House of Commons
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 017 • 2nd SESSION • 39th PARLIAMENT

EVIDENCE

Wednesday, March 5, 2008

Chair

Mr. Art Hanger

Standing Committee on Justice and Human Rights

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● (1535)

[*English*]

The Chair (Mr. Art Hanger (Calgary Northeast, CPC)): I'd like to call the Standing Committee on Justice and Human Rights to order this Wednesday, March 5, 2008. The committee will be following the agenda as noted pursuant to the order of reference of Wednesday, November 18, 2007. Bill C-426, An Act to amend the Canada Evidence Act (protection of journalistic sources and search warrants) is before this committee.

The witnesses and the presenter of this bill, Mr. Serge Ménard, will be presenting the private member's bill to the committee.

Testifying will be Joshua Hawkes, as an individual. From the Department of Justice we have Karen Markham, counsel, criminal law policy section; and Josée Desjardins, general counsel, director, national security group. From the Department of National Defence we have Lieutenant Colonel Jill Wry, director of law, military justice, policy and research, Office of the Judge Advocate General.

Monsieur Ménard, you have the floor.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Thank you, Mr. Chairman.

I did not table this bill in order to create a privilege, but quite the contrary, in order to protect a certain kind of journalistic activity that has proven in every country in which it has been applied that it allowed for certain very serious situations that required correcting to be corrected. And in passing, these countries are our allies, they are also recognized as democratic countries.

This bill deals with two topics of great importance to any democratic society in which freedom of the press and freedom of information are fundamental values ensuring that an informed debate can take place on issues facing modern societies. In the vast majority of democratic societies, legislation has been passed concerning these two topics. In other societies, such as ours, the courts have had to rule on these matters as specific cases were brought before them. This has resulted in a number of sometimes contradictory rules. As a whole, all these rules may therefore appear inconsistent.

However, the courts have consistently recognized the importance and relevance of such a debate in the context of a free and democratic society. The time has come for the elected representatives of the people to do their part to help solve in a civilized fashion conflicts which, inevitably, might arise from time to time between legitimate objectives of governments and the means specific to journalistic work.

In dictatorships or totalitarian regimes, these issues never arise, but they have arisen in all democracies. To understand this bill better, members need to see that it is divided into five parts. It might be appropriate to divide it into five clauses rather than five subclauses, or perhaps even six, as we shall see later on.

The first part includes the first two subclauses, which consist of the introduction and definitions. The second part includes subclauses (3), (4), (5) and (6). Subclause (3) sets out the principle of protecting a source that has provided a journalist with information in confidence. Since the purpose of the bill is not to give journalists a privilege but to protect a type of journalistic activity that is considered useful and even necessary in a democracy, subclause (4) provides that the judge may, on his or her own initiative, raise the potential application of subclause (4).

The judge does not have to do so, but can if he or she believes it is necessary. The judge is given this power because protecting confidential sources is in the public interest and not a corporate privilege. A source who demanded confidentiality must not suffer because of the negligence or error of the journalist in whom the source confided, if the journalist does not keep his or her promise to protect the source.

Subclauses (5) and (6) deal with the exceptional circumstances under which protection will not be granted. They set criteria that the judge must consider, essentially the values that are at stake, in upholding or refusing protection. They also cover the procedure to follow and the burden of proof on each of the partners.

Subclause (7) does not deal with the confidentiality of the identity of a journalist source who has provided a journalist with information. It deals with journalistic information that has not been disclosed or published even if the journalist did not obtain this information from a confidential source. This protection is important so that the public does not perceive journalists as auxiliary police or as assisting the government, which would impede their ability to obtain information and properly inform the public.

In this regard, I could quote Judge La Forest of the Supreme Court of Canada in Rex v. Lessard at length, but I see that time is running out more quickly than I anticipated. Since this case did not involve protecting a source that provided a journalist with information in confidence, but searching Radio-Canada premises to find and seize video recordings of a demonstration of strikers, the last sentence applied to the journalistic activity in general and not just confidential source protection.

I also believe it is in the public interest that journalists not be regarded as auxiliary police. In fact during the 1970s, at a time when demonstrations were more commonplace and often less peaceful than today, to say the least, camera operators often became the target of projectiles thrown by some demonstrators. I have to say that the choice of words to translate the term "importance déterminante" was not the best. The words in French I use in the strict French sense: the word "importance" has the usual meaning given in the dictionary while the qualifier "déterminante" has a specific legal meaning. It refers to the basis on which the judge can decide for or against the party on the substance of a case or an implicit element.

The best translation that was suggested to me would be "*determinative of the outcome*" rather than "*of vital importance*", which is too vague. It is also the expression used by the European Human Rights Court in Goodwin v. the United Kingdom to translate what was determinative in that case.

This criterion is different from the ones the judge must consider in subclause (5), since it does not have to do with protecting the secrecy of a source, but the fact that journalists must remain independent to do their job. The values are different, even if they all have to do with the gathering of information.

We notice that this independence of journalists is one of the surest ways of identifying democratic societies. In all non-democratic regimes, journalists or the majority of them are auxiliaries of the state when they are not quite simply thurifers of the government in place.

Subclauses (8), (9) and (10) have to do with issuing search warrants for media premises, the procedure to follow, how the searches are conducted and the provisions that guarantee protection of any information the judge deems should be protected.

These measures essentially repeat what is in the case law, which is the current authority. They have the huge advantage of taking up only one page, compared to the hundreds of pages lawyers pleading this type of case must now consult. At least, that is what two lawyers who teach and work in the field of information law all said. So these measures will be a useful tool for justices of the peace who issue search warrants and for the police officers requesting them, for journalists and their bosses who are subject to them, and for the lawyers they call on when the police show up at their door. In a country like ours, the process set out in this subclause is a civilized way of doing things.

Subclause (10) provides for information to remain secret that the court deems must remain secret.

And finally, subclause (11) represents the fifth and final part of this bill. We're taking advantage of this opportunity to solve a problem that is very tiresome for publishers: how to prove something is published? By producing the publication. Was it really necessary to do something more? If we want to prove that something has been published, one will only have to produce it in evidence, or as a supporting document.

Currently, many lawyers still believe that they have to subpoena heads of media enterprises as businesses in order to prove that something has been published. Subclause (11), which I hope will become section 39.5, could be used to remind them.

Finally, the objective of this bill is not to provide immunity to some criminals or individuals who wish to libel someone through a journalist. This principle of anonymity of confidential sources is something that some journalists have been prepared to go to prison to defend, and will continue to be in future. Indeed, some have gone to prison for it.

I think it would offend them greatly to see that the principles that they have defended with such courage might be used by criminals to escape the punishment they deserve. I believe that my bill is clear enough, particularly as it obliges the court to assess the values at stake, which are freedom of information and the interest of the state in having knowledge about and in punishing the crimes that have been committed. However, after having discussed this with many people, I felt it would be a good idea to add a clause that clearly states that this bill does not apply... In fact, I have it here.

In fact it would read as follows: "Sections 39.1 to 39.5 would not prevent the seizure or disclosure of any communication or document prepared with a criminal offence or a fraud in mind."

● (1540)

This interpretation, I am sure, will reassure the police, and will make it clear that we are not talking about a privilege and that this protection will cease when we are talking about indictable offences.

I felt it was a good idea to add a few words here and there in order to clarify the fact that it is not a case of protecting criminals. As far as sources are concerned, for example, I am talking about confidential sources. As far as the information gathered by journalists or the documents created are concerned, it is very specifically in the carrying out of their professional activities. These very short amendments will be able to reassure a lot of people.

Thank you, Mr. Chairman.

● (1545)

[*English*]

The Chair: Thank you, Monsieur Ménard.

Mr. Bagnell.

Hon. Larry Bagnell (Yukon, Lib.): Thank you, and congratulations on getting your bill this far. That's great.

