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Wednesday, March 6, 2013

Chair

Mr. Mike Wallace

Standing Committee on Justice and Human Rights

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● (1605)

[*English*]

The Chair (Mr. Mike Wallace (Burlington, CPC)): Ladies and gentlemen, I call this meeting to order.

This is meeting number 63 of the Standing Committee on Justice and Human Rights, on Wednesday, March 6. Our orders of reference for today, from Monday, February 25, are the study of Bill C-55, An Act to amend the Criminal Code.

Mr. Goguen, I saw your hand.

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): Mr. Chair, I have a motion to propose: that should our meeting not be completed by 17:30 hours, it be extended so as to complete review and clause-by-clause consideration on March 6, 2013.

The Chair: The motion is to extend the meeting for the length of the day until we finish clause-by-clause consideration.

Mr. Robert Goguen: Yes, until we complete the passage... [*Inaudible—Editor*]

The Chair: I did have two things.

One, I'll talk about the timing that we have now. We have until about 4:26, when the bells will start ringing again. We have a vote at 4:56. That vote will take 8 to 12 minutes. That will delay the 5:30 bell that would have happened for the regular voting, which we would have done, so we can come back then, for probably 45 minutes to an hour. Then, if we are not done, it would mean that after those votes, the four votes that we have tonight, we would come back here to finish the clause-by-clause.

There was a question asked, which I appreciate. I did double-check on whether or not I had the right answer, and I happen to have it. There is no deadline, like on a private member's bill, where if nothing happens to it automatically it gets reported back to the House the next day. That doesn't happen with government legislation.

As we know, there's a timeframe to this, so the issue is to try to finish this clause-by-clause today. It is possible that after the next break we will get it done today before we have to come back after votes, but that will be up to the committee.

Right now, we have one witness with us. The other witness, unfortunately, was told by—

Mr. Robert Goguen: Can we take the vote on the motion?

The Chair: Oh, yes—

Ms. Françoise Boivin (Gatineau, NDP): Can we comment?

The Chair: Comment on it? Yes.

Ms. Françoise Boivin: I'll comment very briefly because I most certainly want to hear our witness. I just want to say that we won't disagree with the motion, but I want to stress something again.

[*Translation*]

Forgive me if I am repeating myself, but it is the government that has imposed the very tight timeline on us, having introduced this bill in February. As a result, we have to do intellectual gymnastics and that is not always easy. This is a very important bill about a matter that has been the subject of a Supreme Court decision.

I wanted to point that out. Nevertheless, I am aware that, given our time constraints, we have to either do it or not. And if something is worth doing, it is worth doing well, as my mother would say.

[*English*]

The Chair: Okay.

Mr. Robert Goguen: Mr. Chair, in response, to accommodate the opposition, we propose not to ask any questions and to give them full rein in view of the circumstances.

The Chair: I appreciate that.

All in favour of the motion as presented?

(Motion agreed to)

The Chair: That is carried, so we are going to proceed.

We have one witness with us. Mr. Michael Spratt is from the Criminal Lawyers' Association.

We did have another witness. The operator in British Columbia told the individual that we weren't meeting until 6:30, so they came and went. We're trying to get them back. We'll see what happens. We may not see them before the 4:26 bell, but maybe we will in the next section.

Mr. Spratt, the floor is yours. You have 10 minutes.

● (1610)

Mr. Michael Spratt (Member, Criminal Lawyers' Association): Thank you very much.

My name is Michael Spratt. I am a criminal defence lawyer who practises here in Ottawa. I practise exclusively criminal defence work, and as such, I've done extensive work involving intercepted communications. I'm here representing the Criminal Lawyers' Association, or the CLA.

The Criminal Lawyers' Association is an association of criminal law professionals. The objective of our association is to educate, promote, and represent our members on issues relating to criminal and constitutional law in a manner that respects and emphasizes civil liberties.

It should be noted that the CLA was granted intervenor status in the case of R. v. Tse, the case that brings us here today. As part of our mandate, the CLA is routinely consulted by parliamentary committees such as this, and it's always a pleasure to appear before these committees.

I apologize for not having any detailed position in writing, but I'm happy to answer questions. I know it's a short time period for everyone to get up to speed on this.

I will start by saying that the CLA is in favour of this legislation. The CLA generally supports legislation that is modest, fair, and constitutional, and Bill C-55 does an admirable job of incorporating the comments of the Supreme Court of Canada from the case of R. v. Tse. However, there are some areas that the committee may wish to examine and may wish to have some further reflection upon.

The starting point from my submission relates to the tension between the need to respond in a timely manner to urgent and serious situations, to act quickly to avoid and prevent harm. And of course, that comes into conflict with the citizen's right to be private and avoid warrantless intrusions by the police into very private aspects of a citizen's life.

As Mr. Justice La Forest recognized in the case of Duarte that there is an immense danger that can be posed by electronic surveillance and the intrusion of the state into individual privacy. He described it as an insidious danger that is inherent in allowing the state in its unfettered discretion to record and transmit our words. Bill C-55 is a positive step forward in that it seeks to provide a better balance between the protection of the public and the protection of the public's privacy.

Now, most importantly from our perspective, Bill C-55 imports the notion and adds a notice provision into the existing legislation of section 184.4. The Supreme Court of Canada agreed with my organization's submissions at paragraph 83 of the case, in saying that, “After-the-fact notice should not be viewed as irrelevant or of little value for s. 8 purposes. In this regard, we agree with the observations of the intervener Criminal Lawyers’ Association.” I won't read it; everyone can read it. Following that pronouncement, our position is quoted by the court.

