Presentation to
the House of Commons
Legislative Committee on Bill C-2
Federal Accountability Act

The Professional Institute
of the Public Service of Canada

May 16, 2006

HOUSE OF COMMONS LEGISLATIVE COMMITTEE ON BILL C-2

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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.

Among the various changes, we need clarity on the role of the new Parliamentary Budget Officer and emphasize the need to make the financial information provided to parliamentarians available to bargaining agents and the public at large.

Also, there are the changes to procedures for procurement which will undoubtedly have an impact on the thousands of PIPSC members directly involved in the process of government procurement. We welcome all measures that improve the transparency and reliability of these systems but must ensure that our members and their knowledge and experience are not overlooked.

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 including these amendments in such a wide-ranging and ambitious piece of legislation as the *Federal Accountability Act* can only serve to delay their implementation. For more than 15 years PIPSC has worked for legislative protections for whistleblowers. In November 2005, Bill C-11, the *Public Servants Disclosure Protection Act* received Royal Assent after being passed unanimously by the House of Commons and Senate, yet remains unproclaimed and without effect. The *Federal Accountability Act* seeks to amend Bill C-11 before its proclamation while our members sit without the protections of either Act. While happy to comment on Bill C-2, the Institute urges the Government to proclaim C-11 now and then apply the amendments of this legislation. After all these years of debate, further delay is unacceptable.

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 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.

Required Improvements

1. Parliamentary Budget Officer

The proposed legislation creates a Parliamentary Budget Officer to provide reliable advice and guidance to parliamentarians in understanding government spending proposals and estimates. Given the requirement under the *Public Service Labour Relations Act* for both Arbitration and Public Interest Commissions to give consideration to the financial situation and policy of the government, it is important that this information be available to Bargaining Agents for the purpose of making their arguments during the collective bargaining process. It is not clear when or if the information from this new office will be shared with the public.

2. Procurement

As with ongoing changes to the way the government procures goods and services, further centralization of procurement may have an impact on the jobs of our members in this area. However, with as many as 40% of procurement positions vacant, this may be an academic issue. The key issue here for the Institute may actually be that, without full staffing, the Government may find it difficult to implement these changes, leaving our members to bear the brunt of the fallout.

The experience of PIPSC member Allan Cutler proves that heightened accountability in procurement and whistleblowing go hand in hand. There can be no room in either regime for a system of downloading accountability to the line level worker without reciprocal accountability throughout the ranks of management. To do otherwise would reproduce the environment in which Charles Guité flourished. This point comes back to the issue of why this legislation exists. There can be no presumption of innocence among the higher levels of the public service. Our members do not sign 100 million dollar cheques. This concern runs throughout the ranks of our members involved in procurement and must be addressed.

3. Whistleblowing

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.

3.1 Purpose of Investigation

As stated in Section 204 (New 26(1)), the purpose of an investigation is still to bring wrongdoing to the attention of Deputy Heads and make recommendations. The Institute sees this as a flawed foundation for the disclosure process. While wrongdoing within departments certainly is the responsibility of Deputy Heads, the accountability for safeguarding public funds and programs rests with Parliament. As an Agent of Parliament, the Commissioner cannot be relegated to the role of departmental babysitter and there can be no presumption of innocence for senior management. His or her purpose must be to act as the eyes and ears of Parliament and, by extension, the people of Canada. **The Commissioner, therefore, must have the ability to order Chief Executives to correct wrongdoing in addition to bringing wrongdoing to the attention of Parliament.**

Therefore the Institute recommends the following amendment:

“204. Subsection 26(1) of the Act is replaced by the following:

26(1) Investigations into disclosures and investigations commenced under section 33 are for the purpose of bringing the existence of

wrongdoing to the attention of Parliament and making orders concerning the corrective measures to be taken by chief executives."

3.2 Public Servants Disclosure Protection Tribunal

Section 201 (New 20 - 21.9) of Bill C-2 calls for the creation of the Public Servants Disclosure Protection Tribunal composed of Superior Court and retired 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. 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.

3.3 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, with the exception of the generic representation described in the Act.

It may be that this has been avoided so as to not open the door to bargaining agents disclosing on behalf of their members. 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 workers. 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 when they are most vulnerable during the disclosure process.

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.”

3.4 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 when public service employees are considering making a disclosure or are involved in an investigation of a disclosure with a general cap of $1500, which may be increased to $3000 at the discretion of the Commissioner. Advice is not representation. Unionized public service employees have the benefit of the support of their bargaining agents. Non-represented employees do not. Given the likelihood that powerful politicians and senior managers being implicated in a disclosure, would be supported either directly or indirectly by departmental or government counsel, are whistleblowers then to stand alone before the onslaught of legal maneuvering and accusations? It is absolutely essential that employees taking the risk of blowing the whistle be provided with full and complete representation. To do otherwise is simply to put a price tag on accountability.

Therefore, the Institute recommends that 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.

3.5 Reward for Whistleblowers

Section 220 (New 53.1) of Bill C-2 prescribes a reward of up to $1000 for whistleblowers. In 2004 the Institute conducted a wide survey of its membership on values and ethics in the public service. This survey was followed by focus groups held from coast to coast. Overwhelmingly the answer from our members was clear: **No Rewards!**

There are several reasons for this response which speaks volumes as to the character of our members and the reality that they are your first and best resources in heightening the culture of ethics and "Rightdoing" in government. First, they want the work they do every day in providing and safeguarding services and programs for Canadians recognized and profiled, not the rare occasions when things go wrong. Second, attaching a reward to disclosures would greatly undermine the credibility and motivation of the whistleblower. It would create a built-in kernel of doubt to their claims of wrongdoing. Disclosing wrongdoing is tough enough without stacking the chips against the whistleblower from the outset.

Therefore the Institute recommends that section 220 of Bill C-2 be deleted.

3.6 Delaying Bill C-11

The Institute's major concern respecting the Government's strategy respecting passage of the *Federal Accountability Act* is the delay in proclaiming Bill C-11. 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 have to perform a major overhaul once Bill C-2 is passed. In fact, with the exception of the Tribunal, there are very few structural differences between Bill C-11 and the amendments under Bill C-2. Since the Public Service Labour Relations Board is already in existence for its usual work, there would be nothing to tear down and replace with the creation of the Tribunal, only the need to transfer any outstanding files. In addition, the details of putting the Tribunal in place and communicating and operationalizing the complexities of its processes will further delay the full implementation of these protections. This is not an acceptable argument for a delay in implementing these protections.

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

Conclusion

By far the main area of concern the *Federal Accountability Act* poses for the Institute is the delay this strategy represents in seeing protections for whistleblowers put in place. The argument that the Government does not want to put in place one regime only to replace it with another does not stand up to scrutiny as there are few real structural differences between the two, with the exception of the Tribunal. In reality, this difference is inconsequential. Bill C-2 is an ambitious omnibus legislation and should not stand in the way of the long-awaited protections for our members who need to disclose wrongdoing in government. The Government should proclaim Bill C-11 and amend it once the *Federal Accountability Act* comes into force.