Submission to the Standing Senate Committee
on Legal and Constitutional Affairs
on Bill C-2: *Federal Accountability Act*

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The Professional Institute
of the Public Service of Canada

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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Introduction

For more than 85 years the Professional Institute of the Public Service of Canada (PIPSC) has been representing the interests of employees in the federal public service, a claim almost unparalleled in the sector or, indeed, in this nation. PIPSC now represents 50,000 professionals across the federal public sector and several provinces in almost every profession imaginable. It is because of the Institute's unique role as a bargaining agent for professional public service employees that it is particularly positioned to comment on Bill C-2, the *Federal Accountability Act*.

Accountability is the hallmark of professionals. Through their associations, societies and colleges our members adhere to a code of ethics independent of their roles in the public service. These ethics sometimes force them to make difficult decisions when faced with situations in their work where wrongdoing may be present. Yet, it is this characteristic of professionalism on which the government and Canadians depend to ensure the efficacy and security of the programs and services on which they rely.

As an omnibus bill, the *Federal Accountability Act* is comprehensive and complex and will have far-reaching effects. Therefore, it must be deliberated carefully and thoughtfully. Canadians and public service employees deserve no less. It is in this spirit that the Institute offers the following observations and recommendations.

Executive Summary

Bill C-2, the *Federal Accountability Act* is an omnibus legislation aimed at meeting commitments made during the last federal election campaign. As such, it is far reaching and ambitious. For the purposes of this opportunity to comment on the legislation, the Institute will be restricting its comments to the ambit of the interests of our members.

There are many aspects of this legislation the Institute welcomes. Improvements to protections for whistleblowers are chief among them. However, there are still some areas of concern where we question the impact of this legislation on our members.

The Institute's primary area of focus with respect to Bill C-2 must be the amendments to the legislative regime for the protection of whistleblowers. While there are many changes we support, we must point out that Bill C-11, the *Public Servants Disclosure Protection Act,* which received Royal Assent after being passed unanimously by the House of Commons and Senate, remains unproclaimed and without effect. Having fought for these protections for more than 15 years, and watched many initiatives come and go with the fortunes of politics, we are calling for the immediate proclamation of Bill C-11 to give our members much needed protections now.

In addition, we have concerns regarding the new Public Servants Disclosure Protection Tribunal Bill C-2 establishes and its impact on our ability to represent our members. Surely an innovation of this magnitude and complexity can only create a barrier to public service employees who want to blow the whistle on wrongdoing. Given this reality, the justification for this new system is hard to understand.

The *Federal Accountability Act* seeks to amend Bill C-11 before its proclamation while our members sit without the protections of either Act. After all these years of debate, further delay is unacceptable.

1. The Positives

The Professional Institute supports many areas of the *Federal Accountability Act*. They are:

- Section 200 **(New 13)**: The removal of any restrictions to disclose wrongdoing directly to the Integrity Commissioner.

- Section 201 **(New 21.7(1)(f))**: Up to $10,000 award for pain and suffering in addition to reimbursement of costs and losses of employees who suffer reprisals for disclosing.

- Section 215 (**New 42.1)** The prohibition on reprisals against employees of organizations outside of government who disclose or give evidence in an investigation of wrongdoing.

- Section 215 **(New 42.2)** The prohibitions on the government acting against outside organizations whose employees disclose or give evidence in an investigation of wrongdoing, by denying grants or contracts.

- Section 220 that provided for Rewards to whistleblowers has been deleted in the Bill as passed by the House of Commons. Its deletion represents the sentiments of our members and removes a barrier to the integrity of the disclosure process.

- Section 210 (3) **(New 38 (3.1))** The Integrity Commissioner reports wrongdoing to Parliament within 60 days of reporting a finding of wrongdoing to a Deputy Head.

- Section 222 **(New 55)** Removal of minimum time limits to Access to Information on wrongdoing. However, we agree with the Information Commissioner's comment that in constructing an Access to Information regime the government should err on the side of openness rather than on the side of secrecy.

- Section 196 **(New 3(a))**: The Governor in Council can no longer remove Crown Corporations and other agencies from the scope of the legislation.

Clearly, in these areas Bill C-2 will bring benefits to our members and further the focus on integrity in the federal public service. However, we do have questions and concerns regarding other aspects of the legislation.

