

**THE HOUSE OF COMMONS OF CANADA
STANDING COMMITTEE ON
GOVERNMENT OPERATIONS AND ESTIMATES**

**BILL C-25
Public Servants Disclosure Protection Act**

SUBMISSION OF

Ad IDEM

**Advocates In Defence of Expression in the Media
also known as**

**The Canadian Media Lawyers Association (CMLA)
l'association canadienne des avocats du droit des médias (ACADM)**

www.adidem.org

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Introduction

Bill C-25 begins with a noble objective: protection of government whistleblowers. Our members are very conscious of the necessity to provide this protection. When individuals come forward to inform the public, through our client media organizations and their journalists, they should not only be protected but, often, rewarded.

The fundamental flaw in Bill C-25, as currently drafted, is that it presumes that whistleblowers owe an iron-clad guarantee to their employer that they will *never* disclose information to parliamentarians, the media, or the public, except in very narrowly defined emergency circumstances. Until now there has been no such guarantee, and one ought not to be created now.

The “duty of loyalty” does not justify a “duty of silence”. Plugging and controlling leaks may be necessary and useful to military or competitive commercial operations, but to the extent it is applied to controlling the public’s access to information about the general operation of government it tends to serve the interests of the government at the expense of public debate and the proper functioning of our democracy. As a result, as currently drafted, this bill contributes substantially to the “democratic deficit” this government has pledged to eliminate.

Under the bill, with few exceptions (note: Section 13), whistleblowers are only entitled to report up the line within the government and to the new Public Service Integrity Commissioner, and action can be taken against them if they have not followed the dictates of the Act. (note: the combined operation of Section 15 and the definition of “reprisal” in Section 2).

Public servants disclosing “wrongdoings” directly to parliamentarians, the media, or the public would face disciplinary action or termination of employment (note: Section 9), with no apparent general public interest defence. The onus is on the whistleblower to demonstrate that he or she believed on reasonable grounds that there is not sufficient time to make the disclosure under the Act, and either that there is a serious offence being committed or an imminent and serious danger to life, health, safety or the environment.

Yet, it is the threat of wrongdoings being disclosed to the public that deters wrongdoing in the first place.

The media and its journalists serve society by acting as a conduit for public servants who notice deficiencies in the delivery of government services. Minor

disclosures rarely result in publication. Serious and significant disclosures more often do.

To encourage effective whistleblowing, we recommend that whistleblowers be given a choice: report up the line, and, if necessary, to the Public Service Integrity Commissioner, or talk to parliamentarians, the media or other persons in a position to investigate or initiate corrective action. Each option offers benefits to the public, and the availability of each will spur the other to more effective action.

To that end, we have proposed amendments to Bill C-25 that would more carefully reflect the duty of loyalty set out in Canadian jurisprudence, and the philosophy underlying existing Access to Information legislation.

Finally, while, as taxpayers, we support the goal of Bill C-25 to root out government mismanagement and waste, we must note that we support the exclusion of Canadian Broadcasting Corporation from the Schedule to the Bill. CBC, as part of the media at large, should not be considered as part of government. Its mandate under the Broadcasting Act makes its unique role clear. It is essential to that role that CBC employees, who, under the Broadcasting Act, are expressly *not* “public servants”, *not* be recreated as “public servants” simply to serve the one government objective identified in Bill C-25. We recommend that CBC be encouraged to develop its own internal whistleblower regime that serves the objectives of Bill C-25, but does not compromise its required independence from government.

Ad IDEM

Ad IDEM (Advocates In Defence of Expression in the Media), also known as the Canadian Media Lawyers Association (CMLA) and l'association canadienne des avocats du droit des médias (ACADM), was formed in November 1998 as a national association of lawyers who practice media law, representing most of the major media organizations and their journalists across Canada. Our members have day-to-day experience in dealing with laws that impact on freedom of expression, affecting the role of journalists and the content of what the media can publish and broadcast. One of our principal goals is to enlarge and enhance the freedom of expression of all Canadians, recognizing that many in this country, as listeners and readers, rely on the media to provide them with information.

