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Chair

Mr. Leon Benoit

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• (1535)

[English]

The Chair (Mr. Leon Benoit (Vegreville—Wainwright, CPC)): Good afternoon, everyone. We'll continue the meeting from this morning. We are meeting pursuant to the order of reference of Monday, October 18, 2004, dealing with Bill C-11, an act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings.

We have as a witness for this second meeting as well Louis Clark, who is president of the Government Accountability Project.

We'll continue with the questioning from this morning and we'll start this afternoon with 10 minutes from Mr. Szabo.

Mr. Paul Szabo (Mississauga South, Lib.): Thank you, Mr. Chair.

Welcome Mr. Clark. I appreciated the informal conversation we had earlier, before this meeting. I thought it would be helpful to get from your perspective commentary on probably the single most important issue that has come out of the testimony of witnesses, and that is the independence, in appearance and in fact, of the body that would be responsible for receiving and discharging of allegations of wrongdoing.

Can you give us an idea of the level of independence that has been implemented in the United States, and whether or not that level of independence has led to a greater confidence level in terms of the perception of those who are available to blow the whistle?

Mr. Louis Clark (President, Government Accountability Project (Washington, DC)): Yes. There are two major different bodies or agencies that I would talk about. One is the Office of Special Counsel, and I believe you will be hearing from the special counsel himself in a week or two.

Second is the inspector general offices of the various departments of government, some of which are more independent than others, although for the most part they are fairly independent.

In terms of the special counsel, when the Civil Service Reform Act was passed in 1978 that established for the first time, perhaps even in the history of the world, actual legislation specifically protecting whistle-blowers, the then general counsel of the Civil Service Commission became the first or acting special counsel. What the legislation did was break up the old Civil Service Commission into the Office of Special Counsel, which is independent, and the Office of Personnel Management, which was the part of the civil

service system that was in charge of hiring and firing and the rules related to the management of the civil service.

So they definitely split those off. The special counsel, as I say, was independent, but there's still a problem with that particular office. One of the problems is that they don't have independence when it comes to going into court. They have to rely on the Justice Department, and the Justice Department routinely and historically declines the invitation of the special counsel to go into court to enforce some of the measures that the special counsel would like to see.

So on that level they're not so independent, and that's been a problem. We've been trying to address that in reform legislation and have thus far not succeeded, but we keep trying. I think actually we might be able to get that even greater level of independence.

Second, in terms of the inspector general offices, as I say, every department is different, but most departments have statutory independent inspector general offices. The inspector generals are appointed by the President, approved by the Senate, just like the head of the agencies, and those operate essentially separately from the departments themselves.

There is a reliance often of the inspector general offices on some of the departments for administrative matters. But for the most part, they are independent. Every department is different. As a project dealing with the various cases that come to us, sometimes we have felt that they haven't been independent enough, other times we feel they are adequate.

Mr. Paul Szabo: If I might, I'll just shift. One of our recent witnesses was from the Royal Canadian Mounted Police, and the subject matter was whether or not there should be an exemption for them from being covered by the process because they had an internal process. What is the experience in the United States with regard to exemptions for the CIA and the FBI? We have something similar with CSIS and I suppose even the military. What has been the experience there, and can you give us an idea of the thinking that's gone on with regard to protection of national interests and privacy rights, etc.?

Mr. Louis Clark: We have actually been the counsel for the FBI association. They don't have unions; they have associations at the FBI. We've actually represented the FBI association in challenging—not legally as much as politically—the fact that at the FBI they are supposed to have parallel systems to the regular civil service system—internal but parallel—and they're just inadequate. All I can say is that our experience is that the internal systems that are supposed to work in parallel don't work in parallel, and I think that's across the board. At least what we get anecdotally from the employees who work there is that it's not adequate.

• (1540)

Mr. Paul Szabo: I'll ask one last question if I may.

In our Bill C-11 a wrongdoing is defined basically as breaking any law, putting employees at risk, creating environmental risks, or committing a reprisal against someone who has made an allegation. That's generally the definition of a wrongdoing in the bill.

In your experience, can you give us an idea, say from the civil service side, what frequency of whistle-blowing allegations we might expect to see from the standpoint of the size of Canada and the definition we have?

Mr. Louis Clark: As best as I can determine, with the exception of treasury rules, it looks to me like your definitions are very similar to our definitions. Our system goes on to say that any rules and regulations that are imposed as a result of statutes, etc., are definitely an area where you can blow the whistle and are part of that definition.

I would say that what you're going to get depends on how free the people are to both come forward and receive protection, as well as depending on there being some kind of independent inquiry or investigative work that is actually going to lead to reform. If you have those, you'll probably get a significant number of people, but I think that's a lot of conjecture on my part.

Mr. Paul Szabo: I'll pass the floor on, and maybe I'll have a question or two after.

The Chair: Thank you, Mr. Szabo.

Mr. Preston.

Mr. Joe Preston (Elgin—Middlesex—London, CPC): Your organization operates more than just domestically in your country; you have spoken with other countries about their legislation. Do you have a best practices model or one country that stands out among others, or is it a piecemeal thing where you found good here and good there?

