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Chair

Mr. Leon Benoit

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• (1105)

[English]

The Chair (Mr. Leon Benoit (Vegreville—Wainwright, CPC)):
Good morning, everyone.

Pursuant to the order of reference of Monday, October 18, 2004, we're dealing today 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 a witness today, from the Government Accountability Project in Washington, D.C., Louis Clark, president of that organization. I'll just give you a very short bio, as I certainly expect Mr. Clark will tell us a little bit about himself and his organization in his comments.

Mr. Clark is president of the Government Accountability Project in Washington. He assumed directorship in 1978, having first served as legal counsel for the organization. He received his J.D. from American University in 1977 and has received two honorary fellowships for his work in the clinical program in the area of prison reform. He's also a minister, with a master of divinity degree from the Pacific School of Religion in Berkeley. In 1992 Mr. Clark received the Gleitsman award for his lifelong commitment to initiating, promoting, and implementing positive reforms for social change.

I'll leave the rest of the comments up to Mr. Clark. Make your opening statement and then we'll get right to the questioning.

Thank you again very much for coming this morning. We're looking forward to the day.

Mr. Louis Clark (President, Government Accountability Project (Washington, DC)): Thank you very much for the opportunity to address this body.

I'm so impressed with this opportunity to be able to share our experiences on this subject, which of course our project sees as quite important not only for our own country but globally. Increasingly we are engaged with other countries, and in many different jurisdictions within our own, on the issues of government accountability, in particular as it relates to whistle-blowers. These are traditionally employees of the government who choose to come forward to reveal problems, wrongdoing, and corruption and often suffer reprisals as a result. It's a humbling experience to be here. I really appreciate this invitation.

I would also like to share that the invitation came not only to me but also to my partner at the Government Accountability Project,

Tom Devine. Tom Devine is our legal director, and he is the person who does our legislative work. I tried very hard to bring Tom with me so that we could testify together and share our experiences, as well as his particular experiences working with the legislation.

What we've decided to do, if it's okay with the committee, is this. I'll take back with me any questions you might have. Then we can work on those questions with our legislative staff to address anything I'm incapable of addressing or only partially capable of addressing. With the committee's indulgence, I would appreciate the opportunity to do that. As well, I invite you to follow up in any way that is appropriate and helpful to you as you move forward.

Just to say a little bit more about the Government Accountability Project, we began in 1977. As most of you may remember, that was the era in our country that probably had more whistle-blowing and more corruption and scandals than any other period. This was just after Watergate and after the President of the United States resigned.

Once that happened, there was a floodgate of revelations about the FBI on the surveillance on citizens and about the CIA and its violation of its mandate in the law in terms of spying internally within the country. As well, we had scandals involving our General Services Administration, where we had millions of dollars of graft and corruption exposed.

That was really our first major case at the Government Accountability Project as well. It was an era of scandal. The Government Accountability Project is one of those NGOs, or non-government organizations, that arose to try to deal from a different perspective, a non-government perspective, with the crimes of our government. That was our beginning.

Our first cases, again, had to do with those scandals. We've continued and have been engaged in quite a few other scandals, some of which you might know something about as well.

So we began then. There are three things we do. It's fairly simple and straightforward. First of all, we represent the people who are the whistle-blowers; we're the lawyers for the whistle-blowers. Obviously we have a bias here, and it's in support of those employees who step forward to reveal wrongdoing. We represent them.

Second, we investigate what they have to say. We try to get to the bottom of it, again from an NGO perspective.

•(1110)

One of the things we've found—and perhaps I'll talk a little bit more about this later—is that employees do not step forward not because of fear of reprisal, but because they believe nothing will happen as a result of their stepping forward. It's really a key finding from back in 1980 and 1981, when the government actually had surveys of the public employees. That was the result. Between 60% and 70% said nothing would happen; therefore, they weren't going to take the risk.

As a project, we decided that we would try to get to the bottom of the problems that were revealed by the whistle-blowers. We would try to focus on acceptable reforms. As a result, we believe—and I think we've shown—that more and more whistle-blowers will actually come forward.

The third thing we do is deal with policy issues and laws and legislation that will help to protect whistle-blowers and hopefully usher in a new era in which the government actually has effective mechanisms to again deal with the concerns that are brought forward by the whistle-blowers.

Let me talk a little bit about some of the cases we've been engaged in over the years. Perhaps you'll then get a sense of how important whistle-blowers have been to essentially getting to the bottom of some extraordinary problems, at least in the United States.

Between 1980 and 1991, over 600 whistle-blowers came forward to our organization about problems in the nuclear power industry. Mainly, they were quality assurance people—not all, but most—working on seventeen different nuclear power plants that were in various phases of construction during the 1980s. Of those seventeen nuclear power plants, three were actually cancelled. One was cancelled when it was 98% complete, one was cancelled at 86%, and another one at 54%, all because of the whistle-blowers who came forward.

In the case of the plant that was 98% complete, we started with one whistle-blower in 1980, and by 1984 there were 76 whistle-blowers who had come forward. They cancelled the plant because fixing the problems that these people had identified would cost more than it had cost to build the plant up to the 98% level. The two other plants were in similar situations, starting with four whistle-blowers in one instance and ending with 36 whistle-blowers.

What this points out in terms of at least the understanding about whistle-blowers is that once you are effective with the information that the whistle-blowers bring forward, more whistle-blowers will come forward if indeed you have a problem. Obviously, if there's no problem and it's just one whistle-blower, perhaps more will not come forward. But what we have been trying to get across to our own government is that if we have effective mechanisms to deal with the problems that people are demonstrating or bringing forward, then it gives an opportunity to the government to actually be effective and deal with the problem that the whistle-blowers identify, which is exactly why those plants were cancelled. The government did get involved, the government did say that the corrective action had to occur, and the companies decided to cancel the projects because the problems were too severe.

Secondly, what most people don't know is that plutonium production was actually stopped in the United States in 1987, which was two years before the end of the Cold War. The reason it was stopped is that there were three whistle-blowers at the Hanford Nuclear Weapons Production Facility who had identified that the PUREX plant that was making the plutonium was completely contaminated and that the workers who worked there were at great risk. They had to either stop production in order to fix the problems—which they couldn't do, of course—or build an entirely new facility. So the government was in the throes of that decision about what to do when happily the Cold War ended in 1989 and therefore it ended the need to continue with the production of plutonium. And we were obviously engaged in that case as well.

•(1115)

Third, the Bermuda naval base in the north Atlantic was actually closed as a result of the chief of police and the deputy chief of police blowing the whistle on the fact that the only real reason anyone could determine why we had a base there was that so generals and admirals could go there and have a nice time. So once that registered with the taxpayers, with the help of *Primetime Live*, a national television show, and obviously with the Congress, then.... Indeed, over the three years prior to our revelation about these problems, 150 admirals and generals had gone to that base, and the only thing the base had was one helicopter and a tugboat.

It was a little hard to beat. And also it just happened that all these important meetings at the base always occurred on either a Friday or a Monday, which gave ample opportunity for the generals and the admirals and their nannies and the boyfriends of their children, etc., to be able to actually have a nice time. And so they cancelled that base.

The homeland security department, which I'm sure you've heard a great deal about, came about because of the whistle-blowing of FBI whistle-blower Coleen Rowley, who I had lunch with yesterday. Coleen Rowley revealed that her office of the FBI in Minnesota was actually trying to investigate all these people, mostly from the Middle East, who were registering and participating in these flight schools all over the country, especially in Oklahoma and Florida. There was some kind of connection to these flight schools and to some radical sects of the Islamic faith. She knocked her head against the wall for months and months, actually eight or nine months, trying to get Washington to wake up and allow a broader investigation. She was limited to her jurisdiction within Minnesota and so she couldn't find out what was going on in Oklahoma and in other places.

Therefore, once 9/11 obviously happened and we had the inquiries afterwards, it came to the point that we needed a homeland security department. So that occurred because of whistle-blowing.

