown on it?

S/Sgt Brian Flanagan: I think if a member was aware of all the facts surrounding it and was legitimately concerned that some of these things might not be above board, I would suggest he had every right to have the thing investigated, for want of a better term, to find out just what exactly took place with respect to RCMP involvement.

And I don't hesitate for a second to say that our door should be open and we should welcome a concern such as that. First of all, it would clear the air with respect to exactly what took place rather than have everybody guess and speculate. And at the end of the day someone might make a determination that what you did here was completely wrong. I don't have any trouble with our being whacked with that particular sword.

Mr. Pat Martin: I'm very glad to hear you have that attitude. I think it has a cleansing effect either way, no matter what the outcome is. Once and for all it's put to rest.

Do I have a moment left?

The Chair: You have two minutes.

Mr. Pat Martin: A luxury of time.

The last thing is, you say you need an independent third party to investigate the RCMP, and much of the debate around this table has hinged on where that new whistle-blower officer should be housed. The government is recommending it be within the Public Service Commission. Now, public servants are saying that's not arm's length enough for us, but for the RCMP, that is arm's length. Would you be satisfied that somebody resident in the Public Service Commission would in fact be arm's length enough that you wouldn't feel there's a conflict of interest?

S/Sgt Brian Flanagan: That's a tough one. Again, that was my concern earlier with respect to having it come out of the public service, because arm's length in those departments.... I come back to your union format again: these are the rules; they're structured. We don't operate in that vein.

Who comes knocking on the door to ask us about a whistle-blowing complaint? I really wouldn't care who came to the door if I had faith that what they were doing was legitimate. You're here to ask the right questions, you're sending a competent investigator, and welcome, come on in and ask me your questions. Who does that? I don't know that I'm overly concerned with that investigator. At the end of the day, who's managing it? If it's the public service and they're the decision-makers on that, I think I'll have some difficulty with that one.

Now, how do you get at arm's length by hiring someone to manage your whistle-blowing legislation that is passed here unless you create something like an ombudsman's office and say, well, here—

Mr. Pat Martin: Some would say that the category of officer of Parliament would be about the only completely impartial—

S/Sgt Brian Flanagan: Yes, but if that person or that group is going to do all the whistle-blowing complaints, they may be busy for a while. I don't know if we'll keep them gainfully employed, but I'm sure the numbers in all the federal government will.

And it depends on how it goes. When you get into the Mickey Mouse whistle-blowing things—and hopefully we won't allow that to take place—that eats up everybody's time and is unnecessary.

● (1610)

Mr. Pat Martin: Well, that's right. Somebody has to make a judgment at the front end as to what is properly a grievance or what is properly worthy of investigation as a whistle-blowing incident.

The Chair: Thank you, Mr. Martin. Your time is up.

Mr. Poilievre, seven minutes, followed by Mr. Szabo.

[*Translation*]

Mr. Pierre Poilievre (Nepean—Carleton, CPC): I'd like to thank our witnesses for their presentations.

To begin with, can you think of any instance where an independent officer of Parliament should not be told of a scandal or some such thing involving the RCMP?

[*English*]

S/Sgt Brian Flanagan: I don't think I got the question.

Mr. Pierre Poilievre: There's an argument that the RCMP should not be covered. For reasons of security, is there ever any circumstance you can see where a complaint should be kept from an independent officer of Parliament?

S/Sgt Brian Flanagan: I can see some situations arising within the ranks of the RCMP where a matter should not be made public—

Mr. Pierre Poilievre: Not public, but where a complaint should be—

S/Sgt Brian Flanagan: Investigated, if you will.

The problem that I think you have to clearly recognize here is that it matters not who does these investigations. At the end of the day, people are going to know what's going on, particularly in an organization such as the RCMP.

But can you have a situation? I'm thinking of the Prime Minister's protective detail. We have a lot of members involved in the protection of the Prime Minister, and his itinerary is known by certain people. If someone sees some wrongdoing in there and it's going to cause protective ops to expose exactly how this whole operation works with respect to protecting the Prime Minister, I don't think that type of thing should be allowed to go to an outside, independent review of the thing. You're into politically sensitive issues with respect to foreign dignitaries and some of those things.

We're into a lot of dirt in this organization, from top to bottom, and we're responsible for investigating a lot of matters that are sensitive. They involve sensitive people, and the issues are sensitive.

Some of those issues, in my view, should be discussed clearly between whoever is going to be running the whistle-blowing legislation and the RCMP with respect to, “How far are we going to go with this? If we go this way, here's what's going to be exposed”. Then the decision must be made by whoever is in charge of whistle-blowing to decide whether or not he or she wants to go down that avenue and to what length, because at the end of the day, if those things are exposed, you've caused a whole lot of grief for a whole lot of people, and I don't know how you can get around things like that.

That's not to say for one moment that they shouldn't be investigated, but—

Mr. Pierre Poilievre: But you do believe this new officer should have competence over the RCMP, that his jurisdiction should flow into the RCMP.

S/Sgt Brian Flanagan: I think the outside, independent agency should have access to every level of the RCMP. I also think they should be given the statutory right to make decisions with respect to whistle-blowing, either upheld or denied, or that type of thing.

Mr. Pierre Poilievre: So tell me the process, then. When someone working in the RCMP steps forward with a complaint, a disclosure, what's the first step they must take, then, to ensure that their complaint is not precluded based on the criteria you mentioned earlier?

You mentioned that there are some that would not be appropriate to forward to the new office of whistle-blower protection. How do we channel these complaints to ensure that those that are appropriate are posed, and those that are not are directed somewhere else?

S/Sgt Brian Flanagan: I would like to think the whistle-blowing complaint is going to come from the whistle-blowing people to the Mounties, not the reverse. Don't go to the Mounties first and then say, ”I want that to go to whistle-blowing.” Go to whistle-blowing; whistle-blowing then comes back to the Mounties and says, “Here's the complaint we have”.

I don't think for one minute that the complaint would be stopped there. Someone is going to have to look at some of the facts surrounding the allegation and make a determination as to whether or not it affects something like a state secret of some sort.

● (1615)

Mr. Pierre Poilievre: Okay, but when they've gone back to the RCMP, they may well have, intentionally or otherwise, violated the anonymity of the complainant. Then they might say, “Well, actually, it turns out that our office is not responsible here. We're going to remove ourselves entirely. We'll let the RCMP manage this problem internally”. So you now have a whistle-blower whose identity is exposed to his superiors, left to fight in the dark by himself.

S/Sgt Brian Flanagan: Yes, you do.

Mr. Pierre Poilievre: Okay, well, that's unacceptable. That's not whistle-blower protection. That gives no comfort to a potential whistle-blower.

S/Sgt Brian Flanagan: If I was around another 25 years or 30 years to come back, if we get whistle-blowing legislation, I'd see how many of these things were really kept secret at the end of the day.

We're not talking Deep Throat here on some of these matters. There's going to be clear knowledge, because members will blab themselves that “I blew whistles and I made the complaint”, that type of thing.

But if it was designed and implemented and was perfect, then you'd be talking about a perfect situation. We do not live in a perfect world. I know you're focusing on something that's—

Mr. Pierre Poilievre: Let me just break in here for a second.

I understand that we're never going to get a perfect law. My concern is that this could endanger whistle-blowers in the RCMP to a greater degree than they are already endangered. If they are misled to believe that they can come in anonymously to an independent body with complaints and then those complaints will just be bounced back to the RCMP after being deemed matters of national security, then their careers are destroyed and they have no recourse.

Would it not make more sense to have a branch of the whistle-blower protection office specifically dedicated to issues affecting national security that are more quarantined to ensure that this information does not come out?

S/Sgt Brian Flanagan: I wouldn't have any difficulty with that if that's going to be hived off to a separate branch, if you will, of the same office.

Mr. Pierre Poilievre: Of the same office, of the same independent office with specific ethical expertise in areas of national security.

This is just an idea. I think you posed a very serious question here. If we're going to give protection to RCMP employees, but at the same time we're going to have an exception for cases that are related to national security, I just worry that we might end up presenting some serious dangers to members of the RCMP. We need to resolve that question if we're going to include the RCMP in the legislation.

The Chair: Thank you, Mr. Poilievre.

A short answer, if you'd like, Mr. Flanagan.

S/Sgt Brian Flanagan: Just quickly, I think management is as concerned with that as the membership would be. If the separate group that is going to look at those issues comes to the Mounties, I don't know that it's necessary to expose who whistle-blew, but rather it's a case of "Here's our situation and here's our complaint. Here's what we're going to be looking at. I'm not telling you where it came from or who brought it here, but I'm looking at it from this perspective. Do you see any reason why we can't, or how far do you see we can, go with this investigation without jeopardizing the scenario that we talked about earlier with respect to something national?"

The Chair: Thank you very much, Mr. Flanagan

Mr. Szabo, seven minutes.

Mr. Paul Szabo: Thank you, Mr. Flanagan and Mr. Fleming.

Can you give us a sense of what would be the number of allegations of breaking a law that would have occurred in the RCMP for any period that you might be familiar with?

S/Sgt Brian Flanagan: Do you mean breaking a criminal law—

Mr. Paul Szabo: A law of Parliament, a law of Canada.

S/Sgt Brian Flanagan: —or a federal statute, or the RCMP Act?

Mr. Paul Szabo: That's also a law, yes. It would be under criminal. I'm not talking about stealing pencils. I'm talking about breaking a law.