I guess we're treading a fine line in legislation like this. We need freedom of the press; it's a hallmark of our society. But we don't want to put in provisions that will give them powers other individuals don't have that aren't related to their work.

I just want to make sure—and I think you cleared it up at the end of your opening statement—that if an ongoing series of articles resulted in a criminal investigation, the police would have access to the journalist's source and would be able to ask the journalist and the source questions about that criminal situation.

[*Translation*]

Mr. Serge Ménard: I have no objection to adding that, but as you can see—it is in subclauses (5) or (3)—the procedure that is set out allows the judge to weigh the contradictory values. On the one hand, we are talking about freedom of information and the fact that journalists must not be perceived as being auxiliaries of the police or of the state, so as to allow people who would like to give them information to trust them, and on the other hand, the interest of the state to investigate crimes and punish criminals. The document used in the commission of an indictable offence could be seized.

[*English*]

Hon. Larry Bagnell: Of course, a journalist is not going to do the police's work for them. But the police would have the same right to ask questions of the journalist as they would of anyone else in a criminal investigation, including who their source was.

[*Translation*]

Mr. Serge Ménard: Yes, but as you know, no one is obliged to answer police officers, except in very unusual cases. Under such conditions, the journalist is the guardian of the trust that he has promised. And during a police investigation, he needs protection from a court order. In any case, no one is obliged to cooperate with the police in our country, except under rare circumstances.

[*English*]

Hon. Larry Bagnell: Could you briefly explain, without going into the section, the major way in which journalists are not protected now in the way they are under this bill?

[*Translation*]

Mr. Serge Ménard: They are currently protected by the charter and by case law. I attempted to sum up in two pages what was the essential case law and I made a small addition to it that I will talk to you about later. The huge advantage of my bill affects practice. The procedure generally is recognized in case law, but within the framework of cases that at times are contradictory, the judge would have to apply it. He would at that time see what values are involved.

He would have to review the case law in order to determine how to weigh the contradictory interests in light of our values. This is the great advantage of this bill. That in fact is what one of the lawyers I consulted said, and he is a judge today, but this was his specialty and he worked in this domain at the time. He told me that my bill was fantastic because in two pages, I was allowing him to avoid quoting one thousand pages of case law. I did not want to add any provisions to my bill that were not already recognized by the charter—

● (1550)

[*English*]

Hon. Larry Bagnell: Okay.

[*Translation*]

Mr. Serge Ménard: —except for one, which I will discuss with you later.

The Chair: Mr. Ménard.

Mr. Réal Ménard (Hochelaga, BQ): Congratulations on your bill, Mr. Ménard. You are appearing before the committee, and I see that you have the support of the Barreau du Québec, the Conseil de presse, the Fédération nationale des communications and the Fédération professionnelle des journalistes. You have shown how important this bill is in terms of freedom, democracy and the balance of power.

If I may, I would like to deal with two questions at the outset. I would first of all like to know what inspired your definition of the word “journalist”, and to have you talk to us about the main elements of that, if you could explain how this definition is clearly set out and how it could prevent any excess. Afterwards, you could perhaps deal with the issue that no doubt represents the second most important component of your bill, that is the conditions under which a search warrant can be issued. I am referring here, of course, to the access to premises where sources might be found, where the media are located.

Mr. Serge Ménard: There are very few definitions of the word “journalist” in existence. I asked the people at the Library of Parliament to do some research on this subject, and they came up with the same results as me. They came to the same conclusion. There have been some definitions for some specific purposes. In this case, because it is an issue not of protecting journalists but of protecting their sources, we wanted the definition of the word “journalist” to correspond to people who would be likely, in the practice of their profession, to be the guardians of some secrets or of anonymity. Our definition limits the sense of the word “journalist”. For example, it does not include people who write editorials. We define the word “journalist” as follows in the bill:

> A person who contributes regularly and directly to the gathering, writing, production or dissemination of information for the public through any media, or anyone who assists such a person.

This is what one finds in the case law. The word “regularly” is important. We're not talking about someone here who wants to commit libel at some point. Furthermore, it is in the practice of the profession. It concerns the gathering of information and what follows that and it is through a media outlet. We are not talking about a private investigator or anything of that nature. Finally, it has to be intended for the public. I'm not talking about a niche group: I'm using an expression that is commonly used by journalists. We're talking about the general public. We're not talking about church bulletins, annual reports of corporations or other things of that nature, but indeed about information that is intended for the general public.

We have left enough flexibility to be able to plan for the future. Every morning, I read a paper on the Internet that is not easily accessible. I think there will be more and more papers on the Internet and some of them will only be available in that format. However, they will have to have people working for them that gather information and process it for the public. In addition, I added the words “anyone who assists such a person”. Experience in other jurisdictions has demonstrated that it was useful. In fact, cleaning ladies have been hired in some countries to go through journalists' notes in order to find out who their confidential sources were. The term “anyone who assists such a person” covers that kind of situation.

I also have an amendment to propose that, I believe, would deal with the objections that some police officers have raised and shared with me. As far as search warrants are concerned, I think I was able to appropriately sum up two Supreme Court cases that are part of the case law, that is to say the requirements of both Regina v. Lessard and CBC v. New Brunswick (Attorney General). I think that if you read the relevant excerpts, you will see that this summary is appropriate. I think we should probably be talking about "search warrants of media premises". That is what I was saying in my presentation and it is also what is said in most of these cases. Journalists are not targeted at home.

● (1555)

Mr. Réal Ménard: Do I have time to ask another question, Mr. Chairman?

[*English*]

The Chair: You may ask one.

[*Translation*]

Mr. Réal Ménard: Mr. Ménard, clauses 39.1(6) and (7) of your bill appear to set out different criteria for removing journalistic privilege. Can you elaborate?

Mr. Serge Ménard: Yes, I can. I've noticed that this closeness confuses a lot of people. I don't believe, however, that it will confuse the court. In clause 39.1(6), a further reference is made to protecting confidential sources; in clause 39.1(7), another issue is raised: unpublished journalistic material. This may include, for example, notes or film excerpts taken by journalists, which they have not published. These provisions are based on the principle that journalists must not be perceived by the public as adjuncts to the police. The public must be able to trust journalists implicitly.

[*English*]

The Chair: Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

[*Translation*]

Thank you, Mr. Chairman.

Mr. Ménard, thank you for being with us.

It has been suggested that the definition of "journalist" is not rigid enough and that too many people may call themselves journalists. Could you comment on this?

Mr. Serge Ménard: To begin with, the definition only applies to clauses in the bill. What are the chances that a cameraman would be covered by the words "anyone who assists such a person"? It is only important insofar as he would probably know the source, if that information were of interest. The definition must therefore cover any individual who may be, albeit sometimes accidentally, a depository of the identity of the source one is seeking to protect. He is not given a status.

It is perhaps the genius of the French language at work here, but legislation seeking to protect any journalistic activity must define the word "journalist". I noted that other pieces of legislation use the expression "individual covered" to designate individuals who may refuse to reveal a source. I still have a preference for that wording because it is a question of journalistic activity. You must find "journalist" and indicate that under this definition, in the clauses in question, any persons assisting such an individual are included.

Mr. Joe Comartin: Have you seen any other definitions of the word "journalist"?

Mr. Serge Ménard: I have seen others. We've tried to do our best based on what we've read. Nevertheless, I would suggest you improve it. So as to reassure the public, I'd be willing to add to the definition by saying "as part of independent or paid work". This would further highlight the fact that the journalist must be a member of a media company, and not just someone who suddenly calls himself a journalist so as to defame someone or spread a falsehood all the while claiming he has a secret source.

In any event, any journalist with a secret source is civilly liable. Any such individual is also criminally liable should he or she engage in libel. The journalist can't use the excuse that he wants to keep a source secret. I want to protect individuals who may end up doing something positive for our society. I'm referring to journalists who get information from confidential sources. I'm referring to journalists who carry out an investigation and publish it once they are in a position to submit independent proof of their source to the public. Should their source mislead them, these individuals would be liable for any damage caused to a third party as a result.