Also in terms of star wars, I'm happy to see that the Canadian government seems to be going in the right direction there, which is away from that program. At any rate, in the 1980s and the early 1990s we had whistle-blowers on the star wars program who revealed that to really have an adequate program would cost more than the United States even had in terms of revenue. If the government spent \$1 trillion it would still be only 93% effective, and obviously, if we have a hundred-times kill rate in terms of a city like Washington or New York, where you have a hundred missiles pointed at it, seven getting through is all you need.

So the program just wouldn't work. In addition to that, most of what was going on there was having study after study in literally 48 different states and contracts within 90% of the congressional districts. It seemed to be just spreading money around to no avail or effect. So we had these whistle-blowers, and they ended up cutting the program from the \$5-billion proposed budget of Bush one, down to \$1.7 billion. Again, that was because of whistle-blowers who were represented.

● (1120)

Now we have a new round of whistle-blowers. We have not been particularly effective yet, but we have a new round of whistle-blowers who are revealing that the system will not work—you cannot tell the difference between decoys and actual missiles, and the tests, which cost \$300 million and were undertaken by the TRW company, actually had faked the results and essentially lied about the results, showing you could tell the difference. They had programmed their computers to see a difference. They had programmed the actual specifications of the decoys so they could see the decoys.

What they had done earlier in terms of star wars, as well, was put homing devices on these supposedly Russian ICBMs. They would send up these Russian ICBMs, and they had homing devices they didn't tell anyone about. It would bring the missiles to the homing devices. Then, obviously, most of us with any sense at all decided probably the Russian ICBMs would not have homing devices, so it might not work. Then when one of those tests didn't work, what they did was put the charge right on the Russian ICBM and blew it up, making it look like it had actually been intercepted, and that a bullet could hit another bullet, which was really what the premise was. Anyway, they cut the program significantly, particularly the space part of the program, again because of whistle-blowers. In that instance, we're just talking about two whistle-blowers.

Recently in our history, on this note, we represent Dr. David Graham. You might have picked up that we have a problem with the drug Vioxx, and a number of other drugs as well, inasmuch as 28,000 people have probably died as a result of taking Vioxx because it wasn't really ever intended to be taken by the general public or by everybody. It was only supposed to be taken by those people who couldn't digest Aspirin or Tylenol, who had severe digestive problems as a result of taking either Aspirin or Tylenol. They developed this drug for those people, who were only 2% or less of the population, but then it worked so well with that 2% of the population that Merck just couldn't stand not to be able to market it to everybody, which they did at \$3 per pill. They were making \$2.1 billion per year, actually.

One whistle-blower, David Graham, who had been at the FDA for 20 years and whose job it was to investigate the safety of drugs actually on the market, came forward and testified at Senate hearings we had significantly helped set up in November. As a result of his testimony, his story was on the front pages of nearly every major newspaper in the country the next day and in succeeding days.

Actually, probably one of the major reasons my companion Tom Devine cannot be here today is that work is going on with that particular case on a daily basis.

In terms of who we are as a project, we have a \$2-million budget. We have 22 employees, most of them in Seattle and Washington, D. C. We also teach a legal course at the University of the District of Columbia School of Law for law students. We have law students from across the country who participate in our program, which greatly helps us to extend our reach and our engagement.

That's a brief history. Turning to the law, I'll try to very briefly say we certainly have had our difficulties in terms of having effective whistle-blower protection. That is why we particularly appreciate having the opportunity to address this body today—because we see you as certainly being equally engaged in the process of coming up with effective mechanisms to protect whistle-blowers as well as taking the opportunity to address the concerns that the whistle-blowers are bringing forward in a way that is going to be effective, in a way that's going to be able to help government and not put the government on the defensive, hopefully, but instead have the government engaged in reform and using the whistle-blower as the opportunity to do so.

● (1125)

I'll very quickly talk about our history, which is very sad in some ways because we are not satisfied with our current state of affairs in terms of whistle-blower protection in our country. I certainly want to share that. Even though this project has been involved in 30 different pieces of legislation, at least on the federal level and to a very minor extent on the state level, and we have had significant input into 30 different pieces of legislation, some of those pieces of legislation are working well and others are working less well.

In terms of addressing a parallel concern in terms of civil servants in the States, we first came out with the Civil Service Reform Act in 1978. In that particular act, as a project, we were a fledgling project at that time. I happened to be there. One of my first assignments was to actually prepare testimony and to testify in our House about that legislation. My testimony at that time, which might be a little bit of parallel to your legislation today, was that we felt that it would be worse to pass the legislation than it would be actually to have no legislation at all. We felt it was inadequate, but it passed anyway. At that time, who cared what this little group thought? We were very tiny and very fledgling.

Over the next years, we suffered through 11 years of disasters, 11 years during which 2,000 self-identified whistler-blowers—I'm not saying they were all legitimate whistle-blowers—used the whistle-blower defence. They came forward, blew the whistle, and tried to defend themselves. Of those 2,000 cases, only four people prevailed. The protections were inadequate.

Probably the worst part of the legislation is that the whistle-blowers really had to prove that the government was taking action against them because of their whistle-blowing. It became impossible, and always was impossible, to prove without dealing with how to balance the burden of proof in a way that made sense in terms of what information alleged whistle-blowers might have and what information it would be impossible for them to gather in any kind of hearing. Anyway, all of the whistle-blowers lost.

Then we had the *Challenger* disaster. In the *Challenger* disaster, we had whistle-blowers. They tried to stop the *Challenger* from going up. It went up, it blew up, and people died. They had a presidential inquiry or commission afterwards.

The whistle-blowers came forward to that commission. They testified courageously in a heartfelt fashion. They were in incredible agony because they felt somewhat responsible for the *Challenger* going up. They tried to stop it, but they were unsuccessful because they didn't go public. If they had gone public, perhaps they could have stopped it. They had to deal with that in terms of wrestling with their consciences.

After they testified, they went back to their workplaces and they were all demoted. As a result, the American people couldn't even have orchestrated the amount of backlash with which Congress was inundated, with people saying, my goodness, something had to happen.

It was really at that point in our history, which was about 1987 through 1989, when our country changed direction in terms of whistle-blower protection. From that point forward, every legislator has known that whistle-blowers are actually important for governance and that the American people definitely want whistle-blowers protected.

Finally, we had the Whistleblower Protection Act, which passed in 1989. It immediately started going south after it was passed. We passed a better bill amending the previous bill in 1994, and that has gone badly ever since. Whistle-blowers have lost 95 of the last 96 decisions.

• (1130)

The reason they have lost is that the judicial review on these cases does not go into the regular federal court system; it goes into a special court that was set up, which is a bureaucratic court. It is a court that does not have, in our view, independence. It's a court that is stacked with essentially somewhat reactionary judges who, for some reason, dislike whistle-blowers immensely. What they have done is they have redefined the act. We have a lot of discussion in our country about whether judges should legislate or should they just rule on the law that's before them, and in this case these judges have legislated a change in the law that's so profound that whistle-blowers can't prevail.

Very briefly, the reason for that is that the law says that essentially anything you blow the whistle on—in other words, it's very broad in terms of whether or not you have a reasonable belief about your whistle-blowing. That's the standard. It's an objective standard.

How the court has interpreted that is to say your belief is not reasonable unless what you brought forward in terms of the substance of the whistle-blowing is incontestable, cannot be

challenged, and you're absolutely right. In other words, there's a presumption of regularity, a presumption of legality, that no whistle-blower can overcome—no one can overcome. As a result of that, no one can have a reasonable belief.

In addition to that, the word “any”, as in any disclosure, has been interpreted by this court to mean that “any” does not mean if you blow the whistle to your superior, so those people are not covered. If you blow the whistle to those fellow employees, you're not covered. If you blow the whistle because that's your job to blow the whistle—you're an inspector or an investigator—well, that's your job, so therefore you don't have legal protection. Furthermore, if you blow the whistle to the person—it might be a superior, it might be someone else—who is actually engaged in the alleged wrongdoing, that's not covered.