S/Sgt Brian Flanagan: The only statistic I can give you is that in an organization of 19,000 employees—and this is from several years ago—less than 1% of members of the RCMP go through their entire career without ever being involved in the discipline process. Being involved in the discipline process usually means matters arise as a result of a member having committed an offence of some sort, or been involved in some code of conduct violation that requires us to invoke the RCMP Act with respect to discipline matters. It's hard to put numbers on them. As I mentioned earlier, we have members who were caught for impaired driving and for dealing in drugs. We have a member who shot and killed somebody. We have excessive force complaints all the time that we investigate. We're not perfect.

● (1620)

Mr. Paul Szabo: This is very important. I want to explain to you and, I guess, to anybody who is watching this why this is important.

Take the George Radwanski case, the Privacy Commissioner. It was a serious matter. It doesn't happen very often. With regard to how many incidents of allegations of serious wrongdoing, where there is breaking of the law, I'm not talking about somebody who was drinking and driving, etc. That's handled under the normal law. I'm talking about breaking the law in the conduct of their responsibilities as an RCMP officer, in that they were embezzling money out of the RCMP, or they stole things, or they did something that affected your safety, or things like this.

The reason I raise this is that if the incidents, say, in the last decade, in the RCMP were three.... If somebody murdered somebody, that's handled under the Criminal Code. That's not something where an employee has to make an allegation. We're talking about when an employee has to make an allegation. How many of those? The reason it's important is that if you say three, I will not set up a department of 100 people to deal with your incidents, but if you say 33, I will have to create a whole department. This act creates an enormous bureaucracy on the presumption that it's going to be necessary. I think we need to find out whether or not the potential would justify the need, whether we could have an independent stand-alone, start small, and see what happens, or do we really know that there is a high volume of allegations that are not being dealt with or should be dealt with on a more timely basis.

S/Sgt Brian Flanagan: As an organization, as I said, we control and handle our own discipline matters within the organization, except the statutory ones that of course go to outside courts. Serious wrongdoing I guess is in the eyes of the beholder, in that what is serious and what is not is relative.

At any point in time I think we have adjudications sitting on wrongdoings of members within the organization—code of conduct violations—numbering probably 40 to 60 a year on average. Bear in mind, if a member is picked up for impaired driving and goes to court, then we deal with him within—

Mr. Paul Szabo: I need you to focus a little more on the number of items for which another employee is forced to make a whistle-blowing claim. You're talking about stuff people have done that obviously in the normal course is identified and dealt with.

I'm talking about your working there and the guy next to you stealing money left, right, and centre, and nobody knows, and if you don't say anything.... He's stealing computers or cash or drugs or evidence or whatever, and you're coming forward because the well-being and the performance of the RCMP is being jeopardized by this person, who is unknown by any other means.

S/Sgt Brian Flanagan: I'd like to think our numbers are small. I don't have specific numbers, but here's an interesting statistic; I'll just take a minute.

In 2003 the Public Service Commission in Nova Scotia did a questionnaire of 400 public servants on whistle-blowing matters. Of those public servants, 27% said that at some point in time in their service they saw wrongdoings that should have been reported, either thefts or just bad business practices, or whatever. Whistle-blowing legislation was passed in the province of Nova Scotia in September 2004. As of last week in Nova Scotia, one whistle-blower had come forth.

When you think that 108 of the 400 surveyed saw some form of whistle-blowing they thought should be reported.... Of those 108, only one came forward. The reason is—if you can believe this—they're saying: "Your whistle-blowing legislation requires that as a provincial employee I must go through the chain of command. I'm not going to do that". Again, going back to what I....

I'm afraid those are the only numbers I can give you, but the numbers are mind-boggling.

● (1625)

Mr. Paul Szabo: No, I don't expect you to have all these things at your fingertips, but I think what you're suggesting to us is that if there were truly an independent, efficient jurisdiction you could use to make an allegation and you were comfortable it would be dealt with on a timely and appropriate basis, whatever you experience today actually would increase simply because that facility existed.

S/Sgt Brian Flanagan: I'm comfortable in saying yes to that question.

Mr. Paul Szabo: Okay, thank you, Mr. Chairman.

The Chair: Thank you, Mr. Szabo.

We have Mr. Lauzon with five minutes, followed by Monsieur Gagnon and, if there is time, Mr. Scarpaleggia.

Mr. Guy Lauzon: Thank you very much again, Mr. Chairman.

I have known just a couple of RCMP officers, and the work is dangerous, etc., and there is a certain sort of macho image about RCMP officers—well-deserved, by the way. But within the ranks, you mention that if you whistle-blow.... This story wasn't investigated, but I had somebody tell me about mixing it up with their superior officer, getting the desk with the paper, and being ostracized, all the buddies just going to the cafeteria and.... That happens in the RCMP.

S/Sgt Brian Flanagan: Yes, it does.

Mr. Guy Lauzon: Right now Bill C-11, if it went forward as it is, would exclude the RCMP—

S/Sgt Brian Flanagan: Yes.

Mr. Guy Lauzon: —or they would suggest, I guess, the RCMP would have to have some form of whistle-blowing legislation in place within.... And of course that would be a form of going up through the ranks. It would probably not be acceptable to the rank and file.

S/Sgt Brian Flanagan: To the rank and file I don't think it would be. Some levels of management certainly don't have any problem with that.

Mr. Guy Lauzon: I'm sure they don't.

S/Sgt Brian Flanagan: As you're well aware, you can create policy to steer it whichever way you want.

Mr. Guy Lauzon: Yes.

Getting back to the independent commissioner, and you talked around that a little bit, I can understand the RCMP is somewhat removed from the president of the Public Service Commission, which in this bill is who's proposed to be the independent person.

You mention Nova Scotia, where 27% of the people would have whistle-blown. I think probably in any organization, including the RCMP, the number would probably be somewhere around 20%. I have experience in the public service myself.

The legislation in Nova Scotia has the whistle-blower going up through the line of command.

S/Sgt Brian Flanagan: Yes.

Mr. Guy Lauzon: That's the same way it is in this legislation, so you're not going to get the desired results.

S/Sgt Brian Flanagan: No, but your chain of command is outside the Mounted Police.

If I call the whistle-blowing office and I want to discuss my matter with someone out there, there's comfort in knowing that I'm not talking to someone within the organization. When you can be given that comfort, I think you have more of a tendency to do the right thing and whistle-blow, if you feel it's appropriate.

Mr. Guy Lauzon: Which is to say that's why the exercise in Nova Scotia is flawed, because you have to go through the internal chain of command.

S/Sgt Brian Flanagan: That's what I read and what I'm led to understand. That's the feeling of the public service employees in Nova Scotia and that's why they're not doing it. They feel there's jeopardy to their whistle-blowing.

Mr. Guy Lauzon: You mentioned as well, and I've witnessed this, that many people would whistle-blow. But when they see something like the Radwanski affair or something similar and they think about whistle-blowing, they go home at night and toss and turn in their sleep. They're trying to figure out what the ramifications are if they do this, if they come forth. They lose sleep.

We had four gentlemen here with over 100 years of service to the public service, and all four of them were in trouble and had left in disgrace because they had stood up for the Canadian public in whistle-blowing. How many people do you think in your organization and with all your years of experience would have come forward over the years if they had had whistle-blowing legislation with some integrity in it? How many do you think would have come forth?

● (1630)

S/Sgt Brian Flanagan: That's a tough one. As I said, I have great admiration for the organization. We're an organization of very good people. I'd like to think we have fewer of our numbers, generally, involved in wrongdoing, if you will, in some areas than a lot of other provincial or federal government departments.

The Chair: Sorry, are you finished Mr. Flanagan?

S/Sgt Brian Flanagan: I guess so.

The Chair: I thought you were finished. I apologize for interrupting.

Thank you, Mr. Lauzon.

We go to Monsieur Gagnon, and if there is any time left—we have five minutes left with these witnesses—then to Mr. Scarpaleggia.

[*Translation*]

Mr. Marcel Gagnon (Saint-Maurice—Champlain, BQ): Thank you very much, Mr. Chairman.

I've been following these exchanges closely and I do have one question. If the grievance office in question did in fact exist, would it afford any protection to an RCMP officer who was issued an order with which he or she did not agree?

Let me give you an example that could prove useful to you. You may recall the troubles in Quebec in 1970. If you weren't there at the time, surely you must have heard about them. RCMP members were instructed to do such things as steal Parti Québécois membership lists. They were also ordered to set bombs. As I recall, Officer Samson was caught in the act. In fact, the bomb he was setting blew up in his hands. Had that not happened, no one would likely have pointed the finger at him. He was acting on the order of a political movement.

Had this legislation been in force and had a grievance office existed, might Officer Samson have been able to say that he wished to defy the order and that he denounced the RCMP for its actions?

[*English*]

S/Sgt Brian Flanagan: That's a tough one.

Again, we're a paramilitary organization and we're taught to obey commands. When the boss says you're supposed to do something, you will do it. Would members go so far as to say they really didn't want to do that, and by the way, they were going to blow the whistle? That's a tough one for me to sit here and give you an answer on, because I really don't know.

That would have a total bearing on the ethics and morality of the member involved. I certainly can't speak to the general thought that it would be something many members would do. I don't even know if I could give you that as a statement of mine. I'm not comfortable in saying that because they would have independent whistle-blowing legislation, they would have blown the whistle. That's extremely hard to say. Some of our members are very aggressive; they wouldn't whistle-blow on anything. Others, if they get tweaked the right way and have a real problem with it, then they will.