● (1600)

Mr. Joe Comartin: One other criticism has to do with clause 39.1 (8). You use the word "judge" in relation to search warrants. In Ontario, it is a justice of the peace. Is the same true of Quebec?

Mr. Serge Ménard: A justice of the peace.

Mr. Joe Comartin: Is the same true of Quebec?

Mr. Serge Ménard: Sometimes we make mistakes in French because of a poor translation. Now the same thing is happening, but in the other direction. In French, you always refer to the "*juge de paix*", "*juge de la cour provinciale*", "*juge de la cour supérieure*". I think that Superior Court judges can also issue warrants, but they are obviously not the ones being covered. By using the word "judge", I thought that I really covered all three categories in English, i.e. "justice of the peace", "justice" and "judge". You could correct this translation error. To make this correction match in English, you could add "*juge de paix ou juge*" in French, because subsection 487 (1) of the Criminal Code refers to "*juge de paix*".

[*English*]

Mr. Joe Comartin: Do I still have time?

The Chair: You still have time, Mr. Comartin.

[*Translation*]

Mr. Joe Comartin: Mr. Ménard, another criticism is that you haven't made the distinction between information involving public safety derived from a terrorist and the information which comes from your everyday criminal. Did you consider that it might be necessary to make such a distinction? I'm thinking in particular to what happened to Ms. O'Neill. The RCMP and other intelligence agencies want more power to protect or to be in a position to charge journalists in order to obtain their sources, when national security is at stake.

Mr. Serge Ménard: Correct me right away if I'm wrong, but I think Ms. O'Neill is the one who published information about Maher Arar in the *Toronto Star*. Justice O'Connor went to the trouble of investigating this and found that the information was false. I certainly do not want to protect that kind of thing. And that's why I'm suggesting an amendment.

When the judge applies subsection 39.1(5) and weighs up findings in the matter, freedom of information, its legitimacy, and the ramifications testimony on the source would have—and the source himself would have committed a crime for having provided information with such a goal in mind—I believe the judge will necessarily come to the conclusion that the source is not protected.

Now, I'll say this quite honestly, my goal was not to protect police officers or secret agents either when they use journalists to discredit somebody they're not in a position to charge. Moreover, when you factor in the addition I suggested earlier, those cases would be covered.

[*English*]

Mr. Joe Comartin: *Merci.*

The Chair: Thank you, Mr. Comartin.

Mr. Moore.

● (1605)

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Chair, and thank you, Mr. Ménard, for being here and appearing today on behalf of your bill.

Mr. Ménard, would it be safe to say that if your bill were to pass there will be instances when, but for your bill passing, a successful prosecution might have been possible in a case dealing with a serious criminal offence, or even a case dealing with our national security...? Would it be safe to say that there could be an instance, it's very conceivable, where under the current law we would have a successful prosecution, and if your bill were to pass, the evidence required for successful prosecution would not be available otherwise?

Mr. Serge Ménard: I don't think so.

[*Translation*]

Honestly, I don't think so. I basically tried to summarize and clarify the current legislation because, when it comes to journalists and the world they inhabit, you have to make sure judges follow the same procedure across Canada.

Let's look at our neighbours. In the United States, in 30 states and in the District of Columbia, there are 31 pieces of legislation on protecting sources. The federal government is in the process of drafting one. Virtually every civilized country—certainly every western European country—already has such legislation. This came about after the First World War, after Wigmore, for those who prefer that point of reference. The free and independent press in the context of a complex modern society, is a core value. What's more, this is stated in the charter, although it is good for legislators to make such a pronouncement.

[*English*]

Mr. Rob Moore: I would have to disagree, because to take the assertion you've made, that a case could not be impacted—a case, for example, dealing with national security—would be to suggest that your private member's bill does nothing beyond what the law currently is in our country. The fact of the matter is, if this bill were to pass, my read of it says that it goes well beyond what the current common law is in this country.

I think, in fact, your bill is designed to protect certain sources and to protect certain information, as I see it—or that would be the effect, if it passed. Therefore, one is led to the inescapable conclusion that what would be a successful prosecution today on a case of national security would not be a successful prosecution if your bill were to pass.

Obviously we recognize—probably everyone around this table recognizes—those basic rights that you've talked about, the charter rights you've mentioned. But just to be clear, in law, if it were to pass, this bill goes well beyond those well-established rights.

I have to refer you—I know you've been following it—to the recent case in the Court of Appeal for Ontario, R. v. the *National Post*, where the Court of Appeal in Ontario discussed these very issues and this balance that we strive to have in Canada between protecting and upholding our freedoms, but also protecting and upholding the rights of Canadians—and that means protecting them from crime and from issues that could impact on national security. The court, in fact, strongly upheld what is the current state of the law.

I would like to get your perspective on that, because to say that a prosecution would be treated the same today as it would be after your bill had passed.... There would be some evidence available now that would not be available if your bill passed. I think we have to be quite aware of that.

● (1610)

[*Translation*]

Mr. Serge Ménard: That depends on the jurisprudence you refer to. And also, I'd need more details on the hypothetical case relating to national security that you're referring to.

I actually read the transcript of the case you're referring to closely and I refer you to paragraphs [116] and thereafter, including [118]—which I will not read aloud now—since you seem to be familiar with them. You'll see that by applying my bill, and also the amendment put forward, the decision would be the same. Furthermore, it's a decision with which I would agree.

Now, when I drafted my bill, I modelled it not only on Canadian jurisprudence, but also international jurisprudence. I read cases from the European Court of Human Rights, including Goodwin v. United Kingdom. I can tell you that what you find in my bill is basically the norm in civilized countries such as ours; countries which consider journalistic independence to be a fundamental value in a modern democracy.

In fact, if you read subclause (5)(b), the judge is called upon to weigh things up. Now, for further clarity, I'd suggest you add paragraph (iv), which would be similar to subclause (8)(b). You would still have all of that as a safeguard since that's what the Ontario Court of Appeal decision was based on, that is on the object used to transport the fraudulent document. In other words, the envelope itself would have been used in the commission of a serious offence. Under my bill, I'm convinced that by applying the principle of subclause (5)(b)—

[*English*]

Mr. Rob Moore: Mr. Ménard, I hear what you're saying. The fact of the matter is, though, there is a difference. I mean, obviously Canada is a civilized country, and we all have tremendous respect for human rights. We recognize that through case law and through amendments that have been made there is right now what we feel is a balance, and it's a balance that's been upheld. It's a balance that respects the charter, respects charter rights.

But to be clear, under the current law the onus is on a journalist to show that information is privileged—that's the current law—and that it is in the public interest not to disclose the information. That is the test.

In really direct contrast with that, your bill would assume that all this information is confidential and would prohibit the disclosure unless the person seeking disclosure meets the test of the bill.

Quite frankly, that is a fundamental shift.

The Chair: Thank you, Mr. Moore.

Mr. Ménard, you have one quick reply to that comment from Mr. Moore.

[*Translation*]

Mr. Serge Ménard: You're right, the burden of proof is shifted, and that is deliberate. That's what's new. But I think that that shift would bring us in line with the international jurisprudence.

[*English*]

The Chair: Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Thank you, Mr. Chair.

Mr. Ménard—

[*Translation*]

Mr. Serge Ménard: The principles are the same, but you are right to say that the burden of proof is different. Perhaps it is not different, but it does not attach to the same individual.

Mr. Derek Lee: Good afternoon, Mr. Ménard.

[*English*]

First of all, before I get out my scissors and my paring knife, I wanted to congratulate the member for bringing the bill forward. He's done a really good job of attempting to codify the sought-after balance between the rights of the individual, the interests of the state, and the freedom of the press. The freedom of the press is a fundamental plank of our democracy, as it is in most democracies. The House has already accepted in principle the object of the bill, and it's a good effort.