Therefore, there are very few things that actually are covered anymore. That's what the decisions have said. Right now one of the things we're doing on a daily basis is trying to change the system so that these cases will go into our regular federal court system as opposed to this very special court.

That's the conclusion of my public statement. I would be glad to entertain questions that you might have either about our experience or focusing on your particular legislation, which I have read, but there is so much that I do not know about your civil service system, so I have some limitations. However, I do have some observations that I would be glad to get to, perhaps with the question period.

The Chair: Thank you very much, Mr. Clark, for your presentation.

I do want to tell you that from time to time you may see lights blinking and activity. We have a controversial bill before our House right now. That's what the activity, such as MPs leaving the table from time to time, is about. Don't be surprised by that.

To the questioning, for seven minutes, Mr. Preston.

Mr. Joe Preston (Elgin—Middlesex—London, CPC): Thanks very much, Mr. Chair.

Thank you, Mr. Clark, for coming today. It's great to get your viewpoint on what we're trying to do.

In the last bit of your speech, you talked about where the legislation has gone in your country and how you're now trying to fix it almost from the inside and the outside. We're at the point where we're just writing the legislation and so we need your help so that we don't, 10 years down the road, have the same difficulties as you're having now in trying to fix it. You mentioned that bad legislation is worse than no legislation, that we were better off using just civil justices beforehand. I tend to agree with you. Hopefully your questions today can help us get to that point.

You mentioned at the start of your speech that your organization came about in the late seventies because of an era of scandal that was happening in your government. Perhaps there are some similarities, because we seem to be at an era of scandal in our own government at the moment, and whistle-blowing is part of what brought it forward. Again, the protection of the people who speak against their government is imperative to good government; I guess that is a better way to put it.

You mentioned also that employees really don't start off with a fear of reprisals, but that they start off with a fear that nothing is going to be done about what they're saying, so why should they bring it forward. I assume it may eventually lead to a reprisal.

How can we write legislation knowing that's maybe more of a premise—that an employee doesn't start off with a fear of reprisal? We tend to be writing legislation based on affecting reprisal more than we're writing legislation based on an openness of government or an openness of whistle-blowers so that people will come forward with wrongdoing.

Do you have some views on what pieces of information should be in our legislation to speak to that?

• (1135)

Mr. Louis Clark: First, all I would say is that I wouldn't want to diminish the effectiveness or the importance of protection against reprisal; however, in terms of motivating people, all surveys have indicated that the view is that nothing's going to happen to change it. I would say that what's critically important here is that there be a place for a person to go that will do an investigation and that will also have some authority to effectuate a reform. So there I would think you would want to look to, as much as possible, a particularly independent organization to do the investigative work.

I would say, too, I don't think the place that you would want to do that investigative work should be a place that has many other duties. For one thing, I think some people will attest to the fact that whistle-blowing, to some extent, is a tar baby. It's something that many agencies don't want to be saddled with because they have many other functions that are very different from investigating wrongdoing. So what we've tended to do in our country, in terms of our inspector general offices, is to have every major department of the government as well as many large governmental organizations have its own inspector general. The inspector general offices tend to be independent of those department heads. The people who are in charge of those investigations, or the inspector generals themselves, are presidential appointees, just as the head of the agency is.

There's always a certain level of controversy about how independent these are, but the ones that are the most independent are the ones that seem to be the most successful. I would say that's crucially important. Also important is that those inspector general offices have basically only one job to do: they investigate. They do not deal with the merit system; they tend not to deal with people who are being employed, talking in terms of the civil service system.

In fact, in 1978, when the Civil Service Reform Act happened, one of the things at least we appreciated about the new system was that they separated the functions of the organization. In other words, they split our old civil service system into three pieces. The first piece was the Office of Personnel Management. That was the office

that was dealing with employment and management of employees. That was one function. Then we had another function, the special counsel. The special counsel was supposed to be the office to help the whistle-blowers. That was very separate. And then we had a third function, which was the Merit Systems Protection Board, which was the adjudicative process. Essentially, that was the place these cases were going to be tried.

I think one of our biggest problems coming out of that Civil Service Reform Act was that the adjudicative process was not independent enough from the special counsel function, which was actually a minor problem compared to having it lumped in with the Office of Personnel Management, which it had been before.

• (1140)

Mr. Joe Preston: Thank you for that input. I dare not interrupt. You're giving us good information, so I'll carry on.

Your organization is perceived, I think, at least from my point of view, to be an expert now on the development of whistle-blowing policy, both domestically in your country and internationally. You've done this in other countries. As we have been trying to develop legislation, has your organization been asked for any input, other than being called to speak before this committee?

Mr. Louis Clark: No, but we would have welcomed that opportunity at any point.

Mr. Joe Preston: That sounds like a good start to me.

We talked about representation. You talked about how you represent whistle-blowers as they're going through what seems to be a fairly trying procedure in the United States. And we're arguing a bit in our legislation about whether whistle-blowers should be represented at each stage of the process.

Can I have your views as to whether representation is by their union representative or by a legal representative at each stage, as they come forward? Would you give us the pros and cons, why you think that is a necessary thing to have in legislation?

Mr. Louis Clark: Yes. First of all, in terms of the whistle-blowers having their representative, I can't conceive that the government would not have a representative, and so I can't conceive that who they would be up against would be the lone whistle-blower or the lone employee, against the entire government operation with the probably vast resources, I assume, of the ministry of justice.

My sense of it is that probably the whistle-blower is outmatched, and from our perspective we would expect the whistle-blower would have an opportunity to be represented as well, unless there is some kind of decision to go into some arbitration process in which no one would be allowed to have an attorney. But I don't think we'd want that.

Mr. Joe Preston: It would have to be one or the other?

Mr. Louis Clark: Yes.

Mr. Joe Preston: No one has representation or all have representation.

Mr. Louis Clark: Yes, that's right. I would think so.

Mr. Joe Preston: It makes sense.

You talked about the setting up of an independent office, an investigative office only: that is their job, to be an investigative office and to come to some sort of finding. Their findings then, of course, would need to be legally binding somehow. Would the legislation have to be that this independent office had the ability to make judgments that are legally binding?

Mr. Louis Clark: Yes. How you would effectuate that.... I know you would have many other issues to deal with in terms of balancing power relationships between ministries and an independent body; however, a body that could do nothing more than report, I would say, is inadequate. It seems something would need to happen that would actually compel a department or an office of government to follow some reform regime that might be coming out of an inquiry.

Mr. Joe Preston: I have one more quick follow-up.

Mr. Louis Clark: Let me just add one more point. I certainly think it would be important as well that this office directly report to a parliament.

Mr. Joe Preston: That's our intent, or it certainly looks it, the way it's going.

Would this office also have the job of investigating reprisals—not just the original whistle-blowing, but also the whole case, through to the case for damages?

Mr. Louis Clark: Yes, I think that would certainly make a lot of sense. It almost is like.... You can't imagine the justice department, for example, or you can't imagine a prosecutor who would be in charge of overseeing an investigative process not also having the ability to protect the people who are their witnesses. I don't think any prosecutor I can imagine wouldn't want to have some level of power over the obstruction of justice, which is in effect what you are seeing when you have retaliation against a whistle-blower.

• (1145)

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

We'll go to Madame Thibault.

Madame Thibault, I'm giving 10 minutes for questions. If you choose to use them, they'll give a little more time to develop a line of questioning.

Mr. Clark, you will need your translation device, so would you put your earpiece in?

Madame Thibault, you have 10 minutes.

[Translation]

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

Thank you, Mr. Clark.

Are there areas or sectors where disclosure of wrongdoings is impossible? I imagine that the answer will be no, but even there, I would like to make sure of it. You talked us about the antimissile shield. Now, some stakeholders of the federal government are saying they have lots of concerns about national security and about some highly secure information that we share with other countries, for example. Are there similar concerns or not in the United States? I am talking here about disclosure.

[English]

Mr. Louis Clark: I would say there's definitely a great deal of concern in the United States about national security issues and about a whistle-blower going public. But there are mechanisms that should be there and available to allow the whistle-blower to blow the whistle in confidence within the government, and the protections against reprisal should be afforded in those circumstances as well.