2. Required Improvements

For more than 15 years the Professional Institute of the Public Service of Canada has advocated for strong and effective legislative protection for public service employees who disclose wrongdoing in government. It is these employees that make our interest in the issue of whistleblower protection particularly compelling. It is our members who, as professionals, bring with their expertise the ethics and ethic regimes of their various professions. These skills and values go hand-in-hand and it is this whole package, the very definition of "professional", on which the Government of Canada relies to ensure its services to Canadians are of the highest standard. These are the same qualities that make our members particularly vulnerable when things go wrong. True to the ethics of their profession, in many cases they have no choice but to blow the whistle, often risking their careers, reputations and the well-being of their families. These are the people who must be kept in mind when evaluating the efficacy of disclosure protection measures.

Throughout our involvement in this issue, the Institute has maintained that:

- the authority to receive and investigate disclosures of wrongdoing must be vested in an independent body reporting directly to Parliament with the power to properly investigate and correct wrongdoing;

- there must be a significant role for public service employees' bargaining agents throughout the disclosure and investigation process; and,

- any disclosure and ethics regime must be woven into the fibre of all levels of the public service and be inculcated as a central part of the work environment.

2.1 Delaying Whistleblower Protections

A central concern to the Institute is the Government's strategy to amend Bill C-11: *The Public Servants Disclosure Protection Act* through the *Federal Accountability Act* before implementing its protections. The *Federal Accountability Act* may take a long time to put in place and will represent a major delay in the protections for which we have been fighting for over 15 years. The Government's argument for their strategy is that they don't want to put in place the apparatus for Bill C-11 only to perform a major overhaul once Bill C-2 is passed. With the exception of the Public Servants Disclosure Protection Tribunal, there are very few structural differences between Bill C-11 and Bill C-2.

Under Bill C-11, the role of the Tribunal is carried out by the Public Service Labour Relations Board. Once the Tribunal is up and running, a process that could take some time, there would only be the need to transfer any outstanding files. The details of putting the Tribunal in place and communicating and operationalising the complexities of its processes will further delay the full implementation of whistleblower protections. The Government's argument for bureaucratic efficiency does not stand up against the need to fully protect public service employees and cannot justify further delays.

Therefore, the Institute recommends the immediate proclamation of Bill C-11 so that public service employees have protections in place now.

2.2 Role of Bargaining Agents

Bill C-2 has not dealt with a shortcoming we addressed in all preceding whistleblower legislation; that is, the lack of an explicit role for bargaining agents. While bargaining agents are included on a consultative basis in the development of the Code of Ethics as prescribed by Bill C-11 section 5(3), they still have no explicit standing under this Act with respect to disclosures, except for the generic allowance of "representation".

Perhaps the Government is trying to avoid the possibility of third party disclosures through bargaining agents. The legislation is clear that this is not an acceptable method of disclosure.

The issue is a really simple one. The bargaining agents of public service employees have a special role in the process of protecting whistleblowers and the integrity of the public service. They have legislated obligations to protect employees under a broad spectrum of circumstances and a duty to act with diligence and fairness. They have a legislated obligation to be consulted in organizational change in the public service. These obligations have expanded the role of bargaining agents and woven that role throughout the fabric of the work environment of government employees. We are legally recognized partners with management in tending to the work lives of our members. It only makes sense to explicitly recognize that relationship in this legislation. Bargaining agents are not generic "representatives" of employees but live under a legislative umbrella making them partners in this issue. This status must be recognized to take advantage of its full benefit in resolving these issues and, most importantly, protecting whistleblowers during the disclosure process when they are most vulnerable.

Therefore the Institute recommends that the Bill be amended to read:

"Nothing in this legislation is to be interpreted so as to limit the right of employees to be represented by their bargaining agent at any time during the processes contained within this Act."

2.3 Public Servants Disclosure Protection Tribunal

Bill C-2 calls for the creation of the Public Servants Disclosure Protection Tribunal composed of Superior Court and former Superior Court judges to hear reprisal complaints. Under Bill C-11 this role was vested in the Public Service Labour Relations Board. From the Institute's perspective it is not apparent why there was a need to create this new body. Clearly the PSLRB already has the structure and expertise to deal with complaints of reprisal. In addition, it is a forum with which the Government and bargaining agents have a great deal of familiarity and is experienced in the customs and standards of labour law. It also houses a mediation service which is referred to in Bill C-2.