Towards ONE Public Information policy

Bill C-25 should honour and further the following basic principles enunciated in section 2 of the Access to Information Act:

- Government information should be available to the public
- Necessary exceptions to the right of access should be limited and specific

Public servants should be encouraged to disclose government information of public interest, not threatened with termination of employment for disclosing information outside the limited exceptions built into its provisions. While it is true that subsection 9(c) permits disclosure mandated by “any other Act of Parliament”, presumably including the Access to Information Act, that subsection and other sections in Bill C-25 begin from the *opposite* principle to that quoted above; i.e. that government information should NOT be disclosed to someone outside government unless the situation fits within very limited exceptions.

Ironically, while downplaying values of free expression and open government and focussing more prominently on the important economic objective of reducing government mismanagement and waste, Bill C-25 fails to recognize that the route to greater citizen control over government mismanagement and waste is through encouragement of information flow to as many interested people as possible, as soon as possible.

To realize the principle already enshrined in the Access to Information Act, **we recommend that subsections 9 (b) and (c) should be deleted from the Bill.** These provisions would simply deter good faith whistleblowers from coming forward for fear that despite their best intentions, their actions would be misinterpreted.

Neither provision is necessary. The kinds of disclosures contemplated by subsection 9(b) would be deterred in the normal course by social convention. In the extreme, they would also be deterred by potential actions for defamation. Disclosures contemplated by subsection 9(c) are covered by other statutes. This provision merely acts as a redundant offence, and, in emphasizing the risk of coming forward, deters legitimate whistleblowing.

Section 13 should also be redrafted to conform more closely to existing law on the duty of loyalty (see below), and to encourage effective and timely whistleblowing. Our suggested redraft is as follows: (*suggested amendments are in italics*)

13. A public servant may make a disclosure other than in accordance with this Act,

- (a) if he or she believes on reasonable grounds that there is not sufficient time to make the disclosure under this Act and
 - (i) a serious offence, under an Act of Parliament *or any Canadian legislature, or wrongdoing has been*, is being, or is about to be committed by another public servant in the purported performance of that other public servant's duties; or
 - (ii) another public servant is, in the purported performance of that other public servant's duties, doing anything, or omitting to do anything, or is about to do anything or omit to do anything, that creates an imminent and serious danger to the life, health or safety of persons or to the environment, *or*
- (b) *whether or not there is sufficient time to make the disclosure under this Act, if he or she believes on reasonable grounds that the public interest would justify discussing with members of Parliament or any Canadian Legislature, the media, or other persons in a position to investigate or initiate corrective action,*
 - (i) *the operations and functions of the public sector,*
 - (ii) *the operations and functions of the portion of the public sector in which the public servant is employed,*
 - (iii) *a serious offence, under an Act of Parliament or any Canadian legislature, or wrongdoing which has been, is being, or is about to be committed by another public servant in the purported performance of that other public servant's duties;*
 - (iv) *that another public servant is, in the purported performance of that other public servant's duties, is doing anything, or omitting to do anything, or is about to do anything or omit to do anything, that creates a*

- serious danger to the life, health or safety of persons or to the environment, or*
- (v) *any other matter within the knowledge of the public servant that would merit public attention*
- where the public servant's comments do not have a significant adverse impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability.*

Freedom of Expression

Freedom of expression is, according to the Charter of Rights and Freedoms, a fundamental right of *all* Canadians. It is useful to be reminded from time to time just how important this right is. Justice Cory of the Supreme Court of Canada wrote the following oft-quoted words in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.

The vital and fundamental importance of freedom of expression has been recognized in decisions of this Court. In *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, McIntyre J., speaking for the majority, put the position in this way at p. 583:

Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

The importance of freedom of expression has been recognized since early times: see John Milton, *Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England* (1644), and as well John

Stuart Mill, "On Liberty" in *On Liberty and Considerations on Representative Government* (Oxford 1946), at p. 14:

If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

And, after stating that "All silencing of discussion is an assumption of infallibility, he said, at p. 16:

Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy.

Duty of Loyalty

The duty of loyalty, as defined by the Supreme Court of Canada, does not demand absolute silence from public servants.