With national security, I'd certainly think from a governmental point of view it's almost more important to have whistle-blowing in those areas than in any other, because those are places, certainly in terms of the level of secrecy necessary on national security concerns, where you in particular want to go out of your way to make sure people have protections against reprisal and are free to speak out to the appropriate forum—obviously a forum that's covered by a veil of secrecy as well.

[Translation]

Ms. Louise Thibault: If I read properly the notes of the Research Service, it is mentioned there that the U.S. legislation does not include explicit provisions prohibiting what I call malevolence, which is the disclosure of information under false pretence, in bad faith, etc. First, am I right to say this? Secondly, can your organization tell us if this happens regularly and on what scale? Are we talking about 2 or 10 %? Can we say it never happens? I would be surprised, but... I would like you to tell me about this aspect for a few seconds. Thank you.

[English]

Mr. Louis Clark: Certainly it does happen, there's no question about it, that there are times when people bring forward information that's false, but we have a certain level of faith in our system that we can essentially weed out that kind of information. In fact, if you did have an investigative office that did nothing but make investigations and protect witnesses, then certainly you would have the opportunity to be....

Any experienced investigator can get to the bottom of false information. We as a project investigate everything that comes to us, because our credibility rises and falls with the people we choose to represent. We do a great deal of work to see that the information is credible and is backed up. Frankly, I don't think it's that hard to find out if someone is bringing forward false information.

Secondly, the level at which these people have to be acting in good faith is an important consideration. We tend to not like just saying the people have to be acting in good faith. We think that in principle that's great, that's good; people should be acting in good faith. But how you find out whether they're acting in good faith or not requires an investigation of those people. If you have an investigation of people who come forward, people are not going to come forward because they'll subject themselves to a government investigation, so that's not the right approach.

The better approach, in our view, is to say that if a person could reasonably believe the information they know, it's an objective standard. Again, an investigator can usually come to grips with what is reasonable and what is not.

• (1150)

[*Translation*]

Ms. Louise Thibault: Here is my last question, Mr. Clark.

Some stakeholders encourage us to make disclosure compulsory. When a civil servant is aware of something, he or she is required to disclose it. What do you think about this requirement? This would be an absolute requirement. In other words, if the person did not disclose the information and it was proved she did not, some measures could be taken against her.

There is also the question of financial rewards. Although they are not necessarily numerous, some parties told us about financial rewards. For example, financial rewards were mentioned in the cases where money would be saved thanks to some persons. You told us about the huge amounts of money spent for the antimissile shield. A person who would have disclosed information about this would have become multimillionaire. Seriously, I would like to know what you think about these two elements. Do you live that in your country, and how do you live it? How could we benefit from your comments to refine our approach when the time comes to do it?

Thank you, sir.

[*English*]

The Chair: Mr. Clark.

Mr. Louis Clark: First of all, concerning the issue of whether people should be required to come forward, our position is that basically people should be required to come forward. On the other hand, if they do, you have to have effective mechanisms—again, independent mechanisms—so those people can defend themselves once they do so. To require one without the other would just be unacceptable and in some ways inhumane, so I do think you have to have that effective system if you're going to have that.

Again, getting back to our system, we do have a code of conduct that's been foisted on the civil servants, which I am not against. But in addition to that, one of the problems—again, getting back to this court I'm not very pleased with—is that if you're required to come forward as part of being a public servant, you don't have protection any more because it's part of your job. If it's part of your job, you can't be a whistle-blower. It gets to the absurdity of some of the decisions we're faced with, but I do think that is an acceptable requirement, again, if it's balanced with effective protections.

In terms of the issue of the finances, in 1986 in our country the government recovered \$27 million in fraud perpetrated against the government. Then what we called the False Claims Act was passed, a law that was originally enacted during our Civil War at Abraham Lincoln's urging. That does provide compensation; it does award portions of the money saved to individual whistle-blowers. Then what happened was that the \$27-million figure jumped to \$127 million, then it jumped up to \$300 million, and for the last several years it's been \$1 billion a year the government has saved through this program, and the whistle-blowers have indeed gotten a portion of those funds.

What happens is that the individual sues the company; it's usually a company. On behalf of the government, the whistle-blower sues the contractor who has cheated the government. If the government joins the case and essentially takes it over, then the whistle-blower

gets, as a result of that, a portion of the money, something like 10%. But if the government says no and the whistle-blower goes forward, then they get a higher percentage of the money as an end result if they prevail.

It's been effective, certainly, both in making some whistle-blowers rich and in recovering tremendous amounts of money for the government.

• (1155)

The Chair: Thank you, Madame Thibault.

Mr. Boshcoff, followed by Mr. Lauzon.

Mr. Ken Boshcoff (Thunder Bay—Rainy River, Lib.): Thank you very much.

Welcome to Canada.

Just to correct the record, I can say we are far from an era of scandal. We have a situation where the government itself has precipitated the investigation, which demonstrates a standard of integrity whereby Canada is measured and respected throughout the world.

If you had to do this all over from scratch—hindsight is always perfect in retrospectives such as this—what would be your fast track to enabling legislation that would make it effective and cost-effective?

Mr. Louis Clark: I would say there probably would be six points.

First of all, I would make sure there were no loopholes in what a person could allege in terms of the context of the freedom of speech rights and where they go. For example, it would be for any whistle-blowing wherever people happen to go. I don't think it should be limited to just protecting the people who blow the whistle to the government or just the people who blow the whistles to their bosses. I think it should also protect people who go to the media as well. We actually were successful there.

Back in 1978, that covered wherever you happened to go with the whistle-blowing, and most of our statutes have been consistent with that premise. One of the reasons for this is that for almost everybody who goes to the media, the response is that the government does an investigation. If you go to the media, you actually usually do prompt a government inquiry or investigation. Therefore, why not protect those people?

Secondly, why saddle those people with having to go just to their bosses or just to a particular government agency, whether it be effective or not effective? Why not allow those people a wider discretion in terms of where to go forward? But there's also a more practical point, which is that almost everybody whom we've ever represented who has blown the whistle—and I could say this about almost anyone we've known about—has gone to their agency first. I would say that as well about most of the Canadian whistle-blowers I've met over the years, because the same thing is true there. Almost everyone of them has gone to their bosses, which is why the issue of being anonymous—which we haven't gotten to—is somewhat of a red herring issue, because the fact of the matter is that almost everybody has raised those issues before.

Let's say there's an anonymous source and it gets into the media. What happens almost immediately when something goes to the media is that you look at who raised that issue internally. It's usually only one person or two people, and they stand out like a sore thumb. So I would start with the premise that this needs to be there.

Secondly, people should have a genuine day in court. I don't know whether that actually means a court system, whether that means a hearing process, or what that might happen to be. But they must be able to defend themselves. They shouldn't have to rely on the government to defend them. They can defend themselves in some fashion at a court or at a hearing that's independent, and not through a hearing process that is prejudiced against them.

In our country, obviously we don't have that, and that's a key problem that we have. We don't have that in terms of the federal employees. We have it in terms of corporate employees.

Mr. Ken Boshcoff: So independence is a key factor?

Mr. Louis Clark: Yes, the independence of the judicial process.

Third, I would make sure we're talking about the effective legal standards in terms of the burden of proof. In our country, what we have for the federal employees—and it has been very effective—is that they don't have to prove that the government went after you because you were a whistle-blower. All you have to show is that there was some connection between your whistle-blowing and what happened to you—in other words, your demotion, your termination—that the whistle-blowing was a factor.

A factor can be, for example, having twenty years of outstanding performance appraisals, blowing the whistle, and six weeks later being demoted or seeing your performance appraisals tank or go down. That could be enough to say there was a connection. Once you've established that there's a connection, then the government has the burden to show, by a very high standard—the terminology we use is “clear and convincing standard”—that they would have taken this action against you despite the whistle-blowing. That burden of proof is one that is effective or can be effective for the whistle-blower.