Now I have some questions about some of the details, as Mr. Moore does. I think Mr. Moore probably has a slightly longer list of questions. But I want to direct your attention to subparagraph 39.1(5)(b)(i). These are the criteria, and it refers to the outcome of the litigation.

I'd like you to rethink that a little bit. You may not have an answer now, but how could the judge in making this decision, how could the parties in making a decision, take into account the outcome of the litigation when they wouldn't know it? They'd be right in the middle of the litigation.

You may be referring to the goal or object of the litigation as opposed to the actual outcome...unless you're thinking of the impact of the outcome of the litigation?

● (1615)

[*Translation*]

Mr. Serge Ménard: I cannot give you a better example than Justice Noël's decision in Charkaoui versus the two journalists from *La Presse* who published information from the Canadian Security Intelligence Service. This information was not at all flattering to Mr. Charkaoui. The issue in question was to determine whether, which is what Mr. Charkaoui claimed, the government or government officials deliberately used journalists in order to discredit Mr. Charkaoui and bolster the grounds for having the security certificate issued against him upheld. He called for a stay of proceedings, because of this abuse. Justice Noël questioned the importance, as it turns out, of knowing the identity of the secret agents who, illegally, according to Charkaoui, gave false and confidential information to the journalists. That was the matter in regard to which he had to make a decision.

[*English*]

Mr. Derek Lee: Okay.

[*Translation*]

Mr. Serge Ménard: It may be something else, but—

[*English*]

Mr. Derek Lee: Mr. Ménard, if you go through all of the details of the case, it'll be an interesting anecdote, but it will use up all of the five minutes I have.

I raise that as an issue that I did notice.

Secondly...I'd like you to answer real quickly. Think about this, in terms of the definition of who a journalist is. The definition does appear rather broad. I'm sure all the journalists appreciate it, but is Conrad—

[*Translation*]

Mr. Serge Ménard: Some journalists find it too restrictive.

[*English*]

Mr. Derek Lee: Let me ask you a question. Is Conrad Black a journalist? Is Don Cherry a journalist? Are the *Yellow Pages* and the people who make them, corporate-wise, journalists? Are the employees of an access to information office journalists? Is Microsoft Corporation a journalist? Is the party who prints and collates our *Quorum* here in Parliament a journalist?

The answer may be yes to all of those. It may not be your intention, but if the answer is yes to most of those, then perhaps the definition has become a little too broad, and we may have to spend some more time looking at that.

Do you have any comment on that?

[*Translation*]

Mr. Serge Ménard: Yes, I do, and I can give you an answer for each example you gave. I'll start with the final example, because it's the one I remember best. *Quorum* is not written by journalists, it does not gather information. Conrad Black is not a journalist either, unless, at some point in time, he found out the identity of the source of one of his journalists. Only in such circumstances would he be considered a journalist. The Yellow Pages are not written by journalists.

[*English*]

Mr. Derek Lee: Mr. Ménard, the *Yellow Pages* gather, produce, and publish information. They do it all the time, the great big yellow book, every year.

[*Translation*]

Mr. Serge Ménard: Yes, that's true, but the nature of the information gathered in the Yellow Pages is such that they will never be seen as having a confidential source of information for the purposes of an investigation which may seek to redress wrongdoing.

● (1620)

[*English*]

Mr. Derek Lee: No. A secret source is not a criterion in your definition. The only criterion is that they gather, collate, or publish information in any media. That is your definition, and that big book is a collection of information.

You may not think it's relevant to what you think of as journalism, but in the definition you have.... I even suggest Conrad Black and Don Cherry. If Don Cherry seeks to provide, on a television program, hockey statistics about how many goals, and he does this regularly, it seems to me that within your definition in electronic media he is a journalist because he gathers information and makes it known.

Thank you.

The Chair: Thank you, Mr. Lee.

Monsieur Ménard, I know you may want to respond to Mr. Lee—quickly, if you would, and then Mr. Petit.

[*Translation*]

Mr. Serge Ménard: I think they deal with the information gathered by others.

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Good afternoon, Mr. Ménard. I'm very glad that you can explain this bill to us today. What I'm thinking, is that the courts will have to deal with this kind of bill in the future. Here is what I am wondering. You were Minister of Justice in Quebec, you were also a criminal lawyer. Imagine you're in government, you know the orders in council 115 and 116 of Quebec dealing with the protection of confidential employees. There are confidential employees in every government.

Imagine that one of your employees decides to speak to a journalist who then goes and publishes the information. He's doing indirectly what he does not have the right to do directly. Legislation stipulates that such an individual cannot speak of what he has seen or what is going on in his department. The employee speaks to the journalist, who then repeats what he has learned and publishes it. That would pose a problem because in your bill, there is reverse onus.

The last time we had a discussion on the reverse onus, it was not easy. I'd like you to explain how we're going to manage that because when you reverse the burden of proof, you are placing this entire burden on the shoulders of another person. And that is what is happening here. I'd like to know if your bill ends up protecting, indirectly, what may not be protected directly. There are confidential employees here in Ottawa, in Quebec, and in your department. Now for argument's sake, let's say they speak to a journalist and that what is said ends up in the papers. Then what do you do, since you've shifted the burden of proof?

Mr. Serge Ménard: No, such an employee is not protected because I don't think he's acting in the public interest. When the judge weighs up the public interest together with the principle of freedom of information, this kind of individual certainly won't be protected. And I certainly don't want to protect this kind of individual. Rather, I'm talking about, for example, one of the most recent and spectacular cases that we've ever seen, and that is the two Enron accountants who confided in journalists and explained the massive fraud that was under way. Their identity could not be revealed until the Enron people were charged and the accountants were given assurances as to their safety.They are the kind of individuals that we seek to protect. There will be many such individuals in our modern-day society, in relation to the environment, for example. Individuals will testify as to company practices; companies that deliberately come up with tricks to get around environmental legislation. Individuals will go to a journalist and the journalist will investigate. Then the journalist will blow the whistle on the companies once information has been gathered. But I do not think that it is in the public interest to simply report an illegal act to a journalist and expect that he will be entirely responsible for making it public. I don't think the judge would think so either.

[*English*]

The Chair: Mr. Petit.

[*Translation*]

Mr. Daniel Petit: How much time do I have left?

[*English*]

The Chair: One question.

[*Translation*]

Mr. Daniel Petit: Mr. Ménard, you were previously a criminal lawyer and you represented individuals who had criminal charges laid against them. Now imagine that your secretary, who is bound by confidentiality as you are because you're a lawyer, decides to talk to a journalist. And the journalist gives an account of your secretary's remarks in the newspaper. Your bill provides for a shift in the burden of proof. The information provided may serve to convict somebody else, and not necessarily one of your clients. Given the reverse onus, how is it that you intend to protect your client-attorney privilege and that of your employee? How can this be maintained if a journalist can publish such information?

● (1625)

Mr. Serge Ménard: I should point out right away, Mr. Petit, that we've been talking about protecting journalistic sources for almost 30 years and that that kind of situation has never occurred. To begin with, the secretary would be breaking the law. Furthermore, I think that the last amendment I brought forward should reassure you in that regard.

Once again, my bill's purpose, and its practical effect, is to encourage all judges to make the kind of reasoned arguments they've made in the past. This is very important for the protection of individuals who talk to the media but don't have the means the *National Post*, *La Presse*, and Radio-Canada have, or don't want to use them, like *Le Journal de Montréal*, which rarely...

[*English*]

The Chair: Thank you, Mr. Petit.

Mr. Réal Ménard, you have an opportunity for one question.

[*Translation*]

Mr. Réal Ménard: Mr. Ménard, I think there is something abusive in making a claim, like my friend the parliamentary secretary just did, that if your bill were to be adopted, it would compromise the smooth running of certain investigations that are important from a national security standpoint, and, I would like once and for all, to go over this with you. I would like you to explain that that would not be possible, upon even a superficial reading your bill, because of the balance that the judge must take into account. I would like you to give us guarantees that it was not at all your intention to hamper investigations involving national security.