So the notice provision is a positive step that brings this provision into constitutional compliance as directed by the Supreme Court of Canada.

With respect, another positive feature of this bill is in respect to clause 3. The CLA supports the narrowing of the applicability of section 184.4 to those offences listed in section 183. That goes above and beyond what the Supreme Court said. They were able to leave it more broadly than that. Having said that, I can't really imagine any offences that wouldn't be captured in section 183 that would fall outside that section. Having said that, it's the CLA's position that legislation should be as modest and restrained as possible and the government should be commended for taking those steps.

I'll deal with clause 2, another positive aspect of this bill. This deals with the “peace officer” versus “police officer” distinction. Although that issue wasn't squarely before the Supreme Court, at paragraph 57, the court did express some reservations about the term “peace officer”. Of course, that's a very broad term. Now, clause 2 replaces “peace officer” with ”police officer”, and that amendment is laudable. However, there still is some room for concern and some room for refinement in that language when we see the language of “police officer” defined somewhat broadly meaning, “any officer, constable or other person employed for the preservation and maintenance of the public peace”.

● (1615)

That leaves open the possibility that this definition is overly broad, and that is important, given the exceptional nature of this section. It's a warrantless intercept of private communications, and the CLA submits that there should be no ambiguity over breadth and concerning who could use this section. There should be clarity.

This section, we submit, should provide a clearer definition, and that definition should be restricted to what we conventionally think of as publicly employed police officers. In addition, some consideration may be given to further restricting the use of what is a very exceptional power to supervising officers or high-ranking officers. That is seen in some other areas of the law, and it would provide some additional safeguards, while at the same time keeping alive the purpose of section 184.4.

Clause 5, the reporting clause, is also a very positive addition. The Supreme Court didn't strictly require this reporting to bring the section into constitutional compliance, but the Supreme Court did say very clearly that a reporting requirement such as the one found in section 195 can provide a measure of accountability. Of course, this is accountability to Parliament about how this power is being used and the ways and mechanisms through which it's being used by the police.

Although we support the importation of the section 195 reporting requirements, we submit that, given the distinction between section 184.4 and the other intercept provisions, something more than the section 195 requirement may be considered by this committee. The other sections that deal with intercepted communications deal with communications that are intercepted pursuant to judicial authorization. There has already been that level of oversight. Section 184.4 deals with the warrantless intercept of communications.

And so I would flag that importing the section 195 requirement doesn't recognize the distinction between judicially authorized intercepts and intercepts made under section 184.4. As I said, from a constitutional perspective, that may not be fatal to the bill, but from the perspective of a citizen who reads the report and the Parliament to which ultimately the police forces have to answer through the legislation, this would provide some good oversight, considering the very exceptional nature of this provision.

For example, clause 5 could be amended to ensure that Parliament is provided with clear information not just about the number of arrests or the number of prosecutions or the number of crimes that had been discovered by virtue of section 184.4; the reporting could include the number of times there were no arrests, the number of times there were no offences, and the reasons for section 184.4 urgency. Why was it urgent in those situations? What harm was sought to be prevented? Why could other sections not be used?

Strengthening the language with respect to reporting would provide more accountability, would provide more oversight, and ultimately would provide Parliament and Canadian citizens with the background statistics to evaluate how useful the section is, how much it is being used, information that's really required, when you're looking at balancing this exceptional intrusion into what otherwise wouldn't be lawful against the harm sought to be prevented through these very unusual and urgent situations.

Having said that, it's nice to appear before the committee. I'm often here saying that we disagree with legislation. It's nice to come and see that the legislation is something that we can support and that the Supreme Court of Canada's recommendations are being incorporated. It's unfortunate that it happened 20 years after it was passed, but I'm very happy to be here to say that in large part we support the legislation.

The Chair: Thank you, Mr. Spratt, for that presentation.

Madame Boivin from the NDP has questions.

[*Translation*]

Ms. Françoise Boivin: Thank you.

Thank you for being here today, Mr. Spratt, especially in response to a last-minute request. Thanks also to your organization for being able to enlighten us.

I do not know if you have had the opportunity to read the Canadian Bar Association's brief, but a number of the elements you mentioned are very similar to what may be found in it. I have some questions for you, just to make sure that I have completely understood what you said.

Essentially, you are saying that a few small questions remain about the narrower definition of “police officer”, though the court did not express an opinion about it. The wording does not clearly state that it could not apply to certain persons. I do not know if you have had the opportunity to see the testimony of the minister and of the Department of Justice officials, but they mentioned that it does not apply to security guards, for example. The fact remains that there may be a need to restrict the definition.

Would you see a major problem if it were accepted as is? As a defence lawyer, do you think that accepting the definition as is would mean that you might end up in court defending cases where the definition is claimed by someone who is not a police officer in the sense of a person employed by the State to keep the public peace?

● (1620)

[*English*]

Mr. Michael Spratt: It took 20 years, from 1993 until the Supreme Court rendered its decision last year, for the constitutional problems inherent in this section as it was to come before the courts. In 20 more years, I don't know whether I will be practising criminal law; maybe I'll be relaxing on a beach somewhere. But when you're dealing with legislation directed at situations that arise very rarely but for which it is very important that they play out fully in court and that the matters proceed to conclusion, if they reach the court stage, it would be our position that you would want to have the legislation as narrowly defined and as specific as possible so as to eliminate the very problem that arose in the Tse case, in which you have very serious crimes that make their way to the court but don't necessarily go to completion because there is an ambiguity in the section.