And as two more—

• (1200)

Mr. Ken Boshcoff: Can you do those quickly? I only have ten minutes.

Mr. Louis Clark: Okay.

Why don't I just say one is committed leadership. In other words, whoever the leaders of these agencies are, they have to deal with the whistle-blowing and show that they are committed to the issue. And getting back to a point that I went into earlier, there has to be a credible internal process of dealing with the investigation and corrective action.

Mr. Ken Boshcoff: I just want to raise the military in general, but not necessarily ballistic missile defence. Years ago, there used to be these great stories of the \$500 hammer and the \$10,000 toilets, and things of that nature. Was that in the pre-whistle-blowing era, or was that the kind of stuff...?

Mr. Louis Clark: That was part of whistle-blowing; those were whistle-blowers.

Mr. Ken Boshcoff: But that was in defence.

Of course, national defence isn't part of this, so what was the process whereby those matters that were clearly military were revealed?

Mr. Louis Clark: What happened is that there were a lot of internal whistle-blowers within the military, most of them civilian, but not all, who leaked that information to the public. So they were not public whistle-blowers, but it was pretty much anonymous whistle-blowing. But we get calls every day from anonymous people who want to point out things like that—but not as dramatically, perhaps.

Mr. Ken Boshcoff: For many reasons, ballistic missile defence is also an interesting issue in Canada, so the whistle-blowing that's going on about that process is more than fascinating to us here—although the issue is somewhat closed.

So the question then becomes, when you talk about \$1 billion a year in savings, a project such as ballistic missile defence would easily swamp those numbers, revealing just how costly a process that might be. So how frequently are these individual cases coming forward, and at what magnitude, I guess?

Mr. Louis Clark: First, I would say they're coming forward frequently, but not frequently enough. In terms again of the anti-ballistic missile system, that's \$9 billion a year. We have a whistle-blower, Professor Ted Postol at MIT, who has blown the whistle on the fact that you can't tell the difference between a decoy and a regular missile. If you can't determine that, then all of your \$9 billion is wasted, which is what he's trying to reveal. What our government did is end up classifying all of that information, so he's not able now to speak out on these issues.

Mr. Ken Boshcoff: I see.

What is the size of the staffing of the operations of the organizations?

Mr. Louis Clark: Are you talking about the inspector general offices?

Mr. Ken Boshcoff: Yes.

Mr. Louis Clark: I'm sorry, but I'll have to get back to you on that one.

• (1205)

Mr. Ken Boshcoff: It's my job to ask those questions.

Mr. Louis Clark: You're right. I don't know the answer to that.

I would say it's probably significant. I can't imagine the inspector general offices not having 200 or so employees from each department; so they are a sizable operation, and focus on only one department each. But I would say they are worth every penny, because I think they recover that not only in terms of what they find, but also and more significantly in what they keep from happening. In other words, I think we would have more corruption without those kinds of offices.

Mr. Ken Boshcoff: You mentioned that you're somewhat disconcerted by the fact that what one might call low-level whistle-blowing—people who would go to their boss—is off the rails, that those types of people are having a more difficult time coming forward.

Did I interpret your concern correctly, when they go directly to their boss? There were several categories that you mentioned.

Mr. Louis Clark: Well, I think there's a huge a problem in their having to go to their boss. I think that's the problem.

Mr. Ken Boshcoff: Thank you. Perhaps you could elaborate on that, then.

Mr. Louis Clark: For one thing, that person has already done so in almost every instance; they have raised that issue internally. To require that of them, in addition, essentially sets off or warns the boss; if the boss is the wrongdoer, which is sometimes the case, that warns the boss that the person is starting a formal process, and therefore it allows them to essentially cover up. I don't think any investigator would want that to happen; this investigative office that essentially is independent and is going to do the investigation doesn't want all the bosses and, supposedly, the wrongdoers to be alerted there's a process started. I think that's what you have when you have that kind of requirement.

The Chair: Thank you, Mr. Boshcoff.

Mr. Lauzon, followed by Madame Marleau, for 10 minutes.

Mr. Guy Lauzon (Stormont—Dundas—South Glengarry, CPC): Thank you very much for being here this morning, Mr. Clark.

Mr. Clark, before we start, can I ask how long you have been involved in whistle-blowing? How many years of experience do you have?

Mr. Louis Clark: I started in 1978.

Mr. Guy Lauzon: If my math is right, that would be 27 years.

Mr. Louis Clark: Yes.

• (1210)

Mr. Guy Lauzon: Then you are a very credible witness, I would suggest. You're such an asset to this committee. We need people with your credentials to advise us and to give us some input.

We've been dealing with this legislation, and it's so critical.

By way of introduction, I should tell you that I've had the privilege of being a public servant in this great country of ours for 22 years. It's interesting; I almost feel vindicated this morning because of a couple of things you said in your opening address.

As soon as I saw this piece of legislation, I said it would not work because we do not have an independent commissioner. I think you made that point very strongly. The other thing I kept telling my colleagues is that we are better off without any legislation than with flawed legislation. I think you've made that point as well.

We've heard witnesses over the last six months who have sat there in your chair.... Good, solid, appropriate whistle-blowing legislation is actually an investment, and there's a return on the investment. You mentioned that you feel your country has probably saved \$1 billion. Is this \$1 billion a year?

Mr. Louis Clark: Yes.

Mr. Guy Lauzon: The United States saves \$1 billion dollars a year as a result of this legislation.

A couple of things jump to mind. In our country we've had witnesses, as I said, sit right there and say that if we'd had whistle-blower legislation, some current difficulties could probably have been avoided. As you may or not may know, we're having an inquiry right now regarding a sponsorship scandal. That was brought to the government's attention, or to someone's attention, somewhere along the line. It's my feeling that because we didn't have adequate whistle-blower legislation, it didn't get moved up the line. We have a BSE issue with your country that's two years old as we speak. We were told by other witnesses that they came forth to try to head that off and weren't listened to. We've heard about illegal visas being sold around the world.

Actually, in every case this whistle-blowing happened because of people who had 20, 25, or 30 years of experience with the public service—and they're very close to my heart because I spent so much time in the public service. They thought they were just doing their jobs when they brought these things up, but the reward they received ultimately was to lose their jobs. I'm almost speechless about it.

The thing I want to get to is, what do you feel about the human cost of this? I've watched my friends, and I've been in some situations, and there's a great deal of emotional turmoil a person goes through when he sees a wrongdoing. First of all, he has to decide whether he wants to bring it forth. As you've said so eloquently, 60% to 70% of people say, what's the use? We have to get rid of that.

With your 28 years of experience, I wonder if you could tell me what you think the human cost is. How much is it costing us? How many good-quality public servants are we losing because we don't have adequate whistle-blowing legislation? Can you speak to this?

Mr. Louis Clark: Obviously, I think that's immeasurable, the damage to individuals. One of the things we do as a project as well is that we counsel. I'm a Methodist minister, so it's natural for me to counsel people about this experience and what they're about to do, and there are so many times I have to counsel people that they should not do it. Not only is the reward perhaps going to be elusive, but they might not survive the process because of the level of stress from what they have to go through. It certainly is a stressful process even if you have the best laws in the world; obviously we don't, but nevertheless we try. Even in the corporate world, where we have very good and adequate legislation, it's still extraordinarily stressful for these people.

As to the human costs in terms of quality people, let me just say I haven't talked about who these people are, which is an oversight. These people are the people you want in your office. They tend to have the highest standards. They tend to work the hardest. They have the most aggressive professional drive to see the success of whatever they happen to be engaged in, and very often they never considered themselves whistle-blowers before they did it.

They have usually crossed the line because they just insist on a level of quality they thought was the standard, or thought should be the standard if it wasn't the standard, and that's what has got them into trouble. Then the whistle-blowing becomes a way of defending themselves against the people in the office who have lower standards, who want to get production going again, or who want to produce the plutonium because of national security concerns even though they're contaminating thousands of people. Whistle-blowers don't set out to be whistle-blowers.