To go back to it again, the legislation presently here, as it is crafted, is permissive. There is no compulsion. The RCMP Act makes it compulsory for members to report wrongdoing. Now you're almost into the same boat here, where I'm saying that if I know you're going down to steal stuff from the Parti Québécois office, or whatever, am I going to allow that to take place, while I'm in a section here?

I guess it goes to your question about what gets whistle-blown and what doesn't. If we're down stealing some government party's records to find out who's on what team, do I whistle-blow, or—in the other 50%—do I go down and steal the stuff? That's a very tough question. I'm not totally evading it, but I think it has, sadly, two answers: yes and no. Would some blow the whistle? Some would. Would as many or more not blow it? Yes, they would not blow it.

The point is that if we brought in strong enough whistle-blowing legislation, would everybody use it? No, they wouldn't. Would more use it than are using it today? Yes, they would.

I hope I'm satisfying some of your concerns.

● (1635)

[*Translation*]

Mr. Marcel Gagnon: If I understand correctly, even actions that just about everyone deems questionable could be carried out by certain RCMP officers, if their conscience permits them. The fact remains that these particular actions, when they finally came to light known, were widely condemned, even though the order was issued by someone from outside the ranks of the RCMP. I have a problem with that. In my opinion, a grievance office would give an officer the opportunity to argue that the order he received is undemocratic, that he will not follow it and that, if compelled to follow it, not only will he refuse, but he will also file a grievance against the RCMP for wishing to resort to this kind of thing. Am I off base here?

[*English*]

The Chair: Thank you, Monsieur Gagnon.

An answer, Staff Sergeant Flanagan?

S/Sgt Brian Flanagan: You have to bear in mind that some of the things our members are asked to do, required to do, or directed to do are sometimes even illegal. Some of our undercover operations in Canada and in different parts of the world are very sensitive, and there are times when members break the law. If you're tracking, and you're driving—running red lights, and all—I mean, you're breaking the laws. We constantly break the law. Not everybody does. Some people don't do that; you just don't go into that field. If you're not geared to do that kind of thing, and you know you can't, and you do go in there, you're not going to last long, because you can't live with what you're doing. So you move to another group.

It goes to his concern, again, with respect to what you keep secret in some of these matters, and it's a good issue.

The Chair: Thank you very much, Staff Sergeant Flanagan, and thank you both for coming today.

The information you've given here has been very helpful, and we will consider it as we develop this legislation. Thank you again for coming.

I'll suspend for just a couple of minutes as the next witnesses come to the table, and we'll resume at that time.

Thank you.

● (1637)

(Pause)

● (1642)

The Chair: We'll get the meeting started again.

I'd like to welcome the witnesses for the second hour. We have Rob Walsh, the law clerk and parliamentary counsel, and I'll allow Mr. Walsh to introduce the people with him.

I would like to remind the committee why Mr. Walsh is here. He's here to deal with the testimony given by the Information Commissioner, the Honourable John Reid, back on November 18, 2004. The questions arising that we're looking for information on are specifically on sections 15 and 29 of the Access to Information Act and clause 55 of Bill C-11, the bill we're examining here today.

I would ask Mr. Walsh to proceed, introducing the gentlemen with him. After your presentation we'll get to questioning.

Mr. Rob Walsh (Law Clerk and Parliamentary Counsel, House of Commons): Mr. Chairman, before doing the introductions, I would just like to check the *paperasse* here. I have provided to the committee clerk a document headed “Submission”. It's a 15-page document. I'm not going to go through that line by line or anything; I really am going to make a presentation that is less than half of that.

The second part of the submission is in more detail in respect of clause 55. I'm happy to take questions on that same subject afterwards instead of going through the written submission.

Thank you, Mr. Chair. I am indeed pleased to be here today to assist the committee in its consideration of Bill C-11, entitled An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings.

[*Translation*]

With your permission, Mr. Chairman, I would like to introduce the persons appearing with me today. On my right is Richard Denis, Deputy Law Clerk and Parliamentary Counsel, and on my left is Gregory Tardi, Senior Legal Counsel, in the Office of the Law Clark and Parliamentary Counsel.

[*English*]

The purpose for my appearance here today is to respond to the comments on Bill C-11 by the Information Commissioner, the Honourable John Reid, in his testimony to this committee on November 18, 2004.

I am trained as a legislative drafter, Mr. Chairman, as is the deputy law clerk, who is here with me today. Legislative drafters, whether at the House of Commons or the Department of Justice, exercise their expertise in respect of only one official language. In my case, as you might expect, it is English. As there may be questions from committee members pertaining to the French text of the bill, I asked that Richard Denis appear with me, as French is the language for which he has expertise as a legislative drafter. I asked that Mr. Tardi also come before the committee with me, as he is our specialist with respect to such acts as the Access to Information Act, the Privacy Act, the Financial Administration Act, the Public Service Staff Relations Act, the Public Service Employment Act, and such related Acts.

● (1645)

[*Translation*]

Before responding to Mr. Reid's comments, Mr. Chairman, I feel I should first emphasize that I am not here to comment on the merit, or lack of merit, if any, of Bill C-11 as a legislative initiative addressing the issue of whistleblowers in the Public Service and their need for confidentiality and protection from reprisals. Whether or not this bill effectively serves this legislative purpose is of course a matter of debate amongst Members, whether in the House or in this Committee. It would be improper of me, as an officer of the House, to enter into that debate. My mandate, simply put, is to read the bill and to advise whether I agree with Mr. Reid's comments.

[*English*]

Mr. Reid's concerns are twofold. First, he finds clauses 15 and 29 troublesome for their impact on the operations of his office under the Access to Information Act. Secondly, he contends that clause 55 proposes an additional exemption to the disclosure requirements of the Access to Information Act, thereby placing a further impediment to access to information.

Mr. Reid's concern with clause 15 relates to paragraph (b) of that clause. The Access to Information Act and the Privacy Act provide for restrictions on the disclosure of information in certain circumstances. Paragraph (b) of clause 15 sets aside any such disclosure restrictions in respect of information that might be disclosed under clauses 12 to 14 of this bill.

Most notable in this respect, Mr. Chairman, is section 62 of the Access to Information Act, which prohibits the Information Commissioner and his staff from disclosing any information to which they become privy while performing their duties under that act. In his testimony, Mr. Reid expressed the view that the broad wording in clause 15 would permit the disclosure of the investigatory records gathered by his office.

Paragraph 15(b) is contrary, says Mr. Reid, to subsection 36(3) and sections 62 to 65 of the Access to Information Act, which ensure confidentiality. In my view, this may not be an unreasonable reading of this clause. Paragraph 15(b) would be capable of having the effect described by Mr. Reid in his testimony to this committee.

[*Translation*]

Mr. Reid made similar comments with respect to clause 29 of Bill C-11. This clause enables the President of the Public Service Commission to have access to information in the possession of offices or agencies to which the bill applies and to the premises of these offices and agencies for the purpose of carrying out the Public Service Commission President's duties under Bill C-11. As I said earlier, Bill C-11 applies to the Office of the Information Commissioner. For this reason, clause 29 would appear to give the President of the Public Service Commission access to the offices and records of the Office of the Information Commissioner and thereby breach the confidentiality that is meant to apply to the work of that Office.

Clause 29 gives disclosure under Bill C-11 priority over any disclosure that might otherwise apply under the Access to Information Act or the Privacy Act. As with clause 15, I feel that Mr. Read's concerns about clause 29 may not be unreasonable. It would appear that clause 29 may be capable of having the effect that he described in his testimony to this committee.

● (1650)

[*English*]

Mr. Reid indicated in his testimony that he does not seek exemption for his office in respect of disclosures pertaining to internal wrongdoing. His concern in respect of clauses 15 and 29, as I understand his testimony, Mr. Chairman, is that these clauses would enable disclosure of information of internal wrongdoing and enable investigation of the Office of the Information Commissioner by the president of the Public Service Commission and at the same time enable disclosure of information that for purposes of the Access to Information Act is meant to be kept confidential. In my view, Mr. Reid's concerns in this regard are understandable.

Mr. Reid's second concern related to clause 55 of Bill C-11. This clause proposes an additional subsection to section 16 of the Access to Information Act. Currently, section 16 of the Access to Information Act sets out the circumstances under which there could and those where there must be a refusal to disclose a record containing information. More specifically, under subsections (1) and (2), the head of a government institution has a discretionary power to refuse the disclosure of a record containing information. These subsections also list the grounds for such a refusal. Under subsection (3), the head of the government institution is obliged to refuse to disclose information that falls under this subsection. There is no discretion allowed.

The additional subsection proposed by clause 55 would provide for yet another discretionary power to refuse. However, as Mr. Reid points out, unlike subsections 16(1) and (2), the exercise of this discretionary power would not have to be justified and would therefore not be subject to the application complaint investigation process available under the Access to Information Act. The exemption to disclosure provided by clause 55 seems to be a blanket or unrestricted discretion that can be exercised without reasons given. In this respect, I would say Mr. Reid has not misread clause 55, or at least his concern is understandable.

Mr. Reid, in his testimony, goes on to suggest that clause 55 does not provide any additional protection to the identity of the whistle-blower than is already available under the Access to Information Act. In this respect, I cannot agree with the Information Commissioner.