Certainly, if a situation arose in which we have a “person employed for the preservation and maintenance of the public peace”, that more expansive definition, who isn't necessarily a police officer, or a constable, or a sergeant, or an RCMP officer, it would create problems. Practically speaking, I don't think it is likely to arise, but one would think you would want to have the legislation as clear as possible.

I doubt you would get the constables walking the beat on the street to apply and use this provision. They would probably need, just organizationally, to get approval for the resources and go up through the chain of command. But having said that, why wouldn't you incorporate that into the legislation to have it be a check and balance?

Ms. Françoise Boivin: On section 195, the reporting....

[*Translation*]

I asked the minister and the Department of Justice officials this specific question, because it seemed to me there is a shortcoming in the area of reporting of interceptions under section 184.4. It seems to imply that charges absolutely have to be laid for a report to be required. Section 195 can be interpreted that way. So I just want to be sure that I understand your suggestion.

The Canadian Bar Association suggests adding a requirement to publicly report on “the number of persons whose communications were intercepted under section 184.4, but not subsequently charged with any offence”. In the best of all worlds, you are suggesting adding even more information so that the context in which the surveillance was done can be seen. But according to the answers we received from the people I asked, those cases are already going to have to be reported, if you look at the way in which section 195 is written.

Do you understand it like that or do you have any concerns?

[*English*]

Mr. Michael Spratt: I do have some concerns. In subclause 5(3), proposed subsection195(2.1) requires in its paragraph (a) a reporting of the number of interceptions made; then you have a proposed paragraph after that requiring a reporting of the number of people against whom proceedings were commenced. Now, it's possible, I guess, to tease out from that information, if you have the number of people who are charged and the number of interceptions made, one would think you can do some simple subtraction, to find out that if ten interceptions were made and we have seven cases that were proceeded with, three therefore were not proceeded with.

Unfortunately, if you look through the reports that have already been generated under section 195, you actually can't do that, because from one interception you might have multiple proceedings and you might have multiple people charged. The numbers don't stack up that well, when you look at it.

For example in 2011, under the reporting clause for paragraphs 195(2)(a) and 195(2)(b), we can see that a total of 116 authorizations were made under that section. Then, if you flip to the reporting for paragraph 195(2)(d), the number of persons identified, we actually have 146, which is more than the number of authorizations made. So the math doesn't work out that well, when you look at the reports, which is why I would submit and the CLA submits that especially when you're dealing with this very.... It's going to be used rarely, but it's going to be used in important cases, in serious cases, and it's not judicially authorized. It's a larger intrusion on privacy, for which we would prefer to see a better and a clearer breakdown of the statistics, so that the public and Parliament can see whether this power is being used, how effective it is, and whether there need to be changes, and really to provide that information in a better form than what is already provided in section 195, which deals with those authorizations that have already had a level of supervision through judicial authorization.

● (1625)

Ms. Françoise Boivin: Does it, in your view, have an impact directly on the accused, or is it more that it's construed for Parliament to be aware of what is being done? Does it worry you that it has an impact upon the accused?

Mr. Michael Spratt: Well, practically this section isn't required for constitutionality; it was discussed a little bit in some of the cases that the Supreme Court did an analysis of.

Frankly, with these types of orders.... For the last wiretap case I did, the authorizations were from 2006. If the report were never done, I don't know whether there would really be a remedy for an accused, since it's not strictly required in order to make the section constitutional. But in our submission, it is required in order to have a properly informed public and some oversight of some very extraordinary police powers.

The Chair: Okay, thank you.

We're going to go now to Mr. Scarpaleggia to ask questions.

I'm sorry, I pronounced that name wrong. I married an Italian; I should be able to do it.

Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.): Yes.

The Chair: If the bells go, we'll let you finish your question period.

Mr. Spratt has offered to stick around, and after we come back—I don't know how long he'll stick around—there may be some more questions.

I'm not sure whether you can hear us from British Columbia, but thank you for coming back. There will be another bell, another vote, but we will get back to you. So don't go anywhere.

Ms. Raji Mangat (Counsel, British Columbia Civil Liberties Association): I will not. I will stay right here.

The Chair: We'll get back to you.

Sir.

Mr. Francis Scarpaleggia: I'd like to go back to the part of the bill that restricts the application of section 184.4 to offences in section 183. I take your point that probably any offence that it is worth doing a wiretap with respect to would fall under that list of offences in section 183. What sticks in my mind is the part of the court judgment that says it's really not necessary to tighten the application of section 184.4 to section 183 offences, that things are okay the way they are.

If it weren't the Supreme Court saying this, I would subscribe readily to your position on the matter. But I'm trying to work it through. You have the court saying don't worry about it; then the government says let's make it narrower. You're supporting that position, so I wonder whether you could expand on it.

Mr. Michael Spratt: Ultimately, the discretion about how broad and narrow the Supreme Court seems to be saying is within the purview of Parliament. We're supportive of Parliament taking a narrow and focused, and as least over broad definition as possible when it comes to criminal law.

I don't think, for all practical purposes, it makes very much of a difference. If the law was left more broadly, as the Supreme Court says it could be, I quite frankly don't think it's going to make that much of a difference.

● (1630)

Mr. Francis Scarpaleggia: You can't foresee any harmful offences that wouldn't fall under section 183. Does nothing come to mind for you?

Mr. Michael Spratt: Nothing comes to mind. In the wiretap cases that I've dealt with, all have been offences listed under section 183. I can't look back and put another hat on. I can't put a prosecutor's hat on or a police officer's hat on and say that if only we had had wiretaps for these other offences, things would have been different. I can't see that. It's for that reason that I welcome the restrictive nature of that section.