In addition to that, according to most of the surveys on who these people are, it's as difficult to figure out who they are or are going to be as it is to determine why in Nazi Germany or in Denmark and in other places you had the rescuers. Why did some people rescue people and other people not rescue people? It goes across all educational lines and all professional lines. It's just impossible to say who's going to step up and take a risk or raise standards and try to follow them and who is not going to do that. It's just impossible, yet obviously who you want to keep in government are the people who have the higher standards.

Mr. Guy Lauzon: Mr. Clark, our government operates a little differently than does yours, and we in this committee, as a matter of fact, can grant wishes. You have 27 years of experience in this business. If we were able to grant you one wish based on that experience, if you could only change one thing or maybe two, what would they be? What would you like to see different in your American procedures? Maybe we can learn from that as to what should be included in ours.

Mr. Louis Clark: I would change two things. One is that I would give the government the opportunity to get to the bottom of the scandals by having an independent body investigate those concerns and deal with the reform process, the corrective action process.

Second, I would give the people who actually bring forward the information, the people who are the witnesses, a fighting chance to win through some process by which they have an ability to have a day in court. They'd be able to defend themselves on their own, not relying on the government to defend them but allowed to defend themselves.

Those are the two things I would look for.

•(1215)

Mr. Guy Lauzon: Did I hear you correctly when you said you had 22 employees and a \$2-million budget?

Mr. Louis Clark: Yes.

Mr. Guy Lauzon: You operate with 22 employees and \$2 million and you get the kinds of results we're hearing about today.

Mr. Louis Clark: Yes, but that's because we rely on the expertise of these people who the government should also be taking advantage of—and do take advantage of.

Mr. Guy Lauzon: And the American government is saving \$1 billion a year on whistle-blowing legislation, from whistle-blowers.

Mr. Louis Clark: Yes. I just want to make one correction to your comment earlier about that. We recover \$1 billion. But we save billions—billions. We recover \$1 billion because of whistle-blowing; we save billions because as a result of having as effective a process as we now have, there are so many people who are deterred from stealing, essentially.

Mr. Guy Lauzon: The other thing is that your government, had it listened to the whistle-blowers, could have prevented that *Challenger* disaster.

Mr. Louis Clark: Yes.

The Chair: Thank you, Mr. Lauzon.

Madame Marleau, you have 10 minutes, followed by Mr. Preston.

Hon. Diane Marleau (Sudbury, Lib.): I want to clarify a little bit your role versus the roles of the other groups that are involved in this. Could you perhaps do that for us? You only have 22 employees, but your group isn't the only group dealing with whistle-blowing.

Mr. Louis Clark: Right.

Hon. Diane Marleau: Could you please clarify that?

Mr. Louis Clark: Yes. We have the Government Accountability Project, and in addition to that we have the Project on Government Oversight. We call it a sister organization. It is about half our size, but very effective. It doesn't have a legal arm, it doesn't have a legislative arm, but it does have an investigative arm that's very effective in taking information, again, from the whistle-blowers. It is similar to what we do—exactly what we do, in fact.

Then we have an organization that I'm actually a founding member of called Public Employees for Environmental Responsibility, which is again about half our size, but that is focused on environmental whistle-blowing. We tend to send most of our environmental whistle-blowers over to that organization. It is very similar to ours, and it was actually an offshoot of our organization.

That's the NGO community. But I think what is important to know is that we're also talking about legislative committees, we're talking about hundreds of newspapers across the country. All those are involved. I like to say that whistle-blowing is the power of one, magnified. It's the power of this one person as a catalyst, but what happens is that our organization gets involved, news media get involved, maybe national television gets involved, congressional committees get involved. And every one of those vehicles is an important part of the process.

Hon. Diane Marleau: Are all agencies and departments in the U. S. government part of this? Can they whistle-blow? For instance, is your Postal Service part of what is covered by the legislation?

Mr. Louis Clark: The legislation that I talked about exempts the FBI, exempts the CIA. It actually, I believe, exempts the post office.

Hon. Diane Marleau: Why would that be? Why would it exempt something like the post office? I can understand the FBI, for security reasons, perhaps. But why the U.S. Postal Service?

Mr. Louis Clark: One of the things with the post office is that there have been various efforts to have the Postal Service become quasi-independent. When we start talking about this kind of privatization... That is why our organization, at least, is very worried about all the privatization talk around the defense department, because once you get privatized functions, you begin to get away from the civil service system and therefore those protections that might exist there.

But to correct the record on the post service, there is a part that's involved in the civil service system and a part that's not. I don't know quite the clarification there, and I don't want to be inaccurate. In terms of the CIA and the FBI, it's very clear that those security agencies dealing with classified information and people who are often clandestine in terms of their identification, are not part of the regular civil service system. They're exempt. But what they're supposed to have is an equivalent internal process that mirrors the process for everybody else. It just so happens that they don't. Those systems are not adequate. We know this and we comment on this all the time.

• (1220)

Hon. Diane Marleau: My impression is that when you say "to all organizations" they should all have them, but sometimes when you're a closed shop and you run it like the military from the top down, these organizations may not work as well. Perhaps they should have the opportunity to go somewhere else. That would probably ensure that their own systems worked a lot better.

My impression is that if you have an independent place where people can go—which in the end is what I think we're going to try to achieve here—then the internal mechanisms will work far better, because what department or agency would want their employees to feel they have to go outside to report it?

Our legislation looks to the employee, the whistle-blower, being able to go outside of his environment to blow the whistle. But what I see is that the employee does not have to remain as part of the picture. The body can then send the complaint to the Auditor General or whoever they want to investigate it. Then there's some form of protection for that whistle-blower. I don't foresee it being a court system. If it's a criminal activity of someone in the department, it is dealt with by the criminal courts, by the regular justice system.

I think our governing system is very different from yours, of course, because we have the opposition, and the opposition loves nothing better than to hammer the government over whatever. So that pretty well guarantees that as soon as something gets out, it has to be addressed. I think that's good. That's why I think it's important for us to make sure the whistle-blower has that protection and can go someplace and not be penalized.

I'm not sure what we can take from your system, because you're far more litigious than we are here in Canada. When you talk about having to go to a separate court to deal with this, you know....

Mr. Louis Clark: I don't think you would have to go to a separate court, as long as whatever court you have is independent of the management system, which is often essentially the opposition to the

whistle-blower if there's a reprisal allegation. So I'm just saying it needs to be independent. I think that would be true in any system, not just ours.

You're right, we do have a litigious system. At the same time, we don't believe you necessarily get the best result by being litigious. Our legislation calls for alternative means of dispute resolution, of which we're very much a proponent. In your legislation I don't think that exists. I think that's something you should consider. It's a way that people can actually come together, which could be valuable.

If whistle-blowers have an alternative and can go to this independent body, or they can stay internally to adjudicate their concerns, then I certainly think that having the alternative is positive. What you'll find is that if the system is working, whether it be external or internal to an agency or department, whistle-blowers will go there. If it's not working, they won't.

• (1225)

Hon. Diane Marleau: I don't have any other questions at this point.

The Chair: Thank you, Madame Marleau.

Mr. Preston is next, followed by Monsieur Sauvageau.

Mr. Joe Preston: Thank you.

Are the OSC and the MSPB independent? To whom do they report?

Mr. Louis Clark: They're independent bodies.

Mr. Joe Preston: So they report through a cabinet position, and they are independent.

Madam Marleau talked a bit about the military—in your case the FBI and the CIA, in our case the RCMP and CSIS—being included or not being included. My first question would be on what your views are on the police forces being included or not.

We've had witnesses here from the RCMP, and it seems as though the members would like to be included, but the management would like them not to be included—if I could just give you my own view on it. The point is, how will they handle it, how is it handled in the States if someone from an excluded organization does come forward to the whistle-blowing place, if you will? Are they punished for having done that from an excluded organization?