This was made clear in the decision of Justice Tremblay-Lamer in *Haydon v. Her Majesty the Queen*, [2001] 2 F.C. 82:

[82] In *Fraser*, Dickson, C.J. held that the duty of loyalty does not demand absolute silence from public servants. The *Fraser* decision instructs us that the common law duty of loyalty encompasses certain exceptions or qualifications:

And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies.

[83] In my opinion, these exceptions embrace matters of public concern. They ensure that the duty of loyalty impairs the freedom of expression as little as reasonably possible in order to achieve the objective of an impartial and effective public service. Where a matter is of legitimate public concern requiring a public debate, the duty of loyalty cannot be absolute to the extent of preventing public disclosure by a government official. The common law duty of loyalty does not impose unquestioning silence. As explained in *Fraser*, the duty of loyalty is qualified: "some speech by public servants concerning public issues is permitted." It is my understanding that these exceptions to the common law rule may be justified wherever the public interest is served. In this regard, the importance of the public interest in disclosure of wrongdoing, referred to as "the defence of whistleblowing", has been recognized in other jurisdictions as an exception to the common law duty of loyalty.

Significantly, Bill C-25 adopts only part of this formulation of the common-law whistleblowing defence. Section 13 only permits disclosure "when there is not sufficient time" and only for "serious offences" or "imminent and serious danger". It has dropped the equally valid and independent whistleblowing defence where "*the public servant's criticism*" has "*no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability.*"

As a result, while Bill C-25 pays homage to the "duty of loyalty" in its preamble, it expands it broadly and unacceptably in the specific provisions of the proposed Act.

Public Service Integrity Commissioner

We welcome the unique contribution to government that a Public Service Integrity Commissioner can make. The success of this office will depend on how the Commissioner carries out his or her responsibilities, and reports to the public. The greater the success of that office, the more likely whistleblowers will feel comfortable in coming forward to it.

At the same time, however, it must be acknowledged that there will be a number of whistleblowers, equally noble, who will not wish to take this route, and should not be forced to do so. In our view, if they speak to parliamentarians or the media directly, provided doing so does not conflict with their duty of loyalty (properly defined), they should be permitted to do so. It should not be left to the government exclusively to stage manage the release of the information these whistleblowers have to offer.

The amendments we have suggested offer whistleblowers this important choice.

Canadian Broadcasting Corporation

While we understand that mismanagement and waste in every department of government and every Crown corporation should be dealt with, we cannot accept that the provisions of Bill C-25 are the appropriate means to deal with CBC. Fitting CBC into this bill is like fitting a square peg into a round hole. It is a unique Crown corporation that has, as part of its mandate, “independence” from government.

Bill C-25 deals with “public servants”. Under Subsection 44(3) of the Broadcasting Act, CBC employees are expressly “*not* officers or servants of Her Majesty”. Given its independent role, which often involves criticism of the government, this attribute of its employees is essential to its ability to function.

The independence of all broadcasters is confirmed in Section 2(3) of the Broadcasting Act. CBC’s specific independence from government is established in Section 52(1) of that Act:

Nothing in sections 53 to 70 shall be interpreted or applied so as to limit the freedom of expression or the journalistic, creative or programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers.

Bill C-25 would not only compromise CBC by its definitions, but if its provisions were applied to CBC journalists as “public servants”, it would compromise their freedom to make “disclosures” about other government institutions, and compromise their ability to gather and present information independently of government in the face of the powers of the Public Service Integrity Commissioner to require “public servants” to cooperate with him or her. (Section 22)

If Parliament wishes to recast CBC as a government broadcaster, which is not independent of government, it ought not to do so through the back door. The necessity for and value of CBC’s independence from government has been established by every study of the institution since it was created, and most recently reaffirmed by Parliament in the Broadcasting Act.

Having said this, we understand that CBC should not be exempt from the basic principle that whistleblowers in it should be protected. **We recommend that CBC be encouraged to develop its own internal whistleblower regime that serves the objectives of Bill C-25, but does not compromise its required independence from government.**

Conclusion

Whistleblower legislation provides Parliament with an excellent opportunity to foster open government, free expression, and democracy, all values that are fundamental to our society. We are appreciative of the opportunity to assist you in realizing this goal. We look forward to answering any of the Committee's questions in this regard.