[*Translation*]

It seems to me important in this discussion to remember that Bill C-11 deals with wrongdoing, not access to information. Mr. Reid seems to treat his Act as if it is designed to serve the same purpose as Bill C-11. Bill C-11 is trying to address situations outside or beyond the scope of the Access to Information Act. There may be sufficient identity protection under the Access to Information Act for the purposes of that Act, but this is not conclusive as to whether there would be sufficient identity protection to the whistleblower under Bill C-11 in the absence of an amendment of the kind proposed in clause 55. The function of, or justification for, clause 55 is not to be determined, in my view, with reference to the Access to Information Act as if that Act and Bill C-11 served the same legislative purpose.

[*English*]

My main difference with Mr. Reid with respect to clause 55, in terms of statutory interpretation, arises from his view that section 19 of the Access to Information Act provides a mandatory exemption from access to personal information, including the identity of any whistle-blower under Bill C-11. He says section 19 of his act is sufficient and the amendment proposed by clause 55 unnecessary.

In my view, something more is needed for this purpose than what is provided in the Access to Information Act and/or the Privacy Act, whether read separately or together.

Mr. Chairman, I must admit I have some difficulty, as well as does Mr. Reid, understanding why the amendment to the Access to Information Act proposed by clause 55 gives a discretion to the head of the institution—not an obligation, but a discretion, a choice—yet with no indication of how or on what basis and in what circumstances the refusal to disclose may be invoked. This would make any exercise of this discretion virtually impossible to challenge.

Up to this point, Mr. Chairman, my presentation has followed the written submission that has been distributed to committee members. At this point I would seek direction from the committee. If committee members wish, I am prepared to elaborate in greater detail about why I differ with the Information Commissioner with respect to clause 55; the written submission, however, provides this elaboration, Mr. Chairman. But I'm in your hands as to how you wish to proceed from this point.

● (1655)

The Chair: Thank you, Mr. Walsh.

Is there anyone who would like to start with questions to Mr. Walsh or his colleagues?

Yes, Madame Thibault.

[*Translation*]

Ms. Louise Thibault: I imagine that there will be a first round of questions. However, in view of the complexity of this subject, I have no objections to letting Mr. Walsh and his colleagues continue explaining this legislation to us in greater detail.

However, I'll respect my colleagues' position. If they wish to move immediately to questions, then I'll go along with that too.

[*English*]

The Chair: No one has indicated being ready or wanting to ask questions at this time.

Mr. Poilievre.

Mr. Pierre Poilievre: I will for clarification, maybe.

The Chair: That's fine. Go ahead, Mr. Poilievre.

Mr. Pierre Poilievre: I want to get some clarification. You may have actually stated it clearly and you may have written it clearly, but I don't want to lose you and find out that I'm not able to garner an understanding of this point.

Where exactly, again, is it that you differ with the Information Commissioner on clause 55?

Mr. Rob Walsh: Mr. Chairman, may I suggest that members, if they have their bill, take a look at clause 55.

I provided to the committee clerk, Mr. Chairman, extracts from the Access to Information Act and the Privacy Act, and it may be that members might want to have those extracts from those two statutes to look at as well.

Mr. Pierre Poilievre: I know clause 55 fairly well. Could you just precisely reiterate the difference between your interpretation and the Information Commissioner's interpretation?

Mr. Rob Walsh: Right.

As I said in my presentation, which may not be sufficient—and this is the elaboration, Mr. Poilievre, that I said I could do, but you may not want me to—in terms of my presentation, the difference is that Mr. Reid expressed the view that there was no need for the confidentiality protection provided by clause 55 in respect of the identity of the whistle-blower because section 19 of the Access to Information Act, in his view, was sufficient; and I don't believe it is necessarily, or would be necessarily, in every case sufficient.

I think it's important to keep in mind that the Access to Information Act is about obtaining information. It's about asking for information and being denied information, in some cases appropriately and in other cases perhaps not appropriately, and that's when the Information Commissioner comes into the game to find out whether in fact an order is necessary to compel disclosure.

Bill C-11 is about enabling public servants to make known to their superiors, or to the Public Service Commission, actions falling into the meaning of "wrongdoing" as described in clause 8 of the bill. Mr. Reid mentioned in his testimony that if they're doing an investigation on why documents are not being disclosed and they see evidence of statutory offences in these documents, they can deal with that and they would report it. But if you look at clause 8 of the bill, there are six paragraphs in that clause setting out the meaning of wrongdoing, only the first of which deals with offences to statutes. You have paragraphs (b), (c), (d), and (e), which arguably deal with other things and they aren't matters arguably that are necessarily evidenced in documents.

Remember, the Information Commissioner is pursuing records, which are documents setting out information. Whistle-blowers—and this may be part of their frustration—may not have any documents for what they want to talk about, but they may think they have evidence in their own observations perhaps of misuse of public funds, or a public asset, or a gross mismanagement in the public sector, etc., as set out in the definition of wrongdoing.

So Mr. Poilievre, my view is that while in many cases the whistle-blower may enjoy some protection under the provisions of section 19 of the Access to Information Act, it may well be that in other cases he would need the protection provided in this bill. Whether it's what's set out in clause 55 or something like it, that's a matter of study by the committee, but he would need something in this bill that gives him protection where he may not be under the Access to Information Act.

Mr. Pierre Poilievre: So what you're effectively telling us is that there are some critical protections for the whistle-blower's anonymity in clause 55 that are not covered in section 19 of the Access to Information Act. Is that what you're telling me?

● (1700)

Mr. Rob Walsh: Yes, in so many words.

Mr. Pierre Poilievre: All right.

And if clause 55 of the whistle-blower protection act were simply eliminated, you think this would present certain dangers to the confidential identity of whistle-blowers? That's what you're telling us?

Mr. Rob Walsh: I would have to say that in my view the identity of the whistle-blower who might make a disclosure under Bill C-11 would be at risk.

Mr. Pierre Poilievre: So in your view—and I think it would be unfair of me to ask you to elaborate too much on this point—is there a way to amend clause 55 in a way that deals with the Information Commissioner's legitimate concerns about the resulting secrecy and at the same time does not jeopardize the anonymity of a whistle-blower?

Mr. Rob Walsh: My own view, and I must qualify this.... I have not studied the circumstances of whistle-blowing as a policy matter. I'm not here to talk about it as a policy matter. The government, in preparing this bill, has made some decisions, and the minister and his officials can defend the decisions they've taken with regard to the provisions of the statute. But it would seem to me that the protection that clause 55 seeks to provide needn't be as broad or as sweeping as that amendment suggests.

You will note that in clause 55 the amendment to the Access to Information Act pertains to information. If you go to clause 58—a virtually identical amendment to the Privacy Act—it deals only with personal information. Personal information is like a substratum of information; it is not to be disclosed under the Access to Information Act—and I don't want to take you down this path, because I'm sure you might not enjoy going there—but under the Access to Information Act, when you look at section 19, you can't disclose personal information as defined in section 3 of the Privacy Act, so you have to travel over to the Privacy Act to see what the definition of "personal information" is. When you look at that, it seems to me you can see, in some of the categories, what is excluded from personal information—information of a kind that may fall within an investigation under Bill C-11. I said it was excluded, which means, therefore, it's disclosable under the Access to Information Act.

Then if you go to subsection 19(2) of the Access to Information Act, it says there that "the head of a government institution may disclose any record requested...that contains personal information if...the disclosure is in accordance with section 8 of the Privacy Act".

Well, now you travel back to the Privacy Act and look at section 8, where it purports to set out in what circumstances you can disclose personal information. It says that you can do so where authorized to do so by an act.

Well, then you travel back to Bill C-11, and it authorizes disclosure in the absence of the clause 55. So my concern is that there is a loop here that, in the absence of an amendment of the kind contemplated by clause 55, could enable the disclosure of personal information, and particularly the identity of a whistle-blower, because of a reading of these various sections together.

I'm not necessarily speaking to the merit of the actual amendment proposed in clause 55 or clause 58, but as I said in my presentation, something of that kind perhaps ought to be in Bill C-11 to ensure that the identity of the whistle-blower would not become known.

Mr. Pierre Poilievre: All right, that was simple enough. I'm just going to catch my breath and make sure I don't fall off my chair here.

Mr. Walsh, as I understand it, the Information Commissioner's problem with clause 55 was not that it protected the identity of the whistle-blower, but that it almost quarantined information related to the whistle-blower's complaint. Is that not correct?

Mr. Rob Walsh: That is correct, but you have to ask yourself.... You're quite right. Mr. Reid was concerned. He used the language "veil of secrecy" with respect to the matters that would be evidenced in any documents developed in the course of an investigation. He, I guess, was of the view that he, in his role as Information Commissioner, ought to have access to those documents as well, quite apart from the identity of the whistle-blower, unless there was some legitimate reason for his not having access, in which case he would like to see the reason he shouldn't have access.

He referred to the injury test—set out the reason he shouldn't have access, and then, if the circumstances fell within those circumstances, okay, he wouldn't have access, but give him some criterion by which he or the court could make an assessment about whether you were right in withholding the information from him.

But you're quite right, his concern was not simply the protection, the identity of the whistle-blower.