Mr. Louis Clark: Certainly, they can be....They can't be punished just because they went to the wrong place, which is one of the concerns I have with what I've seen about this legislation. If you make a mistake as a whistle-blower, it's unfairly fatal. I'm really concerned about what looks like the procedure. I think there might have been some clarification or improvements between your previous bill and this one on that issue, but it seems to me you have to follow a particular procedure, and if you don't, you're in trouble.

Secondly, if you are from an excluded organization and go to, for example, the special counsel, the special counsel has authority to deal with classified information, so it does have certain ability to send that information back to the CIA, but to the inspector general of the CIA, for example, to be dealt with. So they can deal with some of the issues that come to them even though they might be from a person who would not be able to benefit from what that agency or organization has to offer.

Mr. Joe Preston: That's the point, I guess. If we can give the independent office that's going to look into whistle-blowing the authority to handle the secrecy part of our government also... investigations need to be able to do that, investigators need to be able to do that.

We also talked about the exemption of the military, that because of the top-down nature of its format, or esprit de corps, if you will, it's a difficult situation to blow whistles inside an organization like that, in our national police force and in the military. So giving them the ability in non-secretive areas or even, in that case, to go to the independent body that does the investigations just seems a natural to me. I'd like to have the examples pointed out as to why it wouldn't work.

We talked also about the military in the United States becoming more independent, that there are more private contractors dealing with the military. So at what point...? Now, we're not government employees even. We're not even military employees. We're private contractors dealing with it. I think what my colleague mentioned, the \$500 hammer and the \$10,000 toilet and these types of things, came forward in most cases from private contractors, not just straight from the military.

Where's the protection built into your legislation, and how can we build it into ours, to protect the private sector contractor, the person who's dealing with the government and determines that this kettle of fish needs to be opened up? Where's the protection for that person? And if I could ask further, where's the protection for his company to not be punished for having an employee who comes forward and points something out about the government?

• (1230)

Mr. Louis Clark: Those are great questions. I'll try to deal with them.

First of all, in terms of our military, we did talk about the hammer situation. In some ways, the way that became public was somewhat humorous. What was far less humorous was what our military was doing in terms of Iraqi prisoners of war. What we had there was torture occurring within our military system for over a year to a year and a half before it became public. It became public because of two whistle-blowers in particular.

What we did was go to Congress immediately when this was exposed, and Congress did pass legislation giving the military people military whistle-blower protection. People in the military do have whistle-blower protection for going up the chain of command, then. Before, we had some protection, but it didn't work if you went up the chain of command. Now we have that, and hopefully it will work.

So we do have some improvements there, but this does highlight that if you have an organization that's very hierarchical, you have the opportunity to have torture happening for a long period of time before it goes public. One of the downsides of that kind of structure is that you're going to have abuses that remain secret far beyond when they should. They shouldn't remain secret at all.

Secondly, in terms of contractors, we're working on a number of pieces of legislation that are going to give protection to whistle-blowers within as many contractors as possible, related to the military or anywhere else, in terms of energy, etc. Actually, our House passed legislation last year that our Senate didn't follow through on. The House actually passed legislation covering any contractor to our Department of Energy and to our Nuclear Regulatory Commission. Our Department of Energy contracts \$17 billion worth of work every year. For everybody dealing with those departments of government, there would be whistle-blower protection, if only the Senate had acted. So we are working on that legislation.

Finally, I know we don't have time to talk about it, but in terms of the Sarbanes-Oxley Act of 2002, the Corporate Accountability Act, with every public company in our country—and many of our contractors are publicly traded companies—those people have the best whistle-blower protection of anyone else in our country right now because of the reaction to Enron and the reaction to WorldCom.

So if we go more and more to being a contracting-privatization country, we do at least have the potential of having some levels of protection that unfortunately don't occur right now within our government.

Mr. Joe Preston: So provided that the contracting company is a publicly traded company, we're well protected. It's great that we can protect our private companies, but not our public employees.

You mentioned before what may be the non-need for anonymity in this, in that in almost all cases the whistle-blower has come forward up the chain of command in some way anyway, making it very easy to point out who it is. Do you believe this should be written into the legislation in any event, or is it just something we're spending time on that we probably don't need to spend time on?

Mr. Louis Clark: First of all, I pointed out six things that apparently were really important, and I pointed out to you two things that are absolutely critical. I read an article just this morning about clause 55 in your legislation. I think that clause is very troublesome. Of the 24 characteristics that we think would be important for whistle-blowers—and I don't have time to go through all of them—this one is probably number 24. It is still important, but it's not as critical as many of the others.

In terms of being anonymous, yes, there should be hotlines. Therefore, you have a process—which I think you probably have—so that there will be a way people can remain anonymous. But once you get into an investigative process, you don't go very far before you can't be anonymous, because the person accused of wrongdoing has the right to confront the accuser.

Therefore, as part of the due process, these people cannot remain anonymous. If they are witnesses to wrongdoing, you want them to be witnesses. Therefore, I do think that if a person wants to be anonymous, they should be allowed to be anonymous, but if you want to be able to cloak an entire investigation in secrecy, what you'll end up creating is a bill or a law that's going to be worse than if you had no law at all. You will be able to essentially have a way for all scandals to remain secret, for twenty years in your case. I think that would be unfortunate.

• (1235)

Mr. Joe Preston: I would think there are some governments that would wish that to happen, but ours is not going to be one of them.

I know no one goes looking for work, but what about the ability to lodge preventative investigations? In our case, our Auditor General does fantastic work—close to sainthood—and finds out an awful lot of things that we should be looking at. In your case, could the independent office start an investigation without a whistle-blower, or does it have to have a whistle-blower?

Mr. Louis Clark: Yes, in concurrence with the special counsel, and I think you may be hearing from the special counsel next week, or at some point.

Our special counsel does have certain things they can launch on their own in terms of investigations. They are somewhat limited. There is what we call a “hat-check” violation, which is essentially being engaged in political activity as a civil servant, which is prohibited or is at least limited. In those situations they can investigate. They can investigate certain levels of discrimination. They can investigate certain violations, frauds, or bad practice going on within agencies around the merit system in terms of civil service. So there are limited areas of inquiry that they can do on their own, but it is somewhat limited.

The Chair: Thank you, Mr. Preston, your time is up.

Monsieur Sauvageau, for 10 minutes, followed by Monsieur Godbout.

[*Translation*]

Mr. Benoît Sauvageau (Repentigny, BQ): Good morning and welcome, Mr. Clark.

I think we have a lot to learn if we want to improve Bill C-11, which we are examining. There are huge differences between the U. S. and the Canadian legislations but on the philosophical level of wrongdoings, there are lots of similarities on which we must rely. For these reasons, I thank you for coming to share your expertise with us.

I apologize for not being there during the first part of your presentation. I was in the House of Commons, but my friends and colleagues told me about the information you shared with us.

You talked in particular about the reversed burden of proof in case of reprisal against a whistle-blower. I would like you to explain to me this aspect of your presentation. To my knowledge, we haven't talked much about this up to now during consideration of Bill C-11, and this is an element which seems very interesting to me.

[*English*]

Mr. Louis Clark: Yes, I'd be pleased to do that.

I think one of the problems I had in understanding the legislation I've seen is that I don't understand what the process is. There are some types of statements that there should be a robust investigation of various things, but I don't see the process. Perhaps that's my ignorance of your legal system as to what the process is.

Our process is certainly spelled out in the legislation in terms of the burden of proof. How that works is to overcome the fact that an employee, a lowly employee or an employee with limited resources and a limited ability to get at proof or evidence, is never going to be able to overcome the burden, as we saw. We had 2,000 cases, and only four whistle-blowers prevailed leading up to this legislation. In the way they failed almost every time, they couldn't prove the boss intended to harass them because they couldn't know what was in the mind of the boss.

Therefore, to overcome what we call the proof problem in terms of how it plays out in the process, whistle-blowers come forward and say that they're harassed. The first thing that people look at, or the first thing that a trier of fact will look at, is the connection between the whistle-blowing and the action that's taken against them. If they show a nexus or a connection in any way, a contributing factor in any way, it doesn't have to be a large factor. It doesn't have to be the reason, it only has to be a factor.