Mr. Louis Clark: I would say piecemeal is probably an exaggeration. There are only seven countries in the world that have any kind of real protection, and in some instances they are so different that it's a little bit hard to compare them. I would say that basically we like the United States rules but we don't like their implementation. With Great Britain, we think the rules are rather limited. On the other hand, their implementation seems to be more successful than our own.

I think your own report from the integrity commission on the laws of the world is an extraordinary piece of work of scholarship, and I hope you'll look at that. It is really talking more about what's on the

books as opposed to how the rules work. In that sense, the United States looks pretty good in the comparison.

Mr. Joe Preston: That was my point. Before you came this morning, I was reading about a model system, and I thought we were going to hear all about it. You've told us although it reads fine, its implementation—or how it's been interpreted—is as much of a job as how well it was written in the first place.

• (1545)

Mr. Louis Clark: Yes.

Mr. Joe Preston: What can you put in place to prevent the improper interpretation?

Mr. Louis Clark: For one thing, eternal vigilance. Certainly, eternal vigilance of the Parliament, as well as, hopefully, a robust NGO community, challenging and bringing to light and bringing to the attention of the Parliament, as well as to the general public, what the deficiencies might be.

One of the unfortunate experiences we've had in our country is that the Congress does not like to deal with the civil service rules. Our joke in our office, sad joke, is that Congress is only going to pay attention to the civil service system about every decade. They'll come in and look and make some changes, and then for that next 10 years it's uphill to try to get the attention of our Congress in terms of the rules of the civil service system.

Mr. Joe Preston: If I took the U.S. system as a model and wanted to write our legislation, can you tell us what pieces need to be overhauled in order to prevent what's happened in the United States?

Mr. Louis Clark: Yes, I think our solution is actually pretty close at hand. We think, for example, we have the majority of Congress to make the changes that need to happen, and the changes are not very extensive.

We need to make more leeway for the civil service system to deal with the denial of security clearances. Right now the security clearances are dealt with in the Pentagon, or by another body—put it that way. Denials happen, and it's impossible to raise the whistle-blower defence or challenge to those issues. With the change in the rules so the Merit Systems Protection Board is going to be able to look at the denial of security clearances as a harassment or a retaliation, we think that would be improved.

In addition to that, and I think more significant, is what I talked about earlier. By changing the court, we really think we can change our system back to where it was intended in 1994, when the act was amended for the last time.

Mr. Joe Preston: So your court system was originally designed to work well. It just somehow has grown into a monster that doesn't quite fit the pants anymore, is that it?

Mr. Louis Clark: That's right.

Mr. Joe Preston: We talked about penalties for reprisals, and earlier we talked about rewards from a whistle-blowing point of view or benefit to government point of view. What sorts of penalties does your system have in place for reprisals? Is it all human resources based, or is it...?

Mr. Louis Clark: Well, the penalties we have are that a person retaliating against a whistle-blower can be disciplined, which means they can also be fired. They can be disciplined in any number of ways. It's such a rarity for that to happen; there we have an issue, and there we have a problem. The Office of Special Counsel does have the authority to essentially prosecute a manager for taking retaliatory action; it just happens so rarely.

Mr. Joe Preston: Can the whistle-blower attempt some sort of civil...?

Mr. Louis Clark: No.

Mr. Joe Preston: No? Not a chance through the civil system?

Mr. Louis Clark: No.

Mr. Joe Preston: That's all I have.

Thank you very much.

The Chair: Okay, then to Monsieur Godbout. If you finish early, Mr. Szabo wants to complete your round.

Mr. Marc Godbout (Ottawa—Orléans, Lib.): Yes, I will, Mr. Chair, because I have only one question. It's not an easy one, probably.

In this process you seem to be recommending or advising us to look at one single place where the actual investigation should take place, and then this same office could issue corrective action, rather than possibly going to a tribunal that would issue the sanction. Did I hear you correctly on that, or would you favour a two-step system? In French we would say *c'est difficile d'être juge et partie*. You do the investigation as a prosecutor and then you go to court. If you do the investigation and you rule on your own investigation, I see a problem, but maybe I didn't understand it clearly.

• (1550)

Mr. Louis Clark: Well, for one thing—

Mr. Marc Godbout: Because in the states I think you do have a two-step.

Mr. Louis Clark: Yes, and I don't have a problem with the two-step, as long as both steps are independent.

Mr. Marc Godbout: Okay, that was your point.

Mr. Louis Clark: Yes, that's really the point I was trying to make.

There are corrective actions that can be taken short of any kind of adjudication, I would think, as well.

Mr. Marc Godbout: I see.

Thank you.

The Chair: Mr. Szabo, do you want to finish this round?

Mr. Paul Szabo: Yes, thank you.

This call for whistle-blower legislation in Canada basically took off when we had an incident with what turned out to be an officer of Parliament, the Privacy Commissioner, and there were a variety of things—but a high-level person. We've been struggling with this for some time.

In reflecting on basically the genesis of this call for whistle-blowing legislation, it appears that the concern is not so much with middle or lower-level persons in the employment scheme, because

they have levels of supervisory people and management people and there is HR, human resources, processes that they can usually use to resolve their concerns, or their supervisor in fact can take the information and carry it through themselves. Effectively, it appears that the direction we're going in is that this system is really going to be with regard to whistle-blowing incidents that relate to higher-level personnel within the public service.