Mr. Serge Ménard: What I want to protect is journalistic activity which is always carried out in the public interest. In a fairly short document, scarcely more than two pages, three provisions set out the balance judges must strike between the principles at stake: the government's interest, on the one hand, and on the other hand, the protection of sources and journalistic activity, which is inevitable in a democratic society. And that is the spirit of clause 39.1(7). In order to do a good job at keeping us well informed, journalists need people to trust them. And yet, people will trust them less if they know they are becoming adjuncts of the police. Journalists who are but adjuncts of the police are characteristic of dictatorial or totalitarian regimes. In the bill, reference is made to a balance between the values in clause 39.1(5)(b), clause 39.1(7) and clause 39.1(8)(b).

I remain convinced that such legislation would be highly useful, and very much appreciated not only by the journalistic community but also...

[*English*]

The Chair: Thank you, Mr. Ménard.

Mr. Moore, we have time for one question.

Mr. Rob Moore: Thank you, Mr. Chair.

Again, further to Mr. Réal Ménard's question, to suggest that there wouldn't be an impact, to me, is to suggest that the bill does nothing. We wouldn't all be sitting here if this bill didn't do something. I would argue that it may not have been your intent, but this could have an impact on those types of investigations.

The bill establishes for journalists a new class privilege that does not exist now. The presumption now is that journalists are subject to the same treatment as all other Canadians, and there's a legal presumption that relevant evidence should be presented to the courts. That's the presumption, and I mentioned that in an earlier question. The assertion of journalistic privilege is an exception to that rule.

Whether it's the intention or not, your bill would supercede all other federal acts—that's stated explicitly in the bill—including Criminal Code provisions, as well as acts that could impact on terrorism and national security, as I mentioned. It would extend to journalists a privilege that is not accorded to any other Canadian and in fact throw out the balance that the courts as recently as this week have upheld, which says that there is an appropriate balance, that journalists can exert journalistic privilege but that has to be dealt with on and established on a case-by-case basis.

What we have with your bill is an overly broad definition of journalist that extends this privilege to journalists above and beyond all Canadians and really fundamentally shifts the balance that has been established. Again, I would put to you the question: is it not true that if this bill were to pass, there would be some cases that could proceed now that will not be able to proceed because of a lack of relevant evidence?

● (1630)

The Chair: Mr. Ménard.

[*Translation*]

Mr. Serge Ménard: It was not my intention to create a separate class of citizens, but rather to protect an activity, to protect the sources, and not the journalists themselves. These individuals would not confide in journalists and tell them their sources if they didn't have the guarantee that the information would remain confidential, and it's the confidential sources I sought to protect. Now, even if you don't like the fact that citizens are in a class of their own, the fact remains that these are the only kinds of witnesses who enjoy constitutional protection. Under the Canadian Charter of Rights and Freedoms, everybody enjoys the fundamental freedoms of: freedom of thought, of belief, of opinion, and of expression. In addition to this, there is the freedom of the press and that of other means of communication.

Furthermore, if you pay close attention to justices La Forest and Cory's opinions in the RAD, they provide a very clear explanation of what I said earlier and that is that journalists must not be perceived to be adjuncts of the state. When they collect information and present it, what they disseminate must not be used by the police, unless the police have good reason to make use of it. The notion of good reason is broadly explained in my bill and will be interpreted based on existing case law.

[*English*]

The Chair: Thank you, Mr. Ménard and Mr. Moore.

That ends the first hour of discussion on Mr. Ménard's private member's bill.

Mr. Réal Ménard: And the government will support the bill.

The Chair: I will then call forward the additional witnesses.

Mr. Ménard, please, would you step down.

Mr. Hawkes, Karen Markham, Josée Desjardins, and Lieutenant Colonel Jill Wry.

We'll suspend for one minute.

● _____ (Pause) _____ ●

The Chair: I call the justice committee to order.

For the testimony from the witnesses, I will take them as they appear in order on the agenda. First, Mr. Joshua Hawkes.

Mr. Hawkes, you are a prosecutor with the crown in the province of Alberta, specifically Calgary. Is that correct?

● (1635)

Mr. Joshua Hawkes (As an Individual): That's correct, Mr. Chairman.

The Chair: Thank you, sir. You have the floor.

Mr. Joshua Hawkes: Thank you very much.

I appreciate the opportunity to be here. As the chair indicated, I am a prosecutor in Alberta. I have been prosecuting for approximately 17 years. Currently I prosecute cases in the courts of appeal and the Supreme Court of Canada. I have been asked by my department to appear and express our concern about this bill. That concern can really be divided into two main categories.

The first category relates more to process, and the second relates to the substance of the bill. The process concern can be summarized briefly. It is this. When fundamental changes are undertaken with respect to the criminal law or related acts, frequently, almost invariably, there is extensive consultation. That consultation is critical because not only are there many other stakeholders who are involved, but from the perspective of a prosecution service, the practice changes across the country.

The approach we might take in Alberta with respect to advising police on investigations or prosecutions might very well be different from the approach taken in another province or jurisdiction. Those differences can often have a critical impact on what the legislation is going to do. So without a consultation that gives an opportunity for all of those voices to be heard, and all of those differences to be taken into account, you run the very grave risk of significant unintended consequences. It is to those consequences that I wish to very briefly speak.

In my submission there are at least five areas of the bill that give rise to these unintended consequences. The first is something that has been spoken of, and that is the breadth of the definitions. The definition of journalist is particularly broad. It is broader than analogous provisions—for example, in the United States before the Senate and House of Representatives. The definition is, in my submission, impermissibly broad in two respects. First of all, you can see in analogous legislation in the United States, for example, that specific efforts were taken to exclude those who were not in the business of publishing or disseminating information for gain—that is, as part of their livelihood.

Now, in the age of the Internet, you can readily see where that difficulty might arise. If I have a blog, I can write anything on that blog. I gather the information. I may research it. I then disseminate it. I would qualify as a journalist and have protection under this bill. That could apply virtually without limit to anyone with access to the Internet.

The second difficulty with the definition, and this may be an intractable problem with this structure, is that you can't exclude from the definition certain kinds of journalists or people who would qualify as journalists. There are two organizations that I would reference in this regard. The first is an organization called NAMBLA. It's the North American Man/Boy Love Association. It's their object to, under the guise of seeking to change the law, advocate for sex between adults and children. They have a publication that circulates. Anyone who writes for them would qualify as a journalist. They may well have descriptions of activity that would either constitute an offence under the child pornography provisions of the code or be a description of a substantive offence under the code. We would have no way of excluding them from the definition of journalist.

As a related example, there's a website in the United States that I'm not advocating, but it's called whosarat.com. It gathers and publishes on confidential informants: the picture of the informant, a description of them. If you happen to be an undercover operative in the United States, you may well find your picture and your description on that website. People who run that website are journalists, according to this bill, and would be afforded the protections of the bill. I don't for a moment suggest that was the intention, but it may be the unfortunate reality.

● (1640)

Second, the definition of record in the bill is also very broad. It would capture virtually any kind of information, including pictures or videos. The case law, particularly Lessard, differentiates the expectations of privacy that might attach. You can well appreciate that speaking to a confidential source is a very different circumstance from videotaping a public demonstration; the bill doesn't differentiate between those types of information and the case law does.

A further difficulty, and this is a fundamental difficulty, is that this bill drastically increases the scope of privilege. Currently every legislative provision of which I am aware, as well as the common law, protects privileges for information that's given in confidence. There is no reference in the operative provisions of the bill to these being confidential sources. They are simply journalists' sources. That would result in a protection of virtually any kind of source, and it would be a fundamental and—with respect—virtually unprecedented expansion of the law that's not found in any other common-law country of which I am aware.