For example, we had a whistle-blower whose case we fought for five or six years. It was one of the few of the previous cases that won. This person was charged with six offences. One of the offences was having a press conference. Well, that's proof. If one of the charges against you is having a press conference to reveal this information, you're allowed to have a press conference because we have a first amendment, freedom of speech, in our country. Therefore, it would be proof right there that there was a connection.

It can be a matter of a short distance of time between the whistle-blowing and the action taken against them. Maybe two months or three months would be adequate to show a connection. Once you show that connection, the person has to show that through a preponderance of evidence. We're talking about 51% of the evidence. Then the burden shifts to the government to prove by clear and convincing evidence, which is a high standard, that they would have taken this action anyway.

An important part of that phraseology too is that you're not saying they could have taken this action anyway. In other words, they could have done it, and they had the power to do it; they would have done it. In other words, in every other similar situation, if some other employee who was in the same situation would have done that, then that's proof. The government has that burden. If the government meets the burden, then the whistle-blower loses.

●(1240)

[*Translation*]

Mr. Benoît Sauvageau: You were talking about the fourth amendment in the United States. As you know, we have adapted it in Canada. We have called it “Je ne m'en souviens plus” (I don't remember any more). Here, instead of saying that we raise the fourth amendment, we say that we don't remember any more, and we go to another issue. My liberal friends probably know what I am talking about.

You said in your presentation that, since 1995, the U.S. disclosure legislation was less frequently used. Is it because there are less wrongdoings? Is it because the act is so efficient that people are afraid that their wrongdoings will be disclosed? Is it because whistle-blowers have seen that it worked more or less properly? For what reason is the U.S. legislation less used?

[*English*]

Mr. Louis Clark: I don't know that there's a decrease in the use of our legislation for civil servants. I would say we've gone from only four out of 2,000 winning their cases to about one out of a hundred winning their cases. There's a slight improvement but it's not adequate. The reason for that, again, is that the cases go to a court system, which is essentially a bureaucratic civil service court system, and not the regular federal judiciary. Therefore, the decisions that have come down from that tribunal have been so prejudicial against the whistle-blower—and the press events have been so disastrous—that the whistle-blowers can't win.

The silver lining to that situation, if there is one, is that we have 29 other pieces of legislation federal government employees can take advantage of. For example, if they're blowing the whistle on nuclear weapon issues or nuclear power issues, if they're blowing the whistle on environmental issues, or if they're dealing with banking systems, airline security, or airline safety in terms of repairing and maintaining airplanes, there are particular pieces of legislation we've been able to get through that will cover federal employees and private employees equally in those situations. What we can do as an organization is take them to the legislation that will help them, and we find those pieces of legislation actually work much more effectively. In many cases, 20% to 30% or so, the whistle-blowers prevail in those alternative systems of adjudication.

Another thing too—and you'll know this is important if you saw anything related to David Graham, who blew the whistle on the Vioxx drug—is that we have a Senate hearing. One of the things we do as a project is take all these people to Congress, and the members of Congress—and they're not happy about this—then step up and say, you agency or department had better not retaliate against that whistle-blower.

That's actually how we're able to protect most of the people we represent, by getting members of Congress to step in and assert themselves. The agency then knows it's going to lose some budget opportunity or lose in other ways, and maybe they're going to have to come forward and testify about what that agency did to that particular whistle-blower. It's that threat Congress has over the departments of government that has helped many of the people we represent.

●(1245)

The Chair: Thank you, Monsieur Sauvageau.

Monsieur Godbout.

[*Translation*]

Mr. Marc Godbout (Ottawa—Orléans, Lib.): This is now my turn to welcome you.

[*English*]

I will switch to English, Mr. Clark.

I just want to clarify a few points. Yours is a non-governmental organization with no government funding whatsoever?

Mr. Louis Clark: No. I'm sorry, when we win cases, we get attorney's fees, but the government is not happy about that money.

Mr. Marc Godbout: Your organization's general budget was \$22 million or...?

Mr. Louis Clark: It's \$2 million.

Mr. Marc Godbout: That's not associated with the legislation cost of the whole process, though.

Mr. Louis Clark: No.

Mr. Marc Godbout: I just wanted to clarify that.

Your legislation relates, naturally, to wrongdoing, but it does include all the human resources aspects too, like discrimination and other aspects relating to personnel. What would be the percentage you have seen—just a rough estimate—of human resources cases and what are clearly the wrongdoing cases?

Mr. Louis Clark: I don't have actual figures for that; I just know anecdotally. I can say that the discrimination cases are very different. A far higher percentage of people prevail if they have brought discrimination cases. I would say we're talking about twenty times the likelihood of winning if you bring a discrimination case. That's why, if someone comes to us and there is a dual possibility, where we could pursue either a discrimination case or a harassment case as a result of whistle-blowing, we're going to pursue the discrimination case.

In addition to that—and maybe this is too technical—if you bring a discrimination case, you can go into our federal court system, and as a result of that you have a much higher percentage chance of winning. What happens is that once you go into our court system, you can tack on the harassment whistle-blower stuff. That's the only occasion when our regular federal judiciary can actually take an action related to harassment for whistle-blowing.

Mr. Marc Godbout: But it does provide a parallel process.

Mr. Louis Clark: It's a parallel process.

Mr. Marc Godbout: Now, talking about process, if there is a situation and you are a whistle-blower—just the basic steps, to differentiate from the present legislation—where would you go? Would you naturally, as a first step, go to your organization to make sure you're protected, or would you go to the Office of Special Counsel or the Merit System Protection Board? Just to differentiate these three bodies, what are the major steps that would be followed?

Mr. Louis Clark: First of all, if you're talking about a whistle-blower in terms of just the whistle-blowing, the usual step would be to go to the boss or to stay in the office and raise those concerns. That's the usual process.

When we start talking about harassment as a result of doing that, very few whistle-blowers would know really where to turn, so they would probably turn to other employees to ask the question, or if we're talking about something that's public at all, then they perhaps would go to a newspaper reporter and ask what they should do. Then the newspapers would send people to our organization. Also, members of Congress would very often send people to our organization. I would say that once you got out of the department or the agency, people would tend to send people to us, but as long as you're still within that system, most likely you would go to the Office of Special Counsel.

• (1250)

Mr. Marc Godbout: Now, you've talked about retaliation. There is this process where they can come to Congress, and that does answer part of the question, but are you satisfied that your legislation has enough provisos in there to fully protect the individual who is whistle-blowing? Are you satisfied with your existing legislation as it relates to—

Mr. Louis Clark: No.

Mr. Marc Godbout: What would you recommend as additional protection to make sure these people are fully protected?

Mr. Louis Clark: First of all, I would probably say that our primary emphasis in terms of our work right now to change our legislation is to change the judicial appeal process so that these cases will no longer go to this dead-end disastrous court, but instead will

go into our regular federal judiciary, which I think has a much better capability of determining the intent of Congress. Therefore, I'm very confident that if those cases can go into that system, we'd be much better off, and the whistle-blowers would actually be much better off. So that is certainly our major focus.

Mr. Marc Godbout: So for us it would be, according to your advice, not necessarily good to go in the direction that your country has gone, insofar as that aspect anyway.

Mr. Louis Clark: No, I think I'd disagree with that, if I understand your question, because what happens is we don't have an independent place for these cases to go in terms of the judiciary. As I understand, you don't have that in your legislation either, and so I think we're talking about parallel problems here.

Mr. Marc Godbout: I understand.

Thank you, Mr. Chair.

The Chair: Thank you, Monsieur Godbout.

We will break for lunch now. You can leave your papers and so on in the room. The room will be secured till we come back at 3:30 p.m. For anyone going to lunch, it's in the Parliamentary Restaurant, in the New Zealand room. We'll go directly there.

I believe that's all I really have to say. We'll just continue along the same line as we have, just follow right on through to the next party in line, when we reconvene at 3:30 p.m.

Thank you very much.

The meeting is adjourned.

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