Is that your experience in terms of the kinds of cases you're getting—that the need to blow the whistle really is directed at the higher end as opposed to the middle of the management team?

Mr. Louis Clark: That's a fantastic question, because we have to ask ourselves this all the time. Is it because we're paying more attention ourselves to those at the higher level and we're ignoring the people at the lower level? We have to constantly examine that as a project, because we have only limited resources, so we tend to focus on the larger issues. It's a possibility that there's a bias there, very possibly, in terms of our own operation.

However, it's really been our experience with the whistle-blowing that goes on that very often it needs to be a person, or very often it is a person, who has a broader view. In other words, if you're working on a little tiny piece of corruption that you don't even know is corruption, then you don't perhaps see what is going on, or it doesn't stand out. But on the other hand, if you're a quality assurance person and you have a job to perform that is a very specific issue, and then when you take that action and you find that there's a reprisal, and then when you take that up the level and you find that everything is closed to you, you begin to see a larger picture. It seems as if most of the whistle-blowers we have dealt with who have had the most impact are those who have been able to put together a larger picture, or that the cover-up is at a higher and higher level.

Mr. Paul Szabo: To complete the time slot, one of the things that concern me is that if we come up with this vehicle that civil servants can have access to with regard to whistle-blowing activities, there may turn out to be an enormous rush—just immediately after implementation—at the first of matters that are substantively human resources grievances, for which there already is established policy and procedure to deal with, as opposed to the wrongdoings, which are very serious matters. I'm wondering whether or not, in terms of the experience of the U.S., you found that there was an inordinate amount of HR-related matters coming forward that were causing some disruption in the ability of the body to be able to do its work on the legitimate wrongdoings under the legislation?

• (1555)

Mr. Louis Clark: I don't think that has been the experience. What we've found is that people hold back, in fact, because there's a lot of, I think, jaundiced view or jaundiced thinking on the part of the civil servants. They see this new thing that has been created, but they're not going to rush into it. They're going to wait and see what the experience of other people is before they take advantage of it. So I'm not so sure you'll find that.

On the other hand, I will say this: every piece of our legislative experience has been....

We've been inundated, I think, with concern about how this is going to absolutely overwhelm whoever has to deal with these issues. It has just not been the case that this has occurred.

The Chair: Thank you, Mr. Szabo.

To Mr. Lauzon.

Mr. Guy Lauzon (Stormont—Dundas—South Glengarry, CPC): Thank you very much, Mr. Chair.

Welcome again, Mr. Clark.

To whom does your organization report?

Mr. Louis Clark: We have a board of eight people, and that's who we answer to.

Mr. Guy Lauzon: The board is made up of...?

Mr. Louis Clark: The board is made up of mostly people in the NGOs, out of the NGO community. Coleen Rowley, who is the FBI whistle-blower who was on the cover of *Time*, was chosen as the person of the year. Yesterday we had lunch with her and asked her to join our board, and she is considering doing so.

Usually we have only about one whistle-blower on our board. We have one or two people who come from the financial community or the foundation community. Most of the other people are attorneys and NGOs who have a history of working on public interest concerns.

Mr. Guy Lauzon: You're a non-profit public interest organization.

Mr. Louis Clark: Yes.

Mr. Guy Lauzon: It's interesting that you receive funding from foundations, individuals, and of course, your legal fees. Do you think that gives you an advantage?

In our case, of course, the government would be funding the body, or whatever. Do you think it might be hard to serve two masters? Obviously you don't have that dilemma, but maybe you could just speak to the fact that—

Mr. Louis Clark: We don't receive government funding, but it's really not a matter of principle. It's just that we have adequate funding through the foundation community and through individuals.

In some ways, we haven't wanted to engage in the red tape, perhaps, of getting public funds—

Mr. Guy Lauzon: I don't blame you.

Mr. Louis Clark: —but it hasn't been really a matter of principle.

I would hope that if we did receive public funds, it still would not interfere with our independence and our judgment.

Mr. Guy Lauzon: In total, how many cases have you dealt with?

Mr. Louis Clark: We have represented over 1,000 people in our history. In addition to that, we have helped at least another 2,000 people get their information out to the public in a significant way. We're calling those people "clients" now just because of the advice we're getting from lawyers that we should do so.

Mr. Guy Lauzon: That's 1,000 people over how many years?

Mr. Louis Clark: That's over 27 years. That's 1,000 people we've represented, and the other people we're helping we are now representing as well. We're actually signing retainers for those people.

• (1600)

Mr. Guy Lauzon: This is a loaded question, but I'm looking for an opinion, I suppose. Of all the whistle-blowers you've met, how many do you know have been subjected to reprisals?

Mr. Louis Clark: Certainly 70%, easily, of those people.

Mr. Guy Lauzon: Have you ever met a whistle-blower on a significant issue who was not subjected to reprisals?

Mr. Louis Clark: Yes.

For one thing, there are those companies out there; there are those departments and agencies of government that actually listen to the whistle-blower. They actually appreciate the information that's coming forward, and they don't take reprisal. Unfortunately, it's probably a minority, but it's still a significant minority.