Mr. Francis Scarpaleggia: In terms of the definition of—

The Chair: I'm sorry to intervene, but the bells are ringing so we'll put you up first when we come back.

Can you stick around for half an hour or so?

Mr. Michael Spratt: I'll stay to answer, for sure.

The Chair: Okay, thank you very much.

Mr. Robert Goguen: We may not get a chance to come back, Chair, until after....

The Chair: The 5:30 bell should be delayed.

Committee members, the worst case scenario is that if we're not able to get back because of votes, we will come back after the votes that happen this evening. We'll understand if both our guests are not here for that.

I will let the clerk know what is happening so he can inform you. We're sorry about this, but the bells are ringing and we are required at the House.

We will suspend and we'll be back as quickly as we can.

● (1630)

(Pause)

● (1720)

The Chair: I call the meeting back to order.

Mr. Scarpaleggia, the time is yours still for questioning our witness from the Criminal Lawyers' Association.

Mr. Francis Scarpaleggia: I don't have much more to ask of the witness. But we will be presenting an amendment on the reporting to Parliament aspect. We think it might be a good idea to require that the report state the total number of interceptions by province and by police force, simply to give more information and to see over time whether one part of the country or one police force is using this section 184.4 provision more than others. I wouldn't pre-judge what the conclusions would be when looking at that kind of data, but we thought that more data couldn't do any harm.

I wonder what your reaction to that might be.

Mr. Michael Spratt: We're in agreement with that. The more data that citizens and Parliament have the better when evaluating extraordinary provisions such as this, especially if you turn your attention to the previous reports prepared under that section and look at the difficulty and the work required to parse the information in that data and have it in a manageable and useful form for the citizens and Parliament. More information is welcome, and the clarity of that report, although it's not constitutionally mandated by the Supreme Court, is of course always of interest when evaluating extraordinary provisions such as this one.

Mr. Francis Scarpaleggia: My last question is on the notion of circumscribing the definition of the police officer empowered, in this case, to use section 184.4, so as to limit the definition to supervisors. I don't know this part of the criminal justice system and how it works. In actual fact, you are saying a supervisor would have to become involved anyway under pretty much any circumstance.

Is it possible that in a very small number of cases this requirement could slow things down? Some have suggested that in using section 184.4, there should be a little more paperwork for the purposes of record-keeping and therefore to be able to see after the fact whether everything was properly done or was justifiable.

The court suggested, if I'm not mistaken, that it wasn't a good idea to force too much record-keeping on the police officer while he or she is implementing section 184.4, because that just slows things down, and the purpose of the section is to act quickly in exigent circumstances.

I'm wondering whether it's possible that in some cases, restricting the definition to “supervisor” could be problematic and could slow things down.

I don't know how the police work, in actual fact. I imagine all police officers, not only supervisors, are trained in wiretapping techniques. Anyway, I thought maybe you could comment on this.

Mr. Michael Spratt: I've never been a member of a police force and I can't speak to institutional policies. It would perhaps be useful for the committee to have information about how these things are normally done. But from the cases I've seen, and from my view of the legislation, which is very extraordinary legislation, the additional oversight of specifying that a supervisor or senior officer is the one to make the decisions, for all practical purposes, that is probably what's going to happen. However, an amendment of that nature would not, at least from my read and my view of the police force, unduly lengthen or hamper the process or undercut the goals of section 184.4.

We see this in other areas of criminal law in which certain officers are designated as operators of breathalyzer machines and intoxalyzers. When dealing with extraordinary powers like this, that additional level of oversight may provide some assurances that it's being used properly and appropriately.

● (1725)

The Chair: Thank you very much.

I'm going to go to our next presenter so that we can get that presentation on the record, if that's okay.

Ms. Françoise Boivin: I was going to ask him something. It would take two seconds.

The Chair: Well, he's willing to stay.

Ms. Françoise Boivin: Oh, he wanted to stay. Excellent.

The Chair: Yes, he'll stay for a few more minutes.

We're going to excuse the witnesses when the bells ring the next time, and then we'll be done with the witnesses.

Let's call on our witness from British Columbia Civil Liberties Association, Ms. Mangat.

Welcome, and thank you very much for your patience. The floor is yours.

Ms. Raji Mangat: Thank you.

Good afternoon. My name is Raji Mangat. I'm counsel at the B.C. Civil Liberties Association. The BCCLA is a non-partisan, non-profit organization based in Vancouver. I am pleased to be here today to speak with you about Bill C-55. Thank you for this opportunity. The BCCLA supports the committee's work in carefully and narrowly framing the process for the use of these exceptional powers being discussed today, and we agree with many of the amendments.

Subject to the concerns raised by Mr. Spratt in his presentation, the BCCLA is pleased to see that Bill C-55 will limit the use of section 184.4 to police officers. This is in our view a sensible and necessary amendment that supports the rationale behind the provision, to provide a means by which law enforcement can prevent serious and imminent harm on an urgent basis.

On that note, the BCCLA is also pleased that Bill C-55 limits the application of warrantless wiretapping to circumstances in which the goal is to prevent the commission of an offence. The addition of a notice requirement to individuals who have been subjected to warrrantless wiretapping brings section 184.4 in line with other provisions in the Criminal Code. The notice requirement provides transparency and serves as an essential check on this extraordinary power to intercept communications without judicial authorization.

The reporting requirement in Bill C-55 is also a welcome amendment, as it will enhance police accountability. Together, the notice and reporting requirements bolster accountability and oversight in the use of warrantless wiretapping, and the BCCLA supports amendments to gather more data.