The next difficulty to which I refer is the restriction on the dissemination of unpublished information in proposed subsection 39.1(7) of the bill. This would provide a protection that's broader than that attached to what's called work product privilege. It's a subset of solicitor-client privilege. If I, as a lawyer, am preparing documents in contemplation of a court case or litigation, those documents are privileged. That privilege only lasts as long as that particular litigation. The Supreme Court has said that when that litigation ends, the privilege ends. That is not so with this subsection. If a journalist investigates something, it would fall subject to this protection, and the standard is particularly high.

Briefly, the onus provisions of the bill are fundamental and significant. They not only cause difficulty for prosecutions, but also fundamentally alter the law with respect to disclosure of third-party records. If I am Mr. Charkaoui and I am seeking to get information now that might be in the hands of a journalist and would assist me in my defence, this bill imposes a higher standard or onus than currently exists under the law. This bill changes the law with respect to disclosure and would impose a standard that would likely infringe the Constitution. It's a higher standard than in O'Connor or Stinchcombe or any of the related legislation.

Finally, with respect to search warrants, the bill seeks to codify the law, but in my respectful submission dangerously oversimplifies it. Significant considerations are left out of the list. I'm certain it is done by omission and unintentionally, but there are things not included in that list. If the bill is passed, it will be interpreted as a codification and a replacement of the existing common law. Those factors will no longer be available to be considered. All these things will result in a fundamental and, in my submission, drastic change of the laws that now exist.

The Chair: Thank you, Mr. Hawkes.

From the Department of Justice, will it be Ms. Markham who will present?

You have the floor.

Ms. Karen Markham (Counsel, Criminal Law Policy Section, Department of Justice): Thank you very much.

I appreciate the opportunity to speak to you today. Perhaps I should indicate why I'm here. The Department of Justice is, of course, in view of the minister's responsibility for criminal law reform, interested in any bill that would propose fairly significant changes to the criminal law, and hence I am here today to very briefly give an overview of the current law and our assessment of how the bill might change the current law, again whether intentionally or not.

I won't repeat the points that have been already stated, in the interest of time. I might just start, though, by indicating that with respect to the definition of journalist, one of the things that I'd like to bring to your attention is that currently the case law, while not defining a journalist, has been in relation to professional journalists, people who have been employed by newspapers, etc. The activity that's been the subject of consideration by the courts has been journalistic activity. The information in question has been in relation to that activity, and while that may be intended in the definition, I direct your attention to the fact that there is no definition of information in this bill, and there isn't expressly a requirement that the information in question relates to journalist activity. I just highlight that for your consideration.

The other thing I'd like to point out certainly has been referred to by Mr. Hawkes. Currently at common law there is a journalistic privilege. It is a case-by-case privilege. The onus is initially on the journalist to show that the information in question, including the identity of a source, is confidential information. There is a common-law test in respect of assessing whether that information is confidential or not. Then the final aspect of that is, again, an onus on the journalist to demonstrate, through a balancing test, that the interest in non-disclosure outweighs the interest in disclosure. The entire time that onus is on the journalist. In the bill it would appear that there's an assumption that the information is confidential and it is not to be disclosed unless the individual seeking disclosure is able to satisfy particular statutory tests. That would certainly be a difference between the current law and the bill.

Also, very briefly, I'd like to direct your attention to the override provision, as we call it, subclause 39.1(2), which gives priority to this particular act over not only other acts of Parliament but also other provisions of the Canada Evidence Act. I perhaps could direct your attention to the fact that with the reference to search warrants, with the references in the bill to various tests, it would appear that the bill is primarily directed either to criminal or to civil proceedings. It is to be remembered that the Canada Evidence Act, of course, governs all federal proceedings, which includes proceedings in respect of which a judge is not the fact-finder. So it would include administrative tribunals, proceedings before committees, commissions of inquiry, etc. From that perspective, one might be concerned that the scope of the bill is perhaps not consistent with all federal proceedings that are governed by the Canada Evidence Act.

I would like to further indicate that the specific tests for determining, for example, whether or not the identity of a source and whether unpublished information in the possession of a journalist should be revealed are, in my submission, different from what currently is at play. Mr. Hawkes has referred to the test for unpublished information. The court is prohibited from ordering the journalists to disclose that unpublished information unless two specific statutory criteria are met. I suggest to the committee that this is quite different from, for example, the various factors that were considered in the case of R. v. Hughes, where the court was concerned with whether or not the statements of sexual assault complainants should be revealed to the defence. Those statements were in the possession of a journalist.

● (1645)

In that particular case, the court made reference to the importance of many different factors in balancing the interests of disclosure versus non-disclosure. They include such factors as the relevance and materiality of the evidence to the issues at trial; the necessity of the evidence to the accused's case and his or her ability to make full answer in defence; the probative value of the evidence; whether the evidence is available through any other means; whether the media's ability to gather and report the news will be impaired by being called to give evidence and, if so, the degree of the impairment; whether the necessity of the evidence in the case at hand outweighs the impairment, if any, of the media; and whether the impairment of the media's function can be minimized by confining the evidence adduced to only that which is necessary to the accused's case... [*Technical difficulty—Editor*]...certainly a sophisticated consideration of the pertinent factors.

Finally, in the interest of time, I'd just like to draw your attention to the fact that with regard to search warrants, currently the balancing test at play in terms of whether or not a search warrant should be issued involves a consideration of the court being required to strike a balance between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination.

You may be interested to see that the balancing test in proposed subsection 39.1(8) is reflected in one of the paragraphs, proposed paragraph 39.1(8)(b), leaving the possibility that as opposed to being the overarching determinant of whether or not a warrant will be issued, the balancing test becomes one of many criteria, all of which have to be met—and if all of them are not met, the judge is precluded from issuing the warrant. I think that is a relatively significant change from the current law.

Thank you, Mr. Chair.

● (1650)

The Chair: Thank you, Ms. Markham.

Ms. Desjardins, do you have a presentation?

Ms. Josée Desjardins (General Counsel and Director, National Security Group, Department of Justice): I have a very few words.

The Chair: That's fine. You have the floor, then.

Ms. Josée Desjardins: Thank you for hearing our concerns.

I am a colleague of Karen Markham. I will not repeat what my colleague has said, but there are a few points I would like to raise with you.

Of particular concern to me, as the director of the national security group, is what we call the override provision—as mentioned by Karen—and the provision dealing with the other information that may be in the possession of the journalist.

The override appears to exclude the application of sections 37, 38, and 39 of the Canada Evidence Act. Those provisions are there to protect sensitive information. In particular, I simply want to briefly explain the process of protecting sensitive information under section 38 and to identify what appears to be a potential conflict with what is in the bill and what is currently in the Canada Evidence Act.

Essentially, section 38 of the Canada Evidence Act is a mechanism in place to ensure that sensitive information of the government is protected in the public interest in the context of proceedings. So the regime under section 38 will be triggered in the context of proceedings that, as Karen explained, include administrative tribunals, civil proceedings, and criminal proceedings when potentially injurious information or sensitive information may be disclosed. These are two terms that are defined in the act to mean information that would cause injury to national security, national defence, or international relations, or information that the government is making efforts to keep protected.

So essentially, in the context of a proceeding, if a participant knows that sensitive information may be disclosed in the course of the proceeding, the participant has an obligation to give a notice to the Attorney General of Canada.

The effect of the notice is to prevent the disclosure of the sensitive information, and it forces the Attorney General of Canada to look at the information, consult, and to make a decision as to whether to authorize disclosure of the sensitive information or to maintain the prohibition. This decision is also reviewable by the Federal Court through designated judges.

Both the Attorney General of Canada and the Federal Court will apply the same test: whether the information is relevant in the proceeding and whether the disclosure of the information will be injurious to national security, international relations, or national defence. Then they will do a public interest balance, which will assess what is the greater public interest in the context of the proceeding: to maintain the prohibition or disclose the information. Again, the Federal Court judge can issue an order that provides for the disclosure of all or some of the information or, in some instances, will issue a summary.