Mr. Guy Lauzon: You're saying 70% probably experience some form of reprisal or other, so it's probably imperative that we have something to address that in our bill.

Mr. Louis Clark: I would think so, yes.

Mr. Guy Lauzon: Yes. Okay.

In your earlier remarks, your opening remarks, you mentioned that between 1980 and 1991—I think it was nuclear plants, or something—a total of 600 whistle-blowers came forth over an 11-year period.

Mr. Louis Clark: Yes.

Mr. Guy Lauzon: I guess I'm looking for an opinion again, but why would it take 600 people to come forth before this got stopped?

Mr. Louis Clark: Well, for one thing, the United States' investment in nuclear power at that point—we're talking about the 1980s—was \$114 billion. That was what had been sunk into the enterprise. Although they did not come to fruition, the plans were for another \$114 billion or so. It just didn't happen, I think in part because of the whistle-blowing. When you have that kind of investment, you have an enormous amount of pressure and power, I think, on the other side of us.

I would say just one other quick thing. Getting back to my anecdote about the quality assurance people—in part, there we needed 600 people, because these quality assurance engineers were talking about quality assurance on this safety system, but only this safety system; there are many other safety systems at a particular plant, and the same things were happening. If you had a bad quality assurance on this part of the project, then you probably had it over there. When this whistle-blower was listened to, then this one came forward.

Mr. Guy Lauzon: But I think it's significant, because when you're talking about nuclear reactors or whatever it was...if you hadn't stopped those projects, a lot of people could have been seriously hurt.

Mr. Louis Clark: Yes, absolutely. For example, the one plant that was 98% complete...obviously I would never know, but I'm convinced that plant would not have survived.

Mr. Guy Lauzon: There would have been some human lives, or...?

Mr. Louis Clark: Oh yes.

Mr. Guy Lauzon: So it works.

You mentioned, too, in your remarks—I was taking some notes—that of the last 96 cases you've dealt with, you've lost 95.

Mr. Louis Clark: Don't say us. I meant whistle-blowers.

We even wrote a book about anonymous whistle-blowing. We very much regretted having to write a book like that, because we have not invested our resources into defending those losing cases. What we have done is help win those cases politically by raising it up to national attention and forcing the agency to back down on their disciplinary action through an essentially political process.

So we have not lost those cases; we've lost a few of them, but not most of those.

Mr. Guy Lauzon: What is the relationship, 95 out of 96?

Mr. Louis Clark: What I was saying about the 95 out of 96...I would say of the last 96 cases in this particular court, 95 of the 96 whistle-blowers have lost. Of those, we've only represented a couple.

•(1605)

Mr. Guy Lauzon: Okay. In other words, it's probably important that they do have representation—I guess that's the point you were trying to make. Their chances of succeeding are better.

Mr. Louis Clark: Oh yes.

Mr. Guy Lauzon: One last question. You've read our proposed legislation?

Mr. Louis Clark: Yes.

Mr. Guy Lauzon: There have been discussions. Some people have suggested it's totally flawed and we should tear it up and start over. Other people said there are some good parts in it. You've spoken to a couple of the issues, about the independent commissioner and things like that.

What would your advice be to this committee? Do you think there's merit in working within that, or is it...? After reading it, what is your opinion? Should it be torn up, or should we work on improving it?

Mr. Louis Clark: I think I would perhaps be willing to address that issue in written comments afterward, because I think I'd need to know more to try to come to that kind of assessment.

What I do feel clear about is that certain flaws in the legislation are so extreme that you would be better off not to have any legislation at all than to have that flaw. That's what I would be really concerned about.

Mr. Guy Lauzon: I think we're on the same page about those major flaws. Realizing that you're a very busy man, but because of your vast experience, it probably would be very helpful if we could get some comments from you at a later date. If you could do that, I think it would be helpful to our committee.

Thank you very much.

Mr. Louis Clark: I would feel privileged to be able to provide that.

Mr. Guy Lauzon: I appreciate it.

Thank you.

The Chair: Thank you, Mr. Lauzon.

Mr. Clark, you'll need your earpiece again.

Madam Thibault, for 10 minutes.

[*Translation*]

Ms. Louise Thibault (Rimouski-Neigette—Témiscouata—Les Basques, BQ): I would be happy to speak to you in English, sir, but since I have the benefit of interpretation, why should I not avail myself of that service? In any case, it's probably better that I do so.

If I understood you correctly, you said that 60% of whistle-blowers have been the victim of some kind of reprisals. Is that correct?

[*English*]

Mr. Louis Clark: I'd say around 70%.

[*Translation*]

Ms. Louise Thibault: Closer to 70% then.

Then it's fair to say that a change such as the one citizens and proponents are seeking through legislation like this represents a change in culture. I believe you but I'm absolutely floored by what you're saying. You maintain that your organization has been in existence since 1977 and that legislation has been on the books since 1989. Given the amount of time that has passed, the situation is by no means encouraging.

[*English*]

Mr. Louis Clark: Yes, we've become discouraged often, as well.

[*Translation*]

Ms. Louise Thibault: Excuse me, but I didn't catch that. You're not speaking loudly enough.