I appear before you today, however, to alert you to an inadvertent oversight in the amendment that might have unintended consequences. The absence of clear timelines for the use of warrantless wiretaps suggests that there is a genuine risk we may see this provision used to undermine the normal wiretap regime. As the committee's intention with these amendments is to provide the police with a stopgap measure by which to prevent serious harm in urgent circumstances and not to create an alternative to the normal wiretapping regime, it will be clear to the committee that the provision requires the inclusion of a maximum time limit for the duration of a warrantless wiretap.

Section 184.4 is unique. It is one of only two sections in the Criminal Code that permit interception of private communications without a specific time limit and without judicial authorization. The only other provision that allows for this, section 184.1, permits it only with a person's consent in order to prevent bodily harm to that person. So section 184.4 is truly exceptional. It allows for the interception of private communications without judicial authorization, at the sole discretion of officers, prior to any offence or unlawful act having been committed.

As it is currently drafted, Bill C-55 grants police officers a broad and invasive power to intercept personal private communications for an indeterminate period of time. Bill C-55 does not provide guidance to police officers about how long they are permitted to exercise this extraordinary power.

The type of emergency situation contemplated here, one that is so urgent that the police have no time to seek any other form of warranted interception, not even a telephone warrant under section 184.3, is one that will necessarily be brief. If it truly is to be used in exigent circumstances, then by nature its duration must be short. No time limit capping the use of section 184.4 means that the interception could be indefinite and still be perceived as lawful.

For there to exist a power to intercept that is supposed to be based on exigent circumstances but that provides no upper limit on how long that interception may continue would inadvertently undermine the normal wiretap regime already in place in the Criminal Code. A wiretap is by its nature indiscriminate. It captures all communications taking place on the tapped device, including all manner of private, personal, possibly even privileged, confidential communications; communications that may have no bearing on the serious harm that is sought to be prevented; communications with third parties who may have no knowledge of the offence that is possibly going to be committed. Yet these are people who retain a significant interest in their privacy being protected.

● (1730)

Interceptions under section 184.4 are preventive, and therefore in some manner they are also speculative. We must remember that they are being sought without judicial authorization and are intended to be used in the narrowest of circumstances when the police have to act immediately with no time to spare. They are the warrant equivalent of the police entering a home in hot pursuit. But unlike cases of hot pursuit, these cases display no inherent time limitation for the use of the wiretap, and they carry the risk of capturing all sorts of information that is highly personal and private.

A limit to the discretionary power conferred by section 184.4 is necessary to protect privacy rights. Clear wording providing a time limitation on the use of this provision is necessary to support the committee's vision of a carefully and narrowly crafted process for the use of these extraordinary powers. Other wiretap provisions in the code, such as subsection 184.3(6) and subsection 188(2), both of which require a prior judicial authorization, limit the interception to a maximum of 36 hours. In evidence at the lower court in R. v. Tse, the RCMP's “E” division was stated to have a policy whereby warrantless interception was limited to a 24-hour period.

A warrantless interception should be more limited than one in which there is a warrant and prior authorization must be sought. In cases in which there is no warrant, it is all the more imperative that the power not be exercised indefinitely. An inadvertent result of a lack of a time limit in the legislation is that it could result in the de facto operation of two parallel wiretap regimes, one in which prior judicial authorization is sought and one in which the need for a warrant is disposed of in urgent circumstances.

As the committee is aware, the Criminal Code already consists of a thorough regime governing the interception of private communications. A time limit to the use of the warrantless wiretap provision would make it clear that, after the urgent circumstances in which police officers are appropriately empowered to make use of this special power, they are required to revert to the normal regime concerning wiretaps for any continued interception.

The BCCLA urges the committee to explicitly adopt a 24-hour maximum time limit on the use of warrantless wiretaps, as this will support your efforts to craft legislation that appropriately empowers the police to use these powers only in the exigent circumstances within which their use is intended. That will sufficiently protect the privacy rights of Canadians.

Thank you for your time.

The Chair: Thank you very much for your presentation.

We will now go to questions. Madame Boivin, you are first to ask questions of either of our guests.

Ms. Françoise Boivin: Thank you.

For Mr. Spratt I have just one quick question, which I asked you off the record, but I want your answer on the record, because we will be addressing an amendment, and I don't know yet whether it's going to be deemed receivable or not, to modify the text to read "to prevent an unlawful act that would cause". It would go back to "unlawful act" instead of "*infraction*", as it is now called.

I would like your view quickly on this matter. Is that amendment not broadening things for the state a bit more? Would it not be better to have it a bit more restrictive, as it is written right now in Bill C-55?

● (1735)

Mr. Michael Spratt: Yes, I definitely prefer the language as it is now; it's more restrictive. It's the CLA's position that any legislation, especially criminal legislation, should be as narrowly defined and restrictive as is possible to address the ills it seeks to prevent. Again, I am quite pleased to be here today supporting that section of the bill as put forward.

Ms. Françoise Boivin: My next question is for Madam Mangat.

Thank you very much for your patience. It is one of those crazy days here on the Hill, and we have to finish the study of Bill C-55 today.

[*Translation*]

I understand the points you are making about warrantless interceptions under section 184.4. However, we can see Bill C-55 as a response to the Supreme Court decision in R. v. Tse.. The Supreme Court's main difficulty was the following:

> Unless a criminal prosecution results, the targets of the wiretapping may never learn of the interceptions and will be unable to challenge police use of this power. There is no other measure in the Code to ensure specific oversight of the use of s. 184.4. In its present form, the provision fails to meet the minimum constitutional standards of s. 8 of the Charter.