The regime in section 38, as I indicated, applies to all proceedings except those that are excluded through a schedule in the act. The proceedings that are excluded from this regime are those that already have a mechanism in place to ensure that the sensitive information remains protected in the public interest.

Where I see a potential conflict, with greatest respect to Monsieur Ménard, is the override, and in particular subsection (7), which states "A journalist is required to disclose information or a record that has not been published", but "is of vital importance and cannot be produced in evidence by any other means." The scenario that comes to mind is that a journalist is in the context of a proceeding provided under section 39.1; therefore, he is a participant. The journalist knows what type of information he received, so he would be aware whether the information is sensitive or not. Though some of it may have already been published, we would not necessarily know if there is still more information that can be published at a later date.

So at the outset, the journalist is under an obligation to give a notice, and that will make the publication of that information prohibited. However, he may, on the other hand, be required to disclose the information if it is of vital importance.

● (1655)

There appears to be a conflict between his obligation to give notice and prevent the disclosure of the sensitive information and, on the other hand, to comply with a possible order of disclosure.

Also, as I indicated, the test applied by the Attorney General of Canada and the Federal Court appears to be different from the one mentioned here. I will not repeat them, but my colleague did indicate some of the criteria applicable in a national security or Canada Evidence Act application.

Again, there appears to be a conflict between the current section 38 regime and the legal test and whether that is overridden by this.

The only issue I wanted to raise is the possible risk of a vacuum. If journalists are compelled to and disclose information of vital importance, they may be ordered to disclose yet more sensitive information than they already have.

As a final point, Monsieur Ménard mentioned the Charkaoui case in Montreal. In that case, the journalists involved, Monsieur Bellavance and his colleague, had published an article in *La Presse* and *Le Droit* in which they cited a top-secret document that appeared to have originated from the Canadian Security Intelligence Service. Monsieur Charkaoui had sought access to that document by serving a subpoena to the journalist, asking him to appear and to bring the documents with him. Unbeknownst to anybody was what was in that document above and beyond the newspaper article. The Attorney General was a participant in that case and gave notice to the AG, two different groups of the Attorney General of Canada. The intent of that notice was to prevent the journalist from further disclosing information until a decision was made.

As it turned out, *Monsieur le juge Noël* was of the view that he could deal with that issue under section 78 of the Immigration Act, which is one that has a regime to protect sensitive information. In the end, *Monsieur le juge Noël* did not disclose the document but rather issued a summary, a power he has to ensure that Mr. Charkaoui could pursue his challenge on the one hand. The other public interest was to ensure the sensitive information in the document was maintained and protected, to ensure the two public interests were maintained.

That's an example of how it happened in the past. I wanted to raise the possible conflict between the current bill and the current section 38.

● (1700)

The Chair: Thank you very much, Ms. Desjardins.

Lieutenant-Colonel Jill Wry, please, you have the floor.

Lieutenant-Colonel Jill Wry (Director of Law, Military Justice, Policy and Research, Office of the Judge Advocate General, Department of National Defence): Thank you, Mr. Chair and honourable committee members. It's my pleasure to speak to you today about the amendments in Bill C-426, and particularly to explain some of the practical impacts those proposed amendments would have on the Canadian Forces.

I would like to make it very clear that it's not my purpose today to question the importance of the legislation or the importance of the amendments that have been proposed, but to ensure that members of the committee are aware of some potential implications the proposed amendments have on the Canadian Forces and the Canadian military justice system. If I could classify this information, I would put it in the category that my friend Mr. Hawkes has—as unintended consequences of the proposed amendments.

First of all, as you know, the definition of journalist is defined in the proposed legislation to include any "person who contributes regularly and directly to the gathering, writing, production or dissemination of information for the public through any media, or anyone who assists such a person".

As it's currently worded, this definition would apply to members of the Canadian Forces who are involved in activities that are not journalistic in nature. This would include members whose primary duties involve the gathering and dissemination of information to the public, such as public affairs officers. As well, the definition would include members who make regular contributions to Canadian Forces publications for the purpose of raising awareness on topical issues such as military personnel policies and information on compensation and benefits. Furthermore, anyone who provides assistance to those who gather and disseminate this type of information, such as computer technicians or administrative clerks, would also be covered by the definition.

The potential impact of having the definition of journalist apply to Canadian Forces members arises from the conflict that could emerge between the protections proposed under this bill and the obligation on military members to report breaches of discipline. Military regulations require members of the Canadian Forces to report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders, and instructions governing conduct. Given the broad definition proposed for journalists, there is a real potential that conflicts will arise.

Second, as you are aware, the proposed amendments will apply not only to judicial proceedings but also to non-judicial proceedings over which Parliament has jurisdiction. Under the National Defence Act, that would include boards of inquiry, which can be held both in and outside of Canada. According to the proposed amendments, in order to compel journalists to disclose the identity of a source during a non-judicial proceeding such as a board of inquiry, it would be necessary to adjourn the proceeding and seek a judicial order. The potential logistical impact of this requirement is compounded by both the breadth of who can be considered a journalist, if the present definition is maintained, as well as the fact that boards of inquiry can proceed outside of Canada. There would be a requirement to seek an order back in Canada in order to proceed with that inquiry.

Furthermore, when determining whether it is in the public interest to compel the disclosure of a source, a judge is required under proposed paragraph 39.1(5)(b) to consider three factors, which have already been discussed: the outcome of the litigation, the freedom of information, and the impact of the journalist's testimony on the source.

The narrow construction of these factors would make it difficult to apply them in the context of a non-judicial proceeding, such as a board of inquiry, which is an investigative tool, not a tool for litigation, or to consider other potentially relevant factors, such as operational or national security, which would be very relevant in the types of non-judicial proceedings that could arise in the context of the Canadian Forces.

Honourable committee members, I would like to thank you for allowing me this opportunity to raise these practical matters with you. I'd be very happy to answer any questions you may have.

Thank you.

● (1705)

The Chair: Thank you.

A point of order, Mr. Ménard.

[*Translation*]

Mr. Réal Ménard: Before we begin this dialogue, can we just clarify whether the first witness was speaking as an individual or on behalf of the Government of Alberta? It wasn't clear, and I'd like us to know this before engaging in a discussion. He claimed to have been delegated by his department, but we're told that he was appearing as an individual.

[*English*]

The Chair: Mr. Hawkes.

Mr. Joshua Hawkes: I'll try to clarify. I have been requested by my department to appear, so the views that I have expressed are in fact the views of the criminal justice division of Alberta Justice.

The Chair: Thank you, Mr. Hawkes.

Colleagues, there is very little time between now and the bell. However, we will move matters along. I may cut you short on your question time, because I want to give as many people as I can the opportunity to ask a question.

Mr. Bagnell.

Hon. Larry Bagnell: Thank you.

A big concern, I guess, is the override in proposed subsection 39.1 (2). When you bring in a small private member's bill, it's supposed to do something small. But here you override all the other laws. I'm not a lawyer, but to me it seems strange. The only other such case I remember is the Constitution. Of course, the bill of rights overrides everything. Then maybe there's also a non-derogation clause, something related to aboriginal rights.

Is this a little unusual, Mr. Hawkes and Ms. Markham?

Mr. Joshua Hawkes: I believe it is, and it may underscore the need for broader consultation. There may yet be further unintended consequences than the few that we've been able to identify in the short time we have here. The scope of the override is, in my submission, very unusual.

The Chair: Ms. Markham.

Ms. Karen Markham: I would tend to agree that the scope would be unusual. We sometimes see provisions that say “notwithstanding” a specific subsection or paragraph, so I would agree with Mr. Hawkes.

Hon. Larry Bagnell: Ms. Markham, you spoke about other proceedings not covered by the Canada Evidence Act. Can you explain that a bit?

Ms. Karen Markham: The Canada Evidence Act applies to all different types of federal proceedings, including criminal prosecutions and civil proceedings involving the federal government, commissions of inquiry, and proceedings before federal administrative tribunals. As Colonel Wry was saying, this is a much broader type of proceeding than those governed strictly by the Criminal Code.