[*English*]

Mr. Louis Clark: We also become discouraged from time to time.

[*Translation*]

Ms. Louise Thibault: I see. That's not a reason not to do it, but it is nevertheless cause for some serious concern.

Did you in fact state that real political leverage rests with the US Congress and that its members are the ones who generally determine the level of protection to provide and the corrections that need to be made?

[*English*]

Mr. Louis Clark: That's right.

[*Translation*]

Ms. Louise Thibault: Seriously though, are you suggesting that we need to look at the power wielded by the 308 Canadian Members of Parliament when it comes to this very issue?

[English]

Mr. Louis Clark: No, I don't think it's the solution to have the legislators become so directly involved in the civil service system, in terms of reform, on individual cases. Our legislators hate it. They do not like that kind of having to be engaged. But right now, because our system is broken, they are that engaged.

[Translation]

Ms. Louise Thibault: However, they could be collectively involved, if they so desired.

[English]

Mr. Louis Clark: Yes.

• (1610)

[Translation]

Ms. Louise Thibault: I see.

Your organization is an NGO. Since I wasn't here for the beginning of the second half of the meeting, you may be repeating some things you stated earlier. I'm curious as to whether you believe that because yours is a non-governmental organization, you have more leeway to act that an organization that is truly linked to government.

[English]

Mr. Louis Clark: Yes. As a non-government organization, we don't have to worry about making anyone particularly happy about what we say, so I think we do have a level of freedom.

[Translation]

Ms. Louise Thibault: I see. That gives you an advantage. Are there any disadvantages to being an NGO?

[English]

Mr. Louis Clark: Yes, our pay is lousy.

[Translation]

Ms. Louise Thibault: I was speaking from the point of view of the people you defend, naturally.

[English]

Mr. Louis Clark: The disadvantage, of course, is that we can't take direct action to correct the problem. We have to raise it up to other agencies and departments and committees and members of our Congress, etc., and we have limitations in terms of what we can do.

[Translation]

Ms. Louise Thibault: Thank you, sir.

[English]

The Chair: Thank you, Madam Thibault.

Mr. Szabo.

Mr. Paul Szabo: Thank you.

I'm learning a great deal. I want you to know how very important it is that we hear there is not a panacea when it comes to this. There are always a number of aspects that have to be looked at.

Certainly the reprisal percentage is probably a little higher than I would have thought. I was hoping that allegations of wrongdoing would be addressed and dealt with quickly enough, so that reprisals

wouldn't have an opportunity to occur. It makes me ask the question—what is your experience in terms of the turnaround time of discharging an allegation of wrongdoing?

Mr. Louis Clark: I think it's important for me to stress that when I talked in terms of reprisal, I was not speaking just in terms of something like termination. Termination is the most extreme. I would include as reprisal the threat of termination and the threat of demotion and the like. I would say that threats by management are probably one of the largest actions that occur. It doesn't necessarily become a reality in that sense. If someone threatens to terminate someone, we can actually address that by raising that point up to the public, and therefore often the threats will subside.

Mr. Paul Szabo: How do you deal with stonewalling by government agencies, departments, officials, or whoever? We see this in court cases all the time. What kind of tools do you have to be able to address it without frustrating the legitimate right to delay? It's part of the democratic process as well.

Mr. Louis Clark: Absolutely. We have the same experience that I think I've heard of up here about cases going on for a really long time. There are lots of delays. In terms of getting the information out from the government, there are long delays. Let's say you try to get through using our Freedom of Information Act—again, long delays. Sometimes we have to go to court on those cases to get information out.

The one thing that helps to overcome that is, again, our legislative process—I should say, the oversight process of our Congress. Once Congress is engaged, a particular committee is engaged, and we're having the hearings, most agencies dare not respond. We do have ways to get officials on the record on particular concerns. And that's what we try to pursue.

• (1615)

Mr. Paul Szabo: I am very much interested in the protection of employees who find themselves in a position of having knowledge where they have a duty, in fact, in the civil service, the oath of duty to bring it forward under the Criminal Code. If you are aware of a criminal activity, you are bound to bring it forward; otherwise, you could be found equally culpable.

But if somebody is coming forward, and the individual is going to lose his or her job over this thing as an obvious reprisal—it might be a tight shop or it might be for one reason or another—if this matter takes a long time, chances are that person is unlikely to be able to find gainful employment while this matter is going on, or as a consequence of this matter even being alive. They may, as a consequence, become unable financially to discharge their own responsibilities and indeed continue to sustain the support for the allegation.

Is there anything out there in terms of modelling that whistle-blowers could seek with regard to transitional assistance, or some sort of assistance, so that their integrity and their general enjoyment of life is not totally disrupted?

Mr. Louis Clark: I think there are two things that exist, anyway. One is that we do have a kind of stay action, which is almost an imposition of a stay of a personnel action. Our special counsel can seek that. Our special counsel can get that from our Merit Systems Protection Board and can actually stop a personnel action from being consummated. In other words, a person will stay in that job until the issue is adjudicated. So we do have that power in terms of our civil service system.

The second point is that we do have as well—and increasingly we've seen this and have been able to do this in some of our cases—the ability, once they win their case, to get people out from under that particular management and into an entirely different chain of command.