Bill C-55 expressly provides that people be informed that they have been the object of surveillance or that their conversations have been intercepted. Perhaps all the problems surrounding interceptions and electronic surveillance will not be solved. Let us focus on Bill C-55. Does it not address the problem raised by the Supreme Court in that respect?

We have to keep in mind that it deals with very specific cases. According to the wording, conditions must be met.

[*English*]

"A police officer may intercept, by means of any"—whatever means—"(a) the urgency...". They'll have to prove it at some point in time in court if somebody is sued: (a) the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained

The officer must prove that he could not obtain the so-called authorization and that:(b) the interception is immediately necessary to prevent an offence that would cause serious harm to any person or to property; and

(c) either the originator

There are some boundaries. Am I correct in saying so? The person will be notified also, so if at some point in time they think it was

[*Translation*]

…counter to their fundamental rights under the Charter, there could be challenges.

Does the bill not expressly address the Supreme Court's concerns and its request for a correction?

[*English*]

Ms. Raji Mangat: I think the bill does respond to the specific criticism that the Supreme Court set out in its decision. The Supreme Court provided Parliament with some minimum guidance on how to make the provision constitutional.

I think it's up to this committee and to Parliament more generally to seek to make the legislation as clear as possible. I take your point that there are many aspects to Bill C-55 that narrow the scope of the use of this warrantless wiretap provision, and that now there will be notice provided and there is a reporting requirement. These are all things that the BCCLA is very happy to see in this bill.

Our concern is that in those cases where someone is not tried and not brought to court to face charges but has been intercepted, we would like to see some guidance for the police about what would be an appropriate amount of time. We don't know how often and for how long people have been intercepted using this provision because, as you know, there was no reporting requirement before now. We do know about one case.

● (1740)

Ms. Françoise Boivin: Do you agree that they will have to be made aware even though they would not be filing charges? Is that your understanding of the bill?

Ms. Raji Mangat: Yes.

Ms. Françoise Boivin: So at some point in time if somebody knows that they were never criminally charged or anything, aren't you satisfied that the person could go against the state at that point in time or the police force would have done so, to try to have their rights—

Ms. Raji Mangat: I am satisfied that there now is going to be notice to people within a 90-day period from the day on which they were intercepted, but for me, the question isn't, are people then going to be able to get involved in a possibly lengthy legal process to vindicate their rights that were violated at the outset 90 days ago.

I would like to also call your attention to a case from Ontario, R. v. Riley in which the section 184.4 wiretap lasted for four days. Is four days going to be considered a reasonable amount of time to intercept somebody's communications without a warrant? I would think not.

It seems that a 24-hour period kind of already comports with what at least one RCMP detachment has used as their policy, so we don't think that this is an unreasonable amount of time, or that this wouldn't be enough time, and—

Ms. Françoise Boivin: Authorization—

Ms. Raji Mangat: —certainly if the police—

Ms. Françoise Boivin: To get the authorization—

Ms. Raji Mangat: Pardon me?

Ms. Françoise Boivin: To get validated by a court.

Ms. Raji Mangat: Absolutely.

Ms. Françoise Boivin: Have you done a study to see if it varies? I'm from a city, so I cannot foresee not being able to get an authorization at any point in time. There are judges of the peace who can always authorize it. So I don't see the implication of proposed section 184.4 as....

Maybe in a very remote area, where maybe there's a

[*Translation*]

itinerant judge—I think that is what they are called…

[*English*]

it might be a bit more difficult.

So you're talking 24 hours. It might be more complicated somewhere than 24 hours.

Ms. Raji Mangat: Right, and I take your point. I also live in an urban area, and it's almost inconceivable that the police wouldn't be able to get somebody on a phone and authorize a telewarrant.

The Supreme Court did say, in the decision in Tse, that in those circumstances there may not be a need for any affidavit to be filed, that this can be done viva voce, through conversation with the officer.

In my view, if you create a limit of 24 hours and then allow the police to go ahead and seek authorization if they think there is imminent harm and they're going to need to intercept for longer, then you bring this extraordinary power back into the normal wiretap regime that we've had in the Criminal Code for a long time and that is being used across the country seemingly quite well.

My concern is to try to bring this into the regular regime as soon as possible and provide some guidance to officers so that they know this is the upper limit on how long this type of interception can occur.

Ms. Françoise Boivin: Thank you.

The Chair: Are there any other questions for our witness?

Seeing none, I want to thank our witnesses for coming today. We apologize for the interruptions that you had to endure. We thank you for your input.

We will be dealing with this bill later this evening, after another set of votes which will be coming in a few minutes. There are some amendments that are coming forward. We will finish it this evening and then report it back to the House likely tomorrow.

Thank you very much for your patience. Thank you for your input. We appreciate your time today.

Ms. Raji Mangat: Thank you.

The Chair: We'll now suspend.

● (1740)

(Pause)

● (1915)

The Chair: Let me call this meeting back to order. I want to thank everyone for this elongated meeting we're having today. Hopefully this shouldn't take too long.

Thank you to our senior officials from the Department of Justice, who have joined us today, and are here to answer any questions you may have.

Accordingly, we'll go to the clause-by-clause. As per Standing Order 75(1), consideration of clause 1, the short title, is postponed, and it's my responsibility to begin the clause-by-clause with clause 2.

(Clause 2 agreed to)

(On clause 3)

The Chair: We have two amendments, both from the Liberal Party.

Mr. Francis Scarpaleggia: I won't be moving them forward.

The Chair: You're not moving them forward? Okay.

(Clauses 3 and 4 agreed to)

(On clause 5)

The Chair: We have a Liberal amendment on clause 5 and it is in order.

Would you like to move that?