● (1705)

Mr. Pierre Poilievre: For the record, I'll just conclude my intervention here by saying I believe Mr. Reid's remarks pertaining to clause 55 are very important, and that his recommended changes—with perhaps some minor amendments in accordance with Mr. Walsh's concerns—are very critical to making this bill work. As Mr. Reid pointed out, the sponsorship scandal itself might not have been exposed had this clause been in place, because initially it was whistle-blowers who alerted the attention of internal audits. That attention might not have been alerted if access to information requests had been blocked, which the Information Commissioner says would happen in the event that clause 55 stays in.

I hope that makes sense. I do believe that Mr. Reid has made some very solid points on clause 55, and this committee must amend this clause if this bill is going to work.

The Chair: Thank you, Mr. Poilievre.

Mr. Lauzon.

Mr. Guy Lauzon: Thank you, Mr. Chair.

First of all, thank you for coming, gentlemen. I wish I could say, Mr. Walsh, that all the information you are giving me is sinking in, but unfortunately I'm having a hard time digesting it all.

Part of the reason is we just received a letter—at least, I received this letter—about clause 55 from the President of the Treasury Board, Mr. Alcock, this afternoon. It in itself is a six-page letter with a couple of annexes.

In the letter Mr. Alcock says it is not the intent of the government to have a veil of secrecy on wrongdoing in government. I'm sure it's not; I give the president full credit for that.

But I'm more concerned about the effect. As my colleague suggested, in the sponsorship scandal it wasn't the intent for money to go missing or to go over budget or any of that. It certainly wasn't the government's intent, I don't think, to end up with what we have. But the effect was, here we are in the situation we're in.

Isn't there a way to simplify, as my colleague says—a way to amend section 55? It's really critical that we get the whistle-blower protection we need. For example, if the average public servant heard the goings-on you've explained, that poor public servant wouldn't have a hope of ever coping with this. We have to get this legislation for the user, and the user is the more than 400,000 public servants who are going to be affected by this.

Is there a way, Mr. Walsh, that we can simplify this legislation and have the effect the same as the intent that Mr. Alcock and all the members want?

Mr. Rob Walsh: Mr. Chairman, I mean no disrespect by this, but the member's question would take me into the debate. It really isn't my place to second-guess the government as to the decisions they've taken in preparing this bill. Suffice it to say the concerns of the member are well known, but I think I'd better stay away from the discussion.

Mr. Guy Lauzon: I respect that, but I think for the record I have to say I could not support this bill because of clause 55 right now. We have to make it so that it's useful to the user. That's what is important. I just want to go on the record, Mr. Chairman, saying that.

Mr. Rob Walsh: Mr. Chairman, I can answer the member's question in this respect, because I'm here to talk about the language of the bill and the language of this proposed amendment. I'd be interested to know what the experts responsible for the drafting of this bill would have to say about the idea of limiting the proposed amendment in clause 55 to personal information that identifies or could lead to the identification of the public servant who makes the disclosure. It wouldn't just be identification, but it would be other information that could lead to identification.

● (1710)

Mr. Guy Lauzon: I think there has to be a way to amend clause 55 so that the effect will be the same as the intent.

Mr. Rob Walsh: You made reference to a letter from the Treasury Board. I saw that letter only a few hours ago. It makes reference to the fact that the information that's withheld under this amendment would only be for a maximum of 20 years from the time when the information is received. I think that's what the letter said, but that's not what the amendment says. It's 20 years from when the request for the information is received, which could be several years after the request under the Access to Information Act. When that request is received, you have 20 years, as I read it, during which the information could be withheld. That event could happen several years after the information itself was received by the head of a government institution.

Mr. Guy Lauzon: I think there are enough roadblocks preventing a whistle-blower from coming forward. It's intimidating enough to whistle-blow; we certainly don't want to put more roadblocks in their way. I think we have to amend clause 55, and as I've said, I'd like to be on the record as saying it.

Mr. Rob Walsh: Mr. Chairman, perhaps you appreciate the reason I suggest those changes is that this would meet Mr. Reid's concern that there be a test, if you like, a criterion by which the exercise of the discretion under this clause could be measured: does it identify the public servant, or is it of such a kind that it could lead to the identification of the public servant? That would give the Information Commissioner some criteria by which to determine whether the withholding of the information is warranted.

The Chair: Thank you, Mr. Walsh.

Thank you, Mr. Lauzon.

Mr. Poilievre, do you have more questions?

Mr. Pierre Poilievre: Forgive me if this an inappropriate question —I'm just recently elected. I wonder whether you might tell me whether you are willing to help us craft an amendment that would accomplish the two things you just mentioned, that would limit clause 55 to the personal information of the whistle-blower.

Mr. Rob Walsh: Legislative counsel in my office are available to individual members of Parliament and to committees for the purpose of preparing motions to amend bills.

The Chair: Okay, thank you.

Are there any other questions?

Seeing none, I thank you gentlemen.

Mr. Walsh, you have something to add.

Mr. Rob Walsh: I feel obliged to provide this addendum to what I've said. It relates to remarks from Mr. Reid again, where he made reference to natural justice.

You'll see natural justice is referred to in clause 11, I believe it is. I should double-check that. Yes, it's in paragraph (a) of clause 11 and in clause 22, paragraph (d). I'm reading this now as legislative counsel talking to you as members of Parliament who are being asked to read this bill and consider its meaning.

The reference to natural justice in both cases is a kind of override. What's permitted or authorized under those clauses is subject to the principles of natural justice. The "principles of natural justice" is a legal term, if you'll forgive me. They are principles that are quite recognizable at a commonsensical level, of course. Anyone who's charged with an offence is entitled to have both sides of the story heard; they're entitled to provide their defence; they're entitled to a fair hearing. That in a sense, broadly speaking, is what the principles of natural justice involve.

But in some cases they could involve the right to know your accuser. In some circumstances a person against whom an accusation is made is not simply entitled to know what the accusation is or what the basis for the accusation is, but also who the accuser is.

It's hard to sit here and tell you which situations are those that would require the identity of the accuser and which wouldn't. As I recall his testimony, Mr. Reid's concern was that reference to natural justice is another avenue by which the identity of the public servant may need to be disclosed.

Last, Mr. Chairman—I could go on for days on this, but I know you don't want to do that—in the preamble to the bill there is in the fourth paragraph a reference to the duty of loyalty a public servant has to his or her employer and to the right to freedom of expression guaranteed by the charter.

We've been spending some time trying to understand what the balance would be that this act is achieving with respect to those two competing concepts. It is troublesome. That's not to say meaning can't be found. I'm just saying in some circumstances it could be difficult, and it may be a problem to the public servant who believes he has some information he ought to disclose. But for some reason he fancies the notion of reading Bill C-11 and he starts reading at the beginning and reads the reference to duty of loyalty to his employer. That might have a chilling effect.

Then he quickly reads about his right to freedom of expression. That might have an encouraging effect. He sees the act tries to achieve a balance between those two. I would argue the balance is that by this act priority is given to freedom of expression—that is, to disclosure—over any duty an employee may have to his employer.

No employee has a duty to support, assist, or further the illegal or unlawful activity of the employer. That's not within the duty of any employee to an employer. But that's easy. After that, you get a number of grey areas as to whether there is a duty of loyalty on the part of the employee to an employer of a kind the employer could invoke in assessing the disclosure by the public servant.

I am troubled by this reference insofar as, if I were a public servant, I'd need to hire a lawyer—which isn't troubling to me, but is good news—but it could be difficult for the public servant to know what kind of legal quagmire he or she might be entering into, not just for this particular paragraph but in other respects as well.

I should say in fairness to the authors of this bill that it's a very difficult subject to address in legislative terms.

● (1715)

This is an attempt. There was an earlier attempt in Bill C-25. Members of this committee no doubt have differing views on whether this succeeds in its objective, but it ought to be acknowledged that it's a very difficult thing to do in writing with any sense of confidence that it necessarily will succeed.

The Chair: So, Mr. Walsh, you don't have specific suggestions as to how that can be clarified.

Mr. Rob Walsh: I invite the committee to ask the government or its officials to explain why that reference is in the preamble and whether it is necessary. That's the only reason I'm raising it for you.

The Chair: We will do that.

Mr. Lauzon has a comment.

Mr. Guy Lauzon: I just have a comment, Mr. Walsh.

I don't necessarily think loyalty to the employer contradicts or is opposed to whistle-blowing. For example, if I'm whistle-blowing on my supervisor or whomever, that might be loyalty. Or if I'm pointing out a wrongdoing, that probably is an act of loyalty to my employer. I don't think they have to be at cross purposes.

Mr. Rob Walsh: Mr. Chairman, I agree with Mr. Lauzon, but the very fact that this committee may sit here for several hours and debate that very question is enough to give pause to any public servant contemplating a blow on the whistle. It's not that clear.

Mr. Guy Lauzon: Your point is well made.

Mr. Rob Walsh: And don't forget, the other problem I have here is with the reference to good faith and bad faith. What if the information disclosed is in bad faith? It could be right, it could be true. But it would seem that if the disclosure is made in bad faith, the public servant may be at risk.

There's also a reference, in the Treasury Board letter, to the public servant having a "free choice" about going internally. "Free choice" is my term as a reference to having a choice. In earlier discussions in this committee, I think a member of the committee might have used the expression "free choice". But the impression has been left a number of times about the public servant having a free choice as to whether to go internally or go to the Public Service Commission. However, I'd invite you to read paragraph 13(1)(a) in the bill. That is the provision that enables the public servant to go to the Public Service Commission. It says "if...the public servant believes on reasonable grounds that it would not be appropriate to disclose the matter to his or her supervisor".