Mr. Paul Szabo: That was certainly where I was trying to go, because clearly, if you have touched a hot button in an area that goes up the chain of command and has the support and the loyalty, it's almost an impossible environment, which makes me think those who maybe even have knowledge might recognize the environment they're in and know that reprisals are going to be inevitable.

That said, I'm curious as to how many brown envelope cases you receive and to what extent you are able to do appropriate investigation and follow-up on matters that don't have a name and a face.

Mr. Louis Clark: We're of course totally free to do that, and we do that from time to time, especially after we came out with this book about anonymous whistle-blowing. We constantly do receive envelopes with material.

What will tend to happen as well is that when we go to our Freedom of Information Act and we're denied documents, very often a week or two after that we will get those documents. So that is a frequent occurrence. We are completely free as an organization to pursue those documents. We usually go back and try to get them authenticated to make sure they're actually legitimate documents. But we can pursue those, and we do pursue them. We need to know who the people are, though, if we're going to go very far with it.

Mr. Paul Szabo: That might be a limiting factor in terms of your overall success rate.

Mr. Louis Clark: Yes, just in terms of the way we choose to operate.

Mr. Paul Szabo: Understood. Presumably if you're given direct evidence that's clear on its face, anybody can carry it forward.

Mr. Louis Clark: Yes.

Mr. Paul Szabo: What kind of information do people in the public service and the civil service get with regard to the whistle-blowing regime that's available and how this process works? Is the system such that everyone is well aware and properly advised, and trained, if necessary, on how to address these matters?

•(1620)

Mr. Louis Clark: No. As part of the act that was passed in 1989 and again in 1994, there was an affirmative duty on the part of our department, the government, to teach people what the rules are in terms of whistle-blowing and to be able to provide that level of education about the special counsel and the like. I think it has been a disaster in terms of departments actually coming forth and doing that

level of public education or, I should say, education to their employees. It has been very disappointing. They seem to learn from the newspaper, but they don't tend to get very much from their agency themselves.

Mr. Paul Szabo: It would be a type of contempt of the system, though.

Mr. Louis Clark: Well, yes, I think there is a certain amount of that evident on the part of some management.

Mr. Paul Szabo: I'm pretty sure the bill presently contemplates—

Mr. Louis Clark: Yes, I saw that.

Mr. Paul Szabo: There are levels within each group, and I'm pretty sure—and I know we're going to make absolutely sure—that the public service understands clearly what this is and what it isn't, and what recourse they have.

We want a bill. We think we need a bill. We need to protect employees who come forward with allegations of wrongdoing, even if they're unfounded ultimately, so that they're confident there's a process that can do the investigation in an independent fashion and, where possible, give them the assurance that it has happened.

That said, what obligation is there in the United States, once an allegation is made and it goes through all this process, to keep the whistle-blower in the loop and informed of all the details?

Mr. Louis Clark: The Office of Special Counsel can order the agency to investigate a certain matter that the whistle-blowers have brought to that special counsel office. In other words, a special counsel doesn't do the investigation itself. It can order the agency to do the investigation and then it oversees that investigation. Then, when the report comes back, it's obligated by statute to share with the whistle-blower and give the whistle-blower an opportunity to rebut that agency investigation. We do that as an organization absolutely all the time, and we get a second bite of the apple usually. In other words, usually when we comment on the investigation with the whistle-blower, it goes back to the agency, and the agency does another investigation. Very often we have been satisfied with a second investigation. I think it's important.

Mr. Paul Szabo: It is very important, and I think we're learning more as we go through this process.

Finally, I would be fascinated to know from you, if you could give us an idea, of a high-level case that came forward and was dealt with where ultimately the allegation was verified and action was taken. How high a level have you seen, and how difficult was it to deal with a high-level wrongdoing?

Mr. Louis Clark: I think probably the highest level was a case that went on for five years at the General Services Administration. Our client was the head of the national region of the General Services Administration. He was in charge of 600 federal buildings in the Washington, D.C., area, including the White House and the Pentagon. He had a \$1.2-billion budget. He had 7,000 employees under him. We represented him. That was the case where he had the press conference.

The person who took action directly against him was the head of the agency. We won that case. He received, I think, the largest award in the history of our civil service system up to that point, which is about half a million dollars, including attorneys' fees, some of which went to our organization.

Mr. Paul Szabo: But that was to address the reprisal part.

• (1625)

Mr. Louis Clark: His termination, yes.

Mr. Paul Szabo: But what about those who were responsible for the wrongdoing?

Mr. Louis Clark: Well, that's right. In terms of—

Mr. Paul Szabo: What happened? The real point is that protecting employees is one thing, but if you don't deal with the problem in the first instance—if it continues, or the person is still there—how effective is the system in dealing with those who have committed wrongdoings?

Mr. Louis Clark: Well, in a funny way, I think we have probably had more success with getting corrective action on the problems than we have actually had in correcting the personnel problem of the whistle-blower.

Mr. Paul Szabo: Really.

Mr. Louis Clark: Yes. In the case, for example, of the General Services Administration, this person did not receive discipline—he was the head of the agency. He was forced to resign, so he was out of government.