Mr. Francis Scarpaleggia: I would, simply to follow up on a point I raised with the witness, Mr. Spratt. I asked him if it would be useful to require that the reports to Parliament include some additional information, namely the number of interceptions made, including by province and by each law enforcement agency. So all I'm attempting to do here is to make the reports a little more detailed.

The Chair: Mr. Scarpaleggia, thank you for that.

We have questioners.

Madame Boivin, you have a question on the amendment.

[*Translation*]

Ms. Françoise Boivin: I would like to make a comment on the amendment being moved by my colleague Mr. Scarpaleggia. He wants to add the words "the number of interceptions made, including the number of interceptions made in each province and by each law enforcement agency that employs a police officer who made an interception". For me, that is not clear. How is it going to make the bill clearer and better? I have not heard any witnesses talk about this. I have some concern that, if we pass an amendment that is not altogether clear, we could be opening a door.

Perhaps the officials from the department could guide us a little here. Each word is important, especially in this section, and I am not sure that it is clear. How will it go over with the provinces? Does Mr. Scarpaleggia have any information about how it will work with the provinces? Those are my questions. I am just not clear about this.

In addition, this bill is coming to us at the last minute because the government has been dragging its feet. I am not sure this is worth the trouble. It is your amendment, but I am still going to ask the officials from the department.

[*English*]

The Chair: Is the question to the mover or to the staff who are here?

Ms. Françoise Boivin: I don't think I can ask questions of the mover. If he wants to add after that, he can comment.

The Chair: I'll put you down, Francis, to respond.

Who would like to respond to the question?

Karen.

[*Translation*]

Ms. Karen Audcent (Senior Counsel, Criminal Law Policy Section, Department of Justice): We can say this. If the proposed change is made, it will probably bring with it some difficulties in terms of interpretation in the provinces, given the way in which the reporting is divided up. The current bill reflects what is in the Criminal Code at the moment. The Criminal Code talks about designated persons and authorizations. Designated persons can come from a province or they can be federal. That is how the reporting requirement is divided.

The bill proposes that the report be made by the one who initiates the process. If the clause in question refers to the provinces, how will that be interpreted? Will it be interpreted as a requirement for the federal level to produce reports on what comes in from the provincial level? That is not how things work at the moment, nor how we foresee them working in the future.

So the proposal would raise some concerns.

● (1920)

[*English*]

The Chair: Madame Boivin.

[*Translation*]

Ms. Françoise Boivin: That's fine with me.

[*English*]

The Chair: Thank you very much.

Monsieur Goguen.

[*Translation*]

Mr. Robert Goguen: Essentially, this really does not add anything particularly striking. I think it would muddle things in terms of provincial and federal responsibilities in reporting.

[*English*]

We'll be opposing this motion because, quite frankly, just adding the number to be intercepted province to province doesn't really add anything needed. It potentially creates confusion in reporting. Who would have the responsibility of reporting? There would also be a disparity between reporting requirements, between other types of interceptions in section 184.4. In essence, it creates more confusion than benefit, so we will not be supporting the amendment.

The Chair: Mr. Scarpaleggia.

Mr. Francis Scarpaleggia: Both my questions were for the witnesses. I'm trying to understand why this would be complicated. If you're putting together a report, presumably you're getting data from different police forces, different provinces, different attorneys general. Would it come through the attorney general of each province? Is that how they would channel the information?

Ms. Karen Audcent: Provincially it's done through the attorney genera,l and federally it's the Minister of Public Safety.

Mr. Francis Scarpaleggia: Right. So that is already coming in province by province.

Ms. Karen Audcent: How it's designed right now is that each province would report on its own activity. The global numbers that the amendment would seem to be looking for would be already part of the scheme, because each province has to report on the total number of interceptions. The breakdown by police force is not right now something that's done. That would be a new aspect.

Mr. Francis Scarpaleggia: Only the attorney general of that province would have the information about which police force.

Ms. Karen Audcent: Right now, that's the way it's divided up. Each province has information about its own activities, and the federal government has information about the federal activities. The RCMP, which operates in both federal and provincial areas, reports on their provincial activities to the province and on their federal activities to federal.

Mr. Francis Scarpaleggia: Is it not possible to require each attorney general to provide the data according to police force? Is there something legally or constitutionally wrong with that?

Ms. Karen Audcent: The difficulty of doing it the way it's proposed is that people might be confused as to who is receiving the reports. As to your question about whether there's a reason they couldn't provide that information, the only thing I would signal to you is that police forces might be concerned about what the information reveals about operational capabilities, because it's not part of the reporting scheme right now.

Mr. Francis Scarpaleggia: I see.

Ms. Karen Audcent: It's not something that we've ever canvassed with them directly. When information about capabilities regarding intercept was published in the United States, there were repercussions. Organized criminals were taking that information and moving their operations to areas that had less capability. I don't know if police would share a concern like that in this situation or not. It's not something we've looked at.

Mr. Francis Scarpaleggia: I take that point. There's nothing wrong with reporting provincial numbers separately, is there?

Ms. Karen Audcent: How it would work right now is that each province would report its numbers and the federal would report its number.

Mr. Francis Scarpaleggia: There wouldn't be anything wrong with reporting the numbers province by province, would there?

Ms. Karen Audcent: That's how it works.

Mr. Francis Scarpaleggia: It already works that way.

Ms. Karen Audcent: Yes, each province reports its numbers.

● (1925)

Mr. Francis Scarpaleggia: The report that Parliament would get would be by province.