Well, in good faith, in good judgment, the public servant decides there are reasonable grounds to do this, so the public servant trots over to the Public Service Commission. He arrives there, and under clause 24, the president of the Public Service Commission may refuse to deal with the disclosure if he or she is of the opinion that "the public servant has failed to exhaust other procedures otherwise reasonably available". So the employee thinks he has reasonable grounds to go tell the Public Service Commission. The Public Service Commission says they don't think so and that the public servant should be back doing it internally because it's not reasonable that he's coming to see them.

Once you get this word "reasonable" into legislation, you're introducing an objective test, that some third party—maybe a court of law, but who knows?—might have to determine whether in the circumstances, under clause 13, the public servant was entitled to go to the Public Service Commission.

So by the language of the bill, Mr. Chairman, it doesn't appear to be a simple free choice by which the public servant decides he or she is going to go outside the department. There have to be reasonable grounds to believe that it would not be appropriate to disclose the matter to his or her supervisor. These terms might be worrisome to any public servant.

● (1720)

The Chair: Mr. Szabo actually has a question or comment.

Mr. Paul Szabo: First of all, Mr. Walsh, I want to publicly thank you and give you a lot of credit for the support that you gave to this committee when it had to deal with that very difficult matter with regard to the George Radwanski case. To have your guidance along the way was very helpful to us in a difficult time, when we were actually making up the rules as we went along in order to make sure we were protecting identity. Although you've come here basically to deal with the Information Commissioner's problem, you have some firsthand knowledge as to what happened there. We bent over backwards to protect identity, and I think it actually encouraged them to come forward.

I have a feeling there is this wish that we find the mechanism that could guarantee, but as we all know, for some allegations coming from certain areas, someone could reasonably deduce who might have been the whistle-blower. There is nothing we can do about that. But for someone who has an allegation, there also is the opportunity to make it anonymously.

I guess the question to you is whether this bill should have an established focal point for whistle-blowing allegations to go to. Would it be unreasonable for us to include provisions whereby the person responsible for that function would be authorized and should in fact make reasonable efforts to follow up on anonymous allegations?

Mr. Rob Walsh: Let me first say with regard to my experience on the government operations committee of the previous Parliament regarding whistle-blowers and also with the public accounts committee in the matter that was before them in the last Parliament, there were a number of occasions when public servants had information they wished to bring forward, but they were very apprehensive. I have to say I was very impressed on the one hand by their courage, but on the other hand by their real concern. Some of you may have heard it said in a number of quarters that the strongest emotion is fear. Fear grows rapidly once it gets a start, and it doesn't take much for anybody, once they get fearful, to go negative.

So we had persons ready to disclose and who spoke with me privately and provided information that was clearly relevant to the business of the committees, but when push came to shove, no, they weren't willing to go there. I was under duty bound not to make their identity known even to the committee or anybody, and I didn't. I'm not saying the outcome in either case would have been any different had they testified, but clearly they had information that was relevant and they felt it was information that ought to be brought forward. They had a sense of public duty, if you like, or a moral sense of wanting to bring it forward, but quite understandably they recognized there could be serious repercussions for them. The situation, in other words, could get out of control from their point of view. They can control whether they say what they know or don't say what they know. After that, they have no control, in their mind, and it's very worrisome for them.

I'll just go to your other point about when do.... Well, I won't. I've taken too much time.

● (1725)

Mr. Paul Szabo: One of the elements of how we address the people who contacted the committee with allegations was to utilize your services to make preliminary inquiries to do a little bit of discernment as to whether or not this was a credible allegation and whether it's something we might proceed with.

It leads me to believe that in terms of having a whistle-blower function—let's say it's a commissioner of whistle-blowing or something like that—we don't necessarily have to have a person who himself or herself is skilled in all of the disciplines that one might need to actually address an allegation of wrongdoing totally. That person really should be able to coordinate the efforts, just as Mr. Alcock did by drawing on you. We drew on the Auditor General. We drew on other expertise, and indeed even police. I think our clerk was aware of a policeman at one point. We were actually thinking of calling police at one point to maybe pick up a witness.

It's one of these things that I'm trying to picture on how we give ourselves the best opportunity to establish in the eyes of all interested parties that we have an independent process that will be responsible for giving fair and reasonable investigation of an allegation and to carry it forward in accordance with good business practices and, of course, the law.

Mr. Rob Walsh: One of the key ingredients for my intermediary role that you're describing—and of course I was authorized to do this, it wasn't something of my own initiative—was I assured that for every public servant I spoke to, both before they gave me their information and after, nothing of what they said would go forward anywhere unless they approved of it, and if they wanted time to think further about it or if they wanted to talk to a lawyer, I'd give them the time. In other words, I certainly did not want to be causing their disclosure to get out ahead of them.

So there was a certain amount of psychological readiness that had to be allowed to develop, particularly because in both those cases there was a lot of publicity surrounding the controversy. Some of them were very nervous about getting caught up in the maelstrom of all that controversy. So I assured them that it would not go anywhere until they told me it was ready to go.

Mr. Paul Szabo: Okay, on one last point—

Mr. Rob Walsh: I just want to say one other thing about identity. Again, I don't want to get into a debate about the bill, and I'm not going to talk about the choices made in this bill except to say that the comfort level of the public servants obviously is critical. They have to have a very high comfort level when they go forward with their information.

Going back to the natural justice principle mentioned a moment ago and how it could be that in some circumstances the accused—the wrongdoer, let's say—is entitled to know who laid out the information about wrongdoing, who the accuser is, I'm not so sure how many times that might be the case, for this reason. If the wrongdoer trots off to his or her parish priest, as it were, and makes it known under the seal of confession, it's all very safe and no one's going to hear about it. It seems to me that if that information leads to an investigation and the investigation develops information that can stand on its own two feet relative to dealing with the problem, arguably there's no need to go back and know what the actual source or origin of the information was.

Mr. Paul Szabo: The genesis, yes.

Mr. Rob Walsh: It now has feet of its own, enabled by the disclosure but not needing the public servant to make the case.

So all you need, in my view, is a place where that public servant can go while knowing his or her identity won't go any further. The information might go further, and as you suggested, Mr. Szabo, the actual investigation might then be done by persons having expertise in that kind of investigation, bringing that investigative report back to this independent party and saying, this is what we have.

Mr. Paul Szabo: And we have such resources within Parliament, to the extent that maybe the Auditor General's office and the Clerk's office have resources.

The last item I want to deal with is I think very important to us, and that is to understand the options we have available in terms of who that person would be and what role they would play. I understand you're not going to comment, but we know we have officers of Parliament, such as the Auditor General, who report directly to Parliament and sit at pleasure of Parliament.

We also have commissioners. We have an Ethics Commissioner. That Ethics Commissioner also reports to Parliament but administratively still comes under an umbrella of somebody. Is there anyone else, other than someone in an existing department? For instance, I guess we have the public service commissioner as head of a major group. But are there any other options, other than that individual, who we can say reports directly to Parliament but administratively or for reporting purposes of the tabling of an annual report to Parliament, maybe directly or maybe through a minister or someone like that...? Are there any other options within the current positions that we have within the Parliament of Canada, as far as persons who report are concerned, either through committee, through a minister, directly to Parliament, or some hybrid of those?

● (1730)

Mr. Rob Walsh: Let me just say this much. I don't think any parliamentary committee or officer of the House, such as me, should be in that role. Parliament and the officers of the House who support Parliament and its committees are in the oversight-accountability relationship and shouldn't be implicated in dealing with wrongdoing issues internal to the public service.

However, you do have officers in Parliament. You have the Information Commissioner, you have the Public Service Integrity Office, you have the Privacy Commissioner, and you also have the Auditor General. I'm not recommending any one of these, but these are the kinds of positions that exist.

Ever since the Auditor General got environment, I've said to myself that there is a pretty elastic definition of what some of these officers of Parliament can do . It may well be that Mr. Keyserlingk's office or Mr. Reid's office, with some adaptation, might be available to play that intermediary role.

I should say that I'm not saying the Public Service Commission is not suitable. I'm not knowledgeable on the Public Service Commission and certainly don't want to suggest that it's not the appropriate choice. But certainly the public servants have to have a comfort level when they make that initial disclosure. A public servant has to have a sense that it ain't going travelling out there amongst a bunch of people that he said what he said about internal—

The Chair: Thank you very much, Mr. Walsh. The committee's time is at an end.

Before you leave, members, Mr. Walsh has brought with him a presentation today. He offered to read the whole thing into the record. We didn't really allow him time to do that.

I would propose that we deem the complete presentation to have been read into the record. Is that agreed?

(Motion agreed to [See *Minutes of Proceedings*])

Statement by Mr. R.R. Walsh: Thank you, Mr. Chairman. I am pleased to be here today to assist the Committee in its consideration of Bill C-11, entitled An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings.

With your permission, Mr. Chairman, I would like to introduce the persons appearing with me today. On my right is Richard Denis, Deputy Law Clerk and Parliamentary Counsel, and on my left is Gregory Tardi, Senior Legal Counsel, in the Office of the Law Clerk and Parliamentary Counsel.

The purpose of my appearance here today is to respond to the comments on Bill C-11 by the Information Commissioner, the Hon. John Reid, in his testimony to this committee on November 18, 2004. I am trained as a legislative drafter, Mr. Chairman, as is the Deputy Law Clerk who is here with me today. Legislative drafters, whether at the House of Commons or the Department of Justice, exercise their expertise in respect ofonly one official language. In my case, as you might expect, it is English. As there may be questions from committee members pertaining to the French text of the bill, I asked that Mr. Denis appear with me as French is the language for which he has expertise as a legislative drafter.