In the Food and Drug Administration right now we have a whistle-blower who came forward. He blew the whistle on Vioxx. What ended up happening is that his agency is receiving a 25% increase in support from Congress for drug safety, and yet this whistle-blower still is sort of in limbo and isn't really back to the level of support he had before he blew the whistle, even though his name is almost a household word.

So getting the person back to a position of responsibility is actually harder than dealing with the scandal, which is amazing to me. I just wouldn't have predicted that.

Mr. Paul Szabo: Let me then ask the question: if a whistle-blowing system such as you've described is ostensibly to address the situation of the whistle-blower but not ultimately to deal with the wrongdoer, what level of confidence can the civil service have in the system that doesn't deal with the problem, when those who made the decisions and broke laws and the like are still there? Is there no concern that the same kind of activity would continue to go on with that person or others associated with the situation?

Mr. Louis Clark: There is discipline and then there is the reality. In other words, in terms of cultural change, which is what we're talking about here, I think, we do find it's hard to discipline those wrongdoers. At the same time—and this is not a study—I have noticed those people tend to stay at that level, or they're sort of quietly removed from their positions of responsibility 18 months later. I do think they receive a level of negative personnel appraisal as a result of their work, but it's not very direct and it's certainly not adequate.

Mr. Paul Szabo: Agreed.

The Chair: Thank you, Mr. Szabo.

I have some questions, Mr. Clark, on several different topics. I hope we can jump smoothly from one to the other.

The first is a question just to put your Whistleblower Protection Act into perspective. With reference to the inspector general offices, is it the case that the inspectors general are appointed by the President, but report to Congress or to a committee of Congress?

Mr. Louis Clark: They report to both Congress and the President.

The Chair: Very good.

One of the statements you made was that national security areas are those most in need of whistle-blower legislation, yet in our proposed act, clauses 52 and 53 exclude our security agencies and the RCMP. Interestingly, many of the functions of both the security agencies and the RCMP aren't secret. There's no need to keep them secret. They're not really issues of security, and yet the whole agency has been excluded.

If you could write this legislation, how would you handle that?

Mr. Louis Clark: I would want to deal with those first, because those agencies are even more critical. It is a real disappointment that those are excluded. That seems to be the case here; it certainly has been our experience as well. Part of the reason is that in our history of dealing with whistle-blowers, we have always found the most discriminated-against whistle-blowers are those who work for the police, those who work for the investigative agencies like the FBI.

There are lots of potential cultural reasons for that. Some say it is just because of the tight-knit nature of the work—you have to depend on the person you are serving with next to you in the car, or whatever—but whatever the experience is, when there is corruption there, that corruption absolutely goes to the fundamental nature of your society. If you have corrupt police, you are in very serious trouble. Therefore, I really think that if you have corrupt investigative or secretive agencies, like the CIA, you're in a lot of trouble—or in our own military case, when we're talking about the military police in terms of what they are doing in terms of the Iraqis they're torturing.

• (1630)

The Chair: Thank you very much for that.

You also made a comment that in the corporate world we have a very good, adequate protection. Has part of that, or a lot of that, come from the Sarbanes-Oxley Act, which is the Enron-spawned act? Is there anything we can take from that? Even though it has to do with corporate governance, is there anything we can take from it to apply to our legislation?

Mr. Louis Clark: I hope so. I know this is a controversial point, but the fact of the matter is that one of the things that makes the Sarbanes-Oxley Act particularly important, significant, and helpful is you can go to court within six months.

First of all, you have to go through an administrative process at our Department of Labor. There you have an investigation, and then you have a potential hearing, but if you haven't resolved the issue within 180 days, then you, as the whistle-blower, can go into our federal district court and get a jury trial. That is why it's so successful.

I notice you have a Supreme Court decision that seems to be excluding your civil servants from being able to go into court, although there is some ambiguity about whistle-blowing and to the extent to which you can raise those concerns in your judicial system. I would just say that if people had the ability to go into court, you might have some success there in terms of dealing with the reprisals against whistle-blowers and having adequate protection.

The Chair: It's one thing to say that whistle-blowers have access to court, or for that matter to the quasi-judicial system we're proposing here. It's one thing to say they have access; it's another thing for them to be able to afford it. In Canada we don't have an organization like yours to help fund and pay for the defence, so in reality many—most, I would suggest—whistle-blowers simply wouldn't be able to fund their defence or their case in any kind of effective way.

How would you suggest that be dealt with in this legislation?

Mr. Louis Clark: On almost all of our remedial legislation, when we're talking about discrimination—obviously in terms of gender and racial discrimination—attorney's fees are awarded at the end of the process to the victim of the discrimination if they substantially prevail. They have to prevail; they have to prevail substantially. If they do so, then they can receive attorney's fees. That provision alone allows for the representation of all types of people, even at the lowest economic scales.

The Chair: Not in legalese, but just in plain language, what would “succeeding substantially” mean?

Mr. Louis Clark: It means that if you lost your job and then fought to get your job back and were reinstated, that would be substantially prevailing. Or even if you had a settlement and got your job back, that would be substantially prevailing. On the other hand, if you didn't get your job back, that's not. If you don't win, you don't receive your attorney's fees.