The Government has defended the creation of this new body by insisting that public service employees deserve a choice in deciding whether to have their complaint of reprisal addressed by the grievance process and therefore the PSLRB, or through this new Tribunal. The Institute submits that this is not a real choice. Only the Tribunal is empowered to award damages for pain and suffering to a maximum of $10,000. If the Government seriously wished to create a special process for complaints of reprisal, it has the model of the Canadian Human Rights Commission, but this Tribunal falls well short of the powers of the CHRC. The CHRC can award up to $20,000 in damages for pain and suffering and an additional $20,000 where the discrimination was wilful or reckless.

It must be recognized that under the *Public Service Modernization Act*, the PSLRB and Bargaining Agents have been tasked with dealing with human rights complaints. The trend to put employment related matter before the parties to the dispute is based in legislation and jurisprudence across the country and from our highest courts. The provision for the Tribunal described under this legislation, in that sense, is regressive.

In addition, the Tribunal as created under this Act presents the following problems:

- New structure and administration will delay protections and access to remedies
- More bureaucracy with no demonstrable increase in protections for

whistleblowers

- A complex process will be a barrier to confidence of Public Service Employees and therefore deter disclosures
- Tribunal system does not recognize the rights and obligations of Bargaining Agents, e.g. Policy Grievances
- Tribunal hands down discipline with no right of grievance
- Commissioner as gatekeeper to Tribunal, and therefore no right of hearing or complaint
- Undermines labour relations by enticing whistleblowers to use process outside of established labour relations

In assessing the need for this new body, the question must be asked as to how this new process will better help whistleblowers who have faced reprisals and encourage disclosure of wrongdoing, which is a public service. In the final analysis it does not, but adds another layer of complexity and uncertainty from their perspective.

Whatever the rationale for this new tribunal, it cannot be a reason to delay protections for whistleblowers.

Therefore the Institute recommends that the Public Service Labour Relations Board be vested with the authority to deal with complaints of reprisals and given the necessary resources to fulfill that role. In the alternative, the PSLRB should be vested with powers equal to that of the Tribunal, with the exception of handing down discipline, in order to protect the rights of unionized Public Service Employees and their Bargaining Agents.

2.4. Access to Legal Counsel

Bill C-2 proposes in Section 203 (New 25.1) that the Commissioner may provide access to legal counsel for advice only. Advice is not representation. The general cap for legal fees of $1500 and $3000 in exceptional circumstances reflects this.

Unionized public service employees have the benefit of the support of their bargaining agents. Non-represented employees do not. Given the likelihood that

politicians and senior managers implicated in a disclosure would be supported directly or indirectly by government counsel, are whistleblowers to stand alone before the onslaught of legal maneuvering and accusations? It is absolutely essential that employees are provided with full representation. To do otherwise is simply to put a price tag on accountability. It is certain that the cost of legal representation for whistleblowers would be far less that the millions lost to scandals and spent on investigating their aftermath.

> **Therefore, the Institute recommends that in the event that no amendment is made with regards to the creation of the Public Servants Disclosure Protection Tribunal**, **legal representation, not merely advice, be included in the resources made available to those involved in the disclosure of wrongdoing and that the $1500 and $3000 limits be amended appropriately.**

Conclusion

Bill C-2 seeks to the improve protections for whistleblowers contained in Bill C-11 which sits unproclaimed and without effect. We congratulate the Government on many of the improvements it proposed and the Commons Committee on hearing our concerns about a Rewards program and recommending its removal from Bill C-2. However, proposing improvements to theoretical protections is of little consequence.

The Institute is on record repeatedly calling on the Government to proclaim Bill C-11 to immediately provide protections for public service employees. It can then bring in the amendments of Bill C-2 as improvements rather than as an all-or-nothing package. Political fortune has abandoned our members on more than one occasion.

In addition, it must be made clear that we doubt the necessity, fairness or efficacy of the complex and convoluted apparatus the new Tribunal system represents. It has been introduced as an element of choice for whistleblowers. It is not. It creates instead a bias against our collective agreements and therefore our role as bargaining agents for our members. It is a departure from established labour relations norms and adds another level of needless complexity to the disclosure and protection process. The money dedicated to the Tribunal would be much better spent ensuring whistleblowers have improved access to representation in an arduous and intimidating process. Accountability will be far better served by focussing on these essentials.

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