I asked that Mr. Tardi also come before the committee with me as heis our specialist on the Access to Information Act, the Privacy Act, the Financial Administration Act, the Public Service Staff Relations Act, the Public Service Employment Act and related statutes.

Before responding to Mr. Reid's comments, Mr. Chairman, I feel Ishould first emphasize that I am not here to comment on the merit, or lack of merit, if any, of Bill C-11 as a legislative initiative addressing the issue of whistleblowers in the Public Service and their need for confidentiality and protection from reprisals. Whether or not this bill effectively serves this legislative purpose is, of course, a matter of debate amongst Members, whether in the House or in this Committee. It would be improper of me, as an officer of the House, to enter into that debate. My mandate, simply put, isto read the bill and to advise whether I agree with Mr. Reid's comments.

In case anyone thinks otherwise, I should first confirm that, in my view, the Office of the Information Commissioner is covered by Bill C-11,that is, it comes within the meaning of “public sector” as set out in clause 2 of the bill and so would be governed by the bill upon enactment. Mr. Reid's testimony, it seems to me, is, at least in part, premised on this.

Mr. Reid's concerns are two-fold. First, he finds clauses 15 and 29 troublesome for their impact on the operations of his office under the Accessto Information Act. Secondly, he contends clause 55 proposes an additional exemption to the disclosure requirements of the Access to Information Actthereby placing a further impediment to access to information.

Mr. Reid's concern with clause 15 relates to paragraph (b) of that clause. The Access to Information Act and the Privacy Act provide forrestrictions on the disclosure of information in certain circumstances. Paragraph (b) sets aside any such disclosure restrictions in respect of information that might be disclosed under clauses 12 to 14 of the bill. Most notable in this respect, Mr. Chairman, is section 62 of the Access toInformation Act which prohibits the Information Commissioner and his staff from disclosing any information that they become privy to while performing their duties under that Act.

In his testimony, Mr. Reid expressed the view that the broad wording in clause 15 would permit the disclosure of the investigatory records gathered by his office. Paragraph 15(b) is contrary, says Mr. Reid, to subsection 36(3) and sections 62 to 65 of the Access to Information Act which ensure confidentiality. In my view, this may not be an unreasonable reading of this clause. Paragraph 15(b) would be capable of having the effect described by Mr. Reid in his testimony to this committee.

Mr. Reid made similar comments with respect to clause 29 of BillC-11. This clause enables the President of the Public Service Commission to have access to information in the possession of offices or agencies to which the bill applies and to the premises of these offices and agencies forthe purpose of carrying out the Public Service Commission President's duties under Bill C-11. As I said earlier, Bill C-11 applies to the Office ofthe Information Commissioner. For this reason, clause 29 would appear to give the President of the Public Service Commission access to the office sand records of the Office of the Information Commissioner and there by breach the confidentiality that is meant to apply to the work of that Office.

Clause 29 gives disclosure under Bill C-11 priority over any disclosure that might otherwise apply under the Access to Information Act or the Privacy Act. As with clause 15, I feel that Mr. Reid's concerns about clause 29 may not be unreasonable. It would appear that clause 29 may be capable of having the effect that he described in his testimony to this committee.

However, Mr. Reid indicated in his testimony that he does not seek exemption for his Office in respect of disclosures pertaining to internal wrongdoing. His concern in respect of clauses 15 and 29, as I understand his testimony, Mr. Chairman, is that these clauses would enable disclosure of information of internal wrongdoing and enable investigation of the Office of the Information Commissioner by the President of the Public Service Commission and, at the same time, enable disclosure of information that, for purposes of the Access to Information Act, is meant to be kept confidential. In my view, Mr. Reid's concerns in this regard are understandable.

Mr. Reid's second concern related to clause 55 of Bill C-11. This clause proposes an additional subsection to section 16 of the Access to Information Act. Currently, section 16 of the Access to Information Act sets out the circumstances under which there could, and those where there mustbe, a refusal to disclose a record containing information. More specifically, under subsections (1) and (2) the head of a government institution has a discretionary power to refuse the disclosure of a record containing information. These subsections also list the grounds for such a refusal. Under subsection (3), the head of the government institution is obliged torefuse to disclose information that falls under this subsection; there is no discretion allowed.

The additional subsection proposed by clause 55 would provide foryet another discretionary power to refuse. However, as Mr. Reid points out,unlike subsections 16(1) and (2), the exercise of this discretionary powerwould not have to be justified and would, therefore, not be subject to theapplication/complaint/investigation process available under the Access toInformation Act.

Mr. Chairman, perhaps I should summarize for committee members the application/complaint/investigation process under the Access toInformation Act, though some Members might already be very familiar withit. When, pursuant to subsections 16(1) or l6(2), the head of a government institution exercises his or her discretion and refuses to disclose, the persondenied access to information can launch a complaint. This complaint is made to the Information Commissioner under section 30 of the Access toInformation Act. The Information Commissioner might then investigate the complaint. If he does, he does so "in private."

The Information Commissioner may ask to be shown the documents that the department or agency head has refused to disclose. The Information Commissioner must then decide whether the refusal was well-founded. If the Information Commissioner decides that the refusal to disclose is not proper, that is, is not permitted by one of the exemptions under the Access toInformation Act, he then reports this conclusion to the department or agency head, with recommendations for disclosure. If the department or agency head still refuses to disclose, the complaining party or the Information Commissioner can take the matter to the Federal Court. The court is then faced with deciding the legal question under the Access to Information Act, namely, whether the department or agency head was entitled under the Act to refuse to disclose.

Simply put, Mr. Reid's concern about clause 55 is that it would allow department or agency heads to refuse disclosure of information obtained orprepared by the President of the Public Service Commission in the course ofan investigation under Bill C-11. Unlike the discretion to refuse disclosure under subsections 16(1) and (2) of the Access to Information Act, Mr. Reid complains that there is no criterion or test provided in the amendment proposed in clause 55 by which one might determine whether the refusal is well-founded as a matter of law. Mr. Reid is of the view that the Information Commissioner would not have any basis to challenge a refusal to disclose as there is no refusal criterion or test by which the propriety ofthe refusal may be assessed.

It's not clear to me that the Information Commissioner would been titled to see the documents in question to determine whether they were obtained or prepared in the course of an investigation under Bill C-11. It might be that he would simply have to accept the refusal to disclose. The exemption to disclosure provided by clause 55 seems to be a blanket or unrestricted discretion that can be exercised without reasons given. In this respect, I would say Mr. Reid has not misread clause 55 or, at least, his concern is understandable.

Unlike clauses 15 and 29, Mr. Chairman, the amendment to the Access to Information Act proposed by clause 55 would not, it seems to me,adversely affect the operations of the Office of the Information Commissioner. Clause 55 simply denies access, period. It does not, as do clauses 15 and 29, cause information in the possession of the Information Commissioner or his staff to be subject to disclosure where it would otherwise be confidential and not subject to disclosure.

Mr. Reid, in his testimony, goes on to suggest that clause 55 does not provide any additional protection to the identity of the whistleblower than is already available under the Access to Information Act. In this respect, I cannot agree with the Information Commissioner.

It seems to me important in this discussion to remember that Bill C-11deals with wrongdoing, not access to information. Mr. Reid seems to treat his Act as if it is designed to serve the same purpose as Bill C-11. Bill C-11 is trying to address situations outside or beyond the scope of the Access toInformation Act. There may be sufficient identity protection under the Access to Information Act for the purposes of that Act, but this is not conclusive as to whether there would be sufficient identity protection to the whistleblower under Bill C-11 in the absence of an amendment of the kind proposed in clause 55. The function of, or justification for, clause 55 is not to be determined, in my view, with reference to the Access to Information Act as if that Act and Bill C-11 served the same legislative purpose.

My main difference with Mr. Reid with respect to clause 55, in terms of statutory interpretation, arises from his view that section 19 of the Accessto Information Act provides a mandatory exemption from access to personal information, including the identity of any whistleblower under Bill C- 11. He says section 19 of his Act is sufficient and the amendment proposed by clause 55 unnecessary. In my view, something more is needed for this purpose than what is provided in the Access to Information Act and/or the Privacy Act, read separately or together.

Mr. Chairman, I must admit that I have some difficulty, as does Mr. Reid, understanding why the amendment to the Access to Information Act proposed by clause 55 gives a discretion to the head of the institution -not an obligation, but a discretion, a choice - yet with no indication of how, on what basis or in what circumstances the refusal to disclose may bein voked. This would make any exercise of this discretion virtually impossible to challenge.

[ELABORATION ON CLAUSE 55]

Clause 8 of Bill C-11 sets out the wrongdoing that falls within the ambit of protected disclosures under clause 12. There are 6 paragraphs to clause 8, only one of which applies to the kind of wrongdoing that Mr. Reid said he would report or disclose if he found evidence of such wrongdoing in the course of an investigation under the Access to Information Act. Bill C- 11 means to enable disclosures of wrongdoing beyond those falling within the category of statutory offences. It is in respect of disclosures in these other categories of wrongdoing that Bill C-11 seeks to provide identity protection and confidentiality that otherwise would not be available.