Hon. Larry Bagnell: The bill would allow this protection in a whole bunch of other forums that it didn't allow before?

Ms. Karen Markham: One could argue that the effect might be to cause some confusion about whether the bill was intended to cover all federal proceedings when some of the provisions are much more specific to criminal proceedings.

Hon. Larry Bagnell: Proposed paragraph 39.1(5)(a) states as one of the conditions that “the person has done everything in the person’s power to discover the source of the information” . Shouldn't it be discovering the information rather than the source? Are you supposed to hire a private detective to follow a journalist around to see who they're talking to? That was my question about that.

My other one is on—

The Chair: Mr. Bagnell, I think one question will be enough, given our time situation.

Would you answer Mr. Bagnell, please?

Ms. Karen Markham: I'm sorry. Was that directed to me?

Hon. Larry Bagnell: Whoever.

Ms. Karen Markham: I can only indicate what the case law has been focused on. The case law has tended to focus on the identity of the source. Whether or not the identity of the source is available by some other means, other than calling the source or breaching journalistic privilege, has been an important consideration. I can only respond in that context.

The Chair: Mr. Hawkes had something to say.

Mr. Joshua Hawkes: As a footnote, there are cases that have interpreted this somewhat more broadly. We're dealing not only with alternative sources of information considered in relation to the source, but also with alternative sources of information considered in relation to the object. If one were videotaping a demonstration, it wouldn't be just alternative sources of the videotape; it would also be the information contained in the videotape. This gives rise to a host of other difficulties.

● (1710)

The Chair: Monsieur Serge Ménard.

[*Translation*]

Mr. Serge Ménard: My question is directed to Ms. Wry.

In your practice, have you ever heard, even once, of persons in the army who may have received information from a source which demanded confidentiality? I am referring to the individuals that you have spoken of.

[*English*]

LCol Jill Wry: My apologies. I hope I caught that question. Are you asking me if I've run into any cases where people have been required to provide information they've received from confidential sources?

[*Translation*]

Mr. Serge Ménard: It was a little more specific than that. Have you heard of a single case in the army of someone who may have received information from a source which demanded confidentiality?

[*English*]

LCol Jill Wry: Personally I'm not aware of any case of that nature. However, the concern we have with regard to the bill as it's proposed regards the breadth of the definition of journalist and the fact of the confusion and difficulty that may create, given its breadth, to people who are provided with different types of information and how they may then try to characterize their status.

[*Translation*]

Mr. Serge Ménard: Do you prefer the current state of affairs, where there is no definition of the word "journalist"?

[*English*]

LCol Jill Wry: No, sir, I'm not suggesting that at all. My goal here today was simply to advise you of some practical issues that this bill, as proposed, and the framework that's proposed would have on the Canadian Forces in the area of unintended consequences. It's not the idea that there ought not to be a mechanism in place, but a mechanism should perhaps take a number of different situations into account so as to avoid those types of consequences.

[*Translation*]

Mr. Serge Ménard: The more you listen to a second language, the better you learn it. That is what I try and do. What is the overriding clause? Is it clause (2)?

An hon. member: Yes.

Mr. Serge Ménard: Would you be happy to learn that that's not my idea, it is the law clerk's? Personally, I'm satisfied with the general rules of thumb for interpreting legislation, where a specific act takes precedence over broader legislation. If the legislator decides to enact a specific act, he or she does so first being familiar with the broader legislation. As far as I'm concerned, that paragraph could be taken out; it wasn't my idea.

Does anyone else have a definition of the word "journalist" he or she would like to propose?

[*English*]

Mr. Joshua Hawkes: Certainly there are definitions from other jurisdictions, the United States, for example, that cover part of the problem by specifying that the information provided is a part of someone's livelihood or a substantial portion of their income. That doesn't capture the second difficulty with the definition; that is in such publications as NAMBLA's, where you have someone who, for very different interests, assumes the role of a journalist, and I'm not frankly sure how you would capture that within the definition. That's a very difficult drafting exercise, and I have the easy role of identifying a problem without having to propose a solution to it.

The Chair: Thank you, Mr. Ménard.

Mr. Moore.

Mr. Rob Moore: Thank you, Chair. I guess I'll direct this, in the interests of time, to Ms. Markham or Mr. Hawkes. We've had a bit of discussion earlier on whether this is just codifying what is already the law, and when I hear your testimony, it seems very clear to me that this is going far beyond what the current state of the law is.

In fact, I'll put this question to you. Would there not be scenarios where, if this were to pass, an investigation that could be initiated and successfully completed under the current law, and even one dealing with an important case potentially involving national security, would perhaps not get off the ground or would fail under these provisions?

Is that fair to say, that this is going far beyond codifying what's already in existence?

● (1715)

Mr. Joshua Hawkes: I believe it does. It goes far beyond in that it extends in at least three respects. First of all, it extends what I would call a qualified class privilege because of the reverse onus on journalists, not in respect of confidential information but of any source information.

Second, it attempts to codify requirements for search warrants but leaves out many of the requirements that are identified in the case law as factors to be considered and leaves them as sole criteria, so that in the absence of those criteria you wouldn't get the warrant. In current circumstances it would be a balance of many factors.

And last, what I call the work product exception is not found in the law, not only here but anywhere else that I've been able to find.

Ms. Karen Markham: I don't think I have anything to add to that.

Thank you.

Mr. Rob Moore: Do I still have a little bit of time?

The Chair: Make it very quick. I see the bells are now beginning to ring, so we have very little time left. I'd like to go to Mr. Christopherson too.

Mr. Rob Moore: Okay.

Ms. Markham, on the issue of the override, how encompassing is that? When I read the bill—and I've read Bill C-426—it appears to me that this trumps everything else that's out there. Can you quickly comment a bit on the impact that could have beyond what we may be contemplating around this table right now?

Ms. Karen Markham: I might just say that in contrast to the current law, where the issue of journalistic privilege can be raised in any context, it wouldn't necessarily be...I won't say honoured, but agreed to in any context. It would be my understanding that the effect of this would be—in contrast to the current law—that this would be a starting point. This regime would be where you would start in terms of assessing whether or not the journalist could be compelled to provide information. To the extent that it could be in conflict with other provisions in the Canada Evidence Act or other federal statutes, it may raise some difficulties in terms of deciding how the courts would deal with the issue.

But this section would be the starting point.

The Chair: Thank you, Mr. Moore.

Mr. Christopherson.

Mr. David Christopherson (Hamilton Centre, NDP): Thank you.

I am very supportive of this, Chair. I'm from the home of Ken Peters and *The Hamilton Spectator*. That was a major case that I know Monsieur Ménard is familiar with. I've spoken in support of this in the House, but I didn't hear the witnesses, so it really would be wrong for me to engage in questions.

So I will pass, sir.

The Chair: Thank you, sir.

Mr. Lee, you have one question, quickly.

Mr. Derek Lee: I have a quick question, and perhaps the Department of Justice could take this on.

Is this new statutory codification of this in any sense comprehensive? Does it cover off everything it has to, or has it left things, components of this envelope, unaddressed so that even if we pass it as it is, the courts are still going to have to deal with chewing up the new code with unaddressed components of journalistic privilege that are left untouched?

I don't have a head for this, but you may have. If you can't answer it now but you can provide some kind of an answer, it would be helpful.

Ms. Karen Markham: I might just indicate, in the interest of time, that one of the issues we've identified is that the provisions deal with search warrants, but they don't expressly address other forms of state-compelled evidence—like production orders, subpoenas, etc. The potential perhaps is raised that there might be some inconsistency between the way the courts dealt with that pursuant to the common law and then this codification.

The Chair: Thank you, Mr. Lee.

I would like to thank the witnesses for their appearance here. It's been good information to digest. Thank you.

The meeting is adjourned.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

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