The Chair: You would think that would really go a long way to sorting out people who would make frivolous claims. They stand to bear a huge financial cost here, and a lot of time commitment, and so on—a great commitment.

● (1635)

Mr. Louis Clark: That's right. And if attorneys are willing to do these cases, let's say, on the hope or the possibility of eventually substantially prevailing, you know those attorneys are going to be looking at what their likelihood of success is before they make that kind of commitment on a case.

The Chair: Okay.

In terms of the issue of transitory measures to protect whistle-blowers, once somebody decides to come out and disclose wrongdoing, what kinds of measures could be put in place to protect the whistle-blower on an interim period from the time he or she comes out and discloses the alleged wrongdoing and the time the issue is settled in one fashion or another?

Mr. Louis Clark: The simple measure we have is that a person can seek to be reinstated. Let's say you're terminated, and your termination starts in 60 days; then there's an investigation, and there's some evidence that you might be right. In other words, in our system there needs to be some indication that you will probably prevail. It's similar, I guess, to a restraining order or an injunction, where if it

looks like there's substantial reason to think you're going to eventually prevail, you can be reinstated on an interim basis until the end of the process.

The Chair: In reality, though, how many whistle-blowers would be able to work in that environment? Just looking at things realistically, is it likely that many could really work in that environment after they've taken that action?

Mr. Louis Clark: For one thing, I think a lot of them could work in that environment as long as they had counselling. One of the things we do as a project is to counsel people to realize that just because people you used to have lunch with don't have lunch with you any more, it doesn't mean they're the enemy; that they'll still testify. If they're under oath, they're not going to lie. They're still going to be your friends; they're still going to be supportive. It's just that right now they're keeping their distance.

As long as the whistle-blower has a strong support system—in terms of perhaps family, perhaps clergy, perhaps organizations like ours or like FAIR of Canada—as long as they have that kind of support system they can maintain in a job...I mean potentially they can maintain.

The Chair: In terms of incentives and rewards, you've mentioned already that under your system in the United States, there is a system of rewards for money recovered—not money saved, just for money recovered. Approximately 10% of the money recovered would go to the whistle-blower?

Mr. Louis Clark: It's actually 10% to 30%, depending on the circumstances.

The Chair: How important a part of your system is that?

Mr. Louis Clark: In terms of numbers of cases, it's not a huge number, but in terms of importance, it's tremendously important, for two reasons. One is that a billion dollars back into the treasury is substantial, so that's important. Second, the type of fraud we're talking about there is the fraud undertaken by contractors to the government. I think it's a tremendous incentive for the contractors to be much more honest, follow the law, and not engage in fraudulent practices. So I think it's an important measure, an important pressure for them to do right.

The Chair: You may have said this already, but under your system, are contractors doing work for government covered? When contractors are doing work for government, if there's a whistle-blower who exposes wrongdoing in that contract, is that covered under your act?

● (1640)

Mr. Louis Clark: Yes. There are two aspects of the False Claims Act I just talked about. One is the money recovery. Second, it has fairly strong whistle-blower provisions as well, which do protect those employees. In those cases, you go into federal district court, so again you have a judicial remedy.

The Chair: In terms of penalties against those who make reprisals against whistle-blowers, you've already talked about penalties, such as possibly even firing. Would financial penalties...? First of all, do you have financial penalties available under your system, and do you think that's something we should be looking at seriously in our legislation?

Mr. Louis Clark: I don't think I can answer that; I don't know what the financial penalties are. There is that ability to fine, but I don't think it happens very often, and I don't know what the limits are. I have to plead that I don't know. I'll have to get back to you on that.

The Chair: Yes; if you could find that out, I would really appreciate it.

I have just one final question. You did answer this already, I think, or maybe partially. How is having discretion under the act to investigate anonymous disclosure handled in your system, and how do you think it should be handled in ours? I know you've touched on this, but I didn't get a clear picture of what you were saying.

Mr. Louis Clark: First of all, you have the hotlines. My personal point of view is that a government agency should not feel compelled to pursue an investigation as long as they can never find out who that allegation has come from, unless the evidence those people provide is of the nature we just talked about—clear documentation with a value that would be obvious to any investigator.

In terms of obligating a government agency to pursue an investigation on broad, unsubstantiated allegations, with documenta-

tion that comes to them over the transom in anonymous fashion—I think that's asking too much of the government.

The Chair: All right. That's the last of my questions. Are there any further questions from any members of the committee?

Seeing none, Mr. Clark, have you anything to say in a short closing statement?

Mr. Louis Clark: I would just say it was a great pleasure for me to be here; I'm honoured to be here. I've had a terrific day. I enjoyed the session I just watched from the gallery. I enjoyed lunch. It's been a tremendous pleasure for me to answer your questions. I look forward to continued dialogue, and I'm definitely open to being as helpful as I can possibly be as you move forward.

The Chair: Thank you very much, Mr. Clark. Your presentation and your answers to the questions have been very helpful for us. We are looking for some information from you, if you could send it, as noted. Again, thank you so much for coming.

Mr. Louis Clark: Thank you for having me, and Happy Easter.

The Chair: This meeting is adjourned.

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