Ms. Karen Audcent: No, the report that Parliament gets is on the federal. The provincial has the responsibility to make their numbers public. It could go to a provincial legislature. But we don't dictate to the province on that level of detail. We just say to make it public. So the province could table it in the legislature. They could put it on the Internet. They can publish it however they see fit.

Mr. Francis Scarpaleggia: But they would have to publish it.

Ms. Karen Audcent: They would have to publish it. That's the requirement.

Mr. Francis Scarpaleggia: I see, but it wouldn't necessarily be reported to Parliament.

Ms. Karen Audcent: Not necessarily, no.

The Chair: Mr. Mai.

Mr. Hoang Mai (Brossard—La Prairie, NDP): Basically, what you're saying is that this amendment doesn't really add much to the reporting being already done, being already public, so we don't really need to have an amendment like this that would give us more information as parliamentarians. Is that correct?

Ms. Karen Audcent: The amendment wouldn't give anything more in terms of the information if what you're looking for is the global number per province. That information is already going to be required as part of the reporting. The information about the level of breakdown of police forces isn't provided right now in any of the reporting schemes.

Mr. Hoang Mai: Maybe Mr. Scarpaleggia can answer if he has consulted with provinces with respect to asking them in terms of work that they would have to do in terms of reporting by agencies. I don't know if that has been discussed with provinces.

The Chair: Are you asking staff that question?

Mr. Hoang Mai: No, it was more—

Mr. Francis Scarpaleggia: No, I haven't done any consultations with the provinces. I'm prepared to actually withdraw this now that I understand that the information is available. It will be available on a province-by-province basis. I'm quite satisfied with that answer. I have no problem requiring the provinces to report these numbers to the federal government, but if it's already out there, then that allays my concerns. I take your point, Madam Audcent, that reporting by police force might provide some information to organized crime that would bolster criminal efforts. I certainly don't want to do that.

Mr. Wayne Marston (Hamilton East—Stoney Creek, NDP): We'd be the first to point it out.

Mr. Francis Scarpaleggia: I will withdraw the amendment.

(Amendment withdrawn)

The Chair: Thank you very much.

(Clauses 5 to 7 inclusive agreed to)

The Chair: Shall the short title carry?

Some hon. members: Agreed.

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill carry?

Some hon. members: Agreed.

The Chair: Shall the chair report the bill to the House?

Some hon. members: Agreed.

The Chair: I'll do that—

Ms. Françoise Boivin: Can you do it on the 14th of April?

Voices: Oh, oh!

The Chair: No, I think I'll do it tomorrow morning at 10 a.m., if you really want to show up.

Shall the committee order a reprint of the bill as amended for the use of the House? Oh, sorry. There's no amendment, so it doesn't need a reprint. I thought we'd just kill a few trees, but I guess not.

Very good. That's it for tonight. I want to thank everyone for coming back.

Just so my colleagues know, we had invited the minister for the 18th to talk about supplementary (C)s, in which Justice has one line. The minister cannot make it at that time. My understanding is that there's a cabinet meeting or some sort of cabinet event.

Based on our discussion, we will go to Parm Gill's bill, Bill C-394. He will be the first hour, with witnesses there, and then we'll have another hour of witnesses on the Wednesday, and then we'll go clause by clause.

What happens with estimates and supplementary (C)s, or any supplementary estimates, is that they have to be presented in the House within three days after the last supply day, which may happen prior to that anyway, so we'll see. I'm not sure when the supply dates are. Those are called by the House leader.

That's what we'll be doing on the 18th. The main estimates have to be back in the House by the end of May, so I think we should set a date or dates to talk about the mains and give the minister lots of notice about when we would like him to appear for those.

● (1930)

Ms. Françoise Boivin: For the supplementaries, are you saying that the minister is not available? I know that there's only one line, but can he not come even for 15 minutes?

The Chair: We have not been able to get him at that time slot on Monday.

Ms. Françoise Boivin: And on Wednesday?

The Chair: We could ask him for Wednesday, but my educated guess is that Tuesday will be the last supply day, so it'll be too late for the supplementaries anyway.

Ms. Françoise Boivin: Can you try again to have him for 15 minutes?

The Chair: We can make the request.

Ms. Françoise Boivin: Even just for an explanation, or even to get some people from his department.

The Chair: It is a transfer. Anyway, I'm not going to explain. I'll have the minister do it.

Ms. Françoise Boivin: Yes, exactly. I think I could explain it too, but—

The Chair: Do you really need him here, then?

Ms. Françoise Boivin: —I think in principle...or officials from his department. I'm not even being difficult.

The Chair: We'll see if we can get somebody to come soon.

Ms. Françoise Boivin: Exactly. I'm giving a lot of possibilities.

The Chair: We will work on that, but—

Ms. Françoise Boivin: Because I know you guys: one day I'll hear in the House that we don't even care and we don't even get the minister to come.

The Chair: I appreciate that.

Ms. Françoise Boivin: I've heard worse.

Mr. Robert Goguen: The officials could come on Monday, if that helps, but the minister can't.

The Chair: Okay. So we will work on having somebody here and we'll spend some of the time on the supplementary (C)s.

Ms. Françoise Boivin: That's excellent.

The Chair: Then we'll go to the private member's bill.

Ms. Françoise Boivin: For me, that sounds great, because for this one I don't need the minister.

The Chair: We'll put half an hour aside for this one item.

Mr. Robert Goguen: We'll invite the officials. We'll confirm that they can come.

The Chair: We'll put aside half an hour, okay?

Ms. Françoise Boivin: That's excellent.

The Chair: Very good, and thank you very much. Enjoy the evening. Enjoy the rest of the pizza.

The meeting is adjourned.