Mr. Reid has suggested that clauses 15 and 29 be amended to include a schedule to the bill that would clearly define what restrictions are being contemplated by those clauses and list, among others perhaps, the confidentiality provisions of the Access to Information Act. He explainedthat his suggestion would allow for changes to that list to be brought about without going through the legislative process. Mr. Reid's reasoning is flawed in this respect. Normally, schedules to a bill form part of the legislation and cannot be amended except through the legislative process,unless the legislation authorizes an amendment of the schedule by the Governor-in-Council, like Bill C-11 does in clause 3. I would have thought it safer, from Mr. Reid's point of view, to ensure the confidentiality provisions of the Access to Information Act by making express reference to them in the bill, rather than in a schedule to it which could be amended by the government, that is, *removed* without any debate in the House or in committee.

Mr. Reid began his testimony on November 18, 2004, by telling thecommittee that “almost every case of whistleblowing since 1983, when the Access to Information Act came into force, has involved access requests for records relating to the alleged wrongdoing, and sometimes the requests aremade by the whistleblower in order to gain lawful possession of the records relevant to the wrongdoing.”

It may be true that access to information applications may have beenmade for documents pertaining to alleged - confidentially alleged -wrongdoing in the government but this does not mean that such applications were made in respect of every case of alleged or suspected wrongdoing as this term is now defined in Bill C-11, clause 8. Mr. Reid's office may have received a number of complaints about being denied access to information that related to, or were driven by, suspicions or allegations of wrong fulactions in the Public Service but it seems to me an overstatement to say his office would have been used in relation to *all* the wrongdoings ingovernment since 1983 as these are now defined by Bill C-11. I'm not sure Mr. Reid meant to say this, but this seems to be what he was saying in his presentation to the Committee on November 18, 2004. The issue here is notthe incidence of whistle blowing since 1983, but the categories of matters that would have been the subject of any whistleblowing in the past. The definition of wrongdoing now proposed in clause 8 of Bill C-11 is quitebroad, in my view, and would seem to include wrongdoings that may not beevidenced in documents. It must be remembered that the Access to Information Act and the role of the Office of the Information Commissioner pertains to gaining access to information in the form of records, to use theterm used in the Act, or what are more commonly referred to as documents. Bill C-11 involves disclosure and investigation of alleged wrongdoings,whether or not any documents may exist in respect of this alleged wrongdoing and in some cases there may be none. The Access to Information Act is meant to provide a right of access to information of whatever kind, whether or not any wrongdoing, within the meaning that is provided for this term in clause 8 of Bill C-11, is involved or reflected in the information sought.

Mr. Reid went on to say to this Committee that there was no merit inthe government's argument that the discretion to refuse the disclosure of information provided by clause 55 is necessary to ensure that the identities of whistleblowers are kept confidential. The Access to Information Act, said Mr. Reid, already contains in section 19 a mandatory exemption from theright of access for personal information, including information relating to theidentity of a whistleblower. In my opinion, section 19 of the Access to Information Act may not be as reliable as the Information Commissioner seemed to suggest in his testimony. I say this from a reading of thelegislation only, not from any knowledge about how the Office of the Information Commissioner may apply this section.

Section 19 of the Access to Information Act mandates, that is, makes obligatory, that the head of the department or agency not disclose any document that contains “personal information” as defined in section 3 of thePrivacy Act. This would seem, at first glance, to clearly ensure confidentiality in respect of the identity of the whistleblower. However, one must examine section 3 of the Privacy Act to determine if this is in fact the case.

Section 3 of the Privacy Act sets out a lengthy list of what constitutes personal information *and* what is to be *excluded* from the meaning of personal information under that Act. The exclusions are made for the purposes of the Access to Information Act. The effect of the exclusions, inmy view, is that the excluded personal information may be disclosed and therefore fall outside the protection afforded by section 19 of the Access to Information Act. A reading of the exclusions as set out in paragraph (j) ofthe definition of “personal information” in section 3 of the Privacy Act, particularly sub-paragraph (v), suggests to the reader that the identity of a whistleblower could be disclosed or that personal information could be disclosed pertaining to the whistleblower that might enable the whistleblower to be identified by connecting the disclosed personal information to other information that is already disclosed or in the public domain. In other words, one may only have to connect the dots, as it were.

So far, Mr. Chairman, I have only looked at what constitutes“personal information” in section 3 of the Privacy Act. One needs to readon, however, both in the Privacy Act and the Access to Information Act.

Subsection 19(2) of the Access to Information Act allows disclosure of personal information as defined in section 3 of the Privacy Act, provided it is done in accordance with section 8 of the Privacy Act. Section 8 of thePrivacy Act allows disclosure of personal information "for any purpose in accordance with any Act of Parliament or any regulation made there under that authorizes its disclosure." This section therefore allows the disclosure authorized by the Access to Information Act in subsection 19(2). The applicant seeking disclosure of information may be someone from the media; thus, public disclosure could result.

In the absence of an amendment to the Access to Information Act of the kind proposed by clause 55, public disclosure of "*information" and the more limited but included category of "personal information" identifying, or enabling identification of, the whistleblower becomes possible - indeed,may be required - under the Access to Information Act so long as the disclosure complies with section 8 of the Privacy Act. Perhaps Mr. Reid can tell us whether, in his view, the permissive language of subsection 19(2) of his Act doesn't become mandatory if disclosure can be done in keeping with section 8 of the Privacy Act, in which case the Information Commissioner may be required to recommend disclosure of personal information that would, perhaps unintentionally, identify the whistleblower, and may even have to go to court to insist on disclosure unaware that the information he is seeking will identify the whistleblower. All of this assumes that the identifying personal information comes within the meaning of "personal information" in section 3 of the Privacy Act, which it might not as I have earlier discussed, in which case, in the absence of an amendment of the kind proposed by clause 55, it could be disclosed with impunity.*

Mr. Reid also referred to clause 11 and paragraphs (d) and (e) inclause 22 of Bill C-11. He noted that these provisions state that the obligation to protect the identities of whistleblowers is subject to obligations to disclose as may be found in other statutes. In this connection, Mr. Reid identified the Privacy Act, the Access to Information Act, the Public Service Staff Relations Act and the Criminal Code, though Bill C-11 itself does notidentify any particular statutes in its provisions.

In our reading of clause 11 and paragraphs (d) and (e) of clause 22, it is not quite true that these provisions are subject to the provisions of other statutes. Although Mr. Reid's comment is correct with respect to paragraph(a) of clause 11 and paragraph (e) of clause 22, it is incorrect with respect to paragraph (b) of clause 11 and paragraph (d) of clause 22.

Mr. Reid also mentioned that the obligation to protect the identity of whistleblowers under Bill C-11 is made subject to the principles of natural justice and that these principles would require disclosure. Reference to natural justice is found only in paragraph (a) of clause 11 and paragraph (d)of clause 22. In my view, the principles of natural justice would not necessarily require the disclosure of the identity of the whistleblower.

In preparation for my testimony, I tried to determine, Mr. Chairman, whether there were any statutes currently enacted that contain an *obligation*to disclose such as those mentioned in paragraphs (a) of clause 11 and (e) of clause 22 and that would over ride the duty under Bill C-11 to protect the identity of the whistleblower. I found no clear instance of such an override.This is not to say there aren't any, only that I didn't find any. I should however mention that there is a provision in the Criminal Code pertaining to disclosure in respect of certain specified sexual offences. Admittedly, conduct constituting a sexual offence could fall within the meaning of wrongdoing in clause 8 of Bill C-11 and the identity of the whistleblower could consequently become known through the Criminal Code proceedings in relation to that kind of criminal charge.

Although I could find no *obligation*, there is, nonetheless, an*authorization* to disclose personal information under section 8 of the PrivacyAct, as I have earlier mentioned. The authorization to disclose personal information as found in section 8 of the Privacy Act, in terms of strictstatutory interpretation, over rides the protection mandated in paragraph (a)of clause 11 and paragraph (e) of clause 22. This authorization or discretion, if exercised, would enable disclosure of the identity of a whistleblower, not with standing the apparent intent of clauses 11 and 22 to prevent such disclosure.

I should explain here, Mr. Chairman, that the uncertainty about the degree of identity protection provided by Bill C-11 arises in part from use of the phrase, "subject to any other Act of Parliament." This phrase is found in clauses 11 and 22. It causes the reader to search out the other Acts that may have a bearing on the subject-matter of those clauses, such as the Access to Information Act and the Privacy Act. However, when reading the relevant provisions in those Acts, the reader finds the same phrase, "subject to anyother Act." It is found in subsection 8(2) of the Privacy Act to which I referred earlier and in section 19 of the Access to Information Act to which Mr. Reid referred in his testimony.

It would appear that Bill C-11 is subject to these other Acts and these two other Acts are subject to Bill C-11, which is non-sensical. There is a rule of statutory interpretation that gives priority to the later enactment on the assumption that in adopting the later bill, Parliament knew about the Acts it had already adopted. This means that the "subject to" of Bill C-11 has priority, which logically means that Bill C-11 is subject to the other Acts and not the reverse, with the result that the disclosure of personal information possible under the Privacy Act would prevail, not with standing the intent of clauses 11 and 22 of Bill C-11. This may be why clause 55 of the bill proposes its amendment to the Access to Information Act.

The Chair: Thank you very much, committee. Thank you very much, Mr. Walsh, gentlemen, for your appearance and your help here today. It will indeed help.

This meeting is adjourned.

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