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Tuesday, June 10, 2014

Chair

Mr. Mike Wallace

Standing Committee on Justice and Human Rights

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● (1100)

[*English*]

The Chair (Mr. Mike Wallace (Burlington, CPC)): I'm going to call this meeting to order. That means our friends from the media have to leave with their cameras. Thank you very much.

We're at the Standing Committee on Justice and Human Rights, meeting 30, as of the order of reference of Monday, April 28, 2014, Bill C-13, an act to amend the Criminal Code, the Canada Evidence Act, the Competition Act, and the Mutual Legal Assistance in Criminal Matters Act.

We are televised for the first hour, and we have the pleasure of having witnesses from the Office of the Privacy Commissioner of Canada, Mr. Therrien.

Welcome, Commissioner. You can introduce your guests. You have 10 minutes, and then we'll go to questions and answers.

The floor is yours, sir.

[*Translation*]

Mr. Daniel Therrien (Privacy Commissioner of Canada, Office of the Privacy Commissioner of Canada): Thank you, Mr. Chair.

Good morning, members of the committee.

Thank you for your invitation to present our views on Bill C-13.

With me this morning are Patricia Kosseim, Senior General Counsel, and Megan Brady, Legal Counsel.

Today, I will first address the cyberbullying aspect of the bill, and then turn to the elements that introduce new investigative powers, as both aspects implicate privacy.

The Office of the Privacy Commissioner unequivocally welcomes the government taking action to address online bullying and abusive use of intimate personal images. This is a pressing social issue that is of serious concern to Canadians.

It is clear that Internet use has shifted many of our traditional views about privacy. Better education, legal reform and public discussion must all play a part in addressing the problem. We feel that a holistic approach is needed that includes public awareness—such as the government's new Stop Hating Online initiative—as well as a strong emphasis on digital literacy education.

We think it is important that children, parents and teachers all have access to educational resources that help explain online risks, and teach responsible use of technology and ethical behaviour in online interactions.

The government has signaled a commitment to digital literacy as part of its recent Digital Canada 150 strategy, and we would like to see continued dialogue and outreach to youth and educators as part of that effort.

Cyberbullying clearly presents grave risks to individual dignity and privacy for all citizens who use social networks and online communications. We believe the criminalization of non-consensual distribution of intimate images and the extension of existing Criminal Code provisions related to harassing communications sends a clear signal. We also need to ensure that cyberbullying carries serious consequences.

There are still clearly some complex privacy questions attached to many of the proposed measures, particularly those concerning some of the new investigative powers.We agree that the laws need to be modernized, but we have concerns about some of the specific proposals contained in this bill. Given the technical aspects of these amendments, my office has provided you with a written submission outlining these aspects in detail.

Allow me now to summarize our main concerns briefly.

I would begin by reiterating my view that, given the complexity of the issues you have been presented with in the course of your study, I would recommend dividing the bill into its constituent parts.

From a privacy perspective, the offence provisions are largely uncontroversial and could be dealt with quickly by the House of Commons and sent on to the Senate for review. On the other hand, given that sensitive personal information and significant police powers are at play, the lawful access components deserve very close scrutiny and would benefit from a focused and targeted review.

● (1105)

[*English*]

Our first concern, Mr. Chairman, relates to the issue of thresholds for authorizations. The accessing of data is significantly more intrusive than its preservation. While reasonable suspicion may be an appropriate threshold for preserving data, we believe that Parliament should closely scrutinize the proposed threshold for judicial authorization to access certain data. The divergence from the constitutional default of reasonable and probable grounds requires full explanation and a justification by government, and merits a cautious approach.

There is a wide range of new powers attached to Bill C-13, under which sensitive information would become more accessible to law enforcement and a wide range of other governmental authorities at a lower legal threshold of reasonable suspicion.

Transmission data provide a useful example of how authorities can obtain sensitive records via a reduced legal threshold under the new regime. Reasonable suspicion to access transmission data uses the precedent of the standard currently required to use a dial number recorder, or DNR; however, the information and records comprising "transmission data" as it is defined in the bill can be significantly more revealing than a record of telephone calls.

We believe that suspicion is too low a threshold for such potentially revealing information in a digital era, when every transaction, every message, every online search, and every call or movement leaves a recorded trace. As a result we suggest the bill use the traditional standard of reasonable and probable grounds to believe for the provisions under which access to information would be granted. This is the standard that should hold until a more compelling case for the use of a reduced legal threshold is presented and thoroughly examined.

A second concern is the broad range of authorities that can rely on these powers. The investigative powers and provisions in Bill C-13 see both peace officers and public officers at all levels of jurisdiction in Canada broadly empowered with a whole range of new techniques. While many law enforcement and security agencies have robust accountability mechanisms, other government bodies implicated by this definition have no dedicated review and no transparency requirements. We find this to be of particular concern.

Thirdly, there is the key question of legal immunity. Bill C-13 contains an amendment specifying that a person or organization enjoys legal immunity should they voluntarily preserve data or provide a document at an investigator's request without court authorization. We are concerned that this broad language could lead to a rise in additional voluntary disclosures and informal requests. This is of particular concern with private sector companies that are otherwise prohibited from disclosing personal information without consent under PIPEDA or substantially similar legislation. In essence, this could amount to permissive access without court approval and oversight.

Ultimately then, we believe Canadians expect that their service providers will keep their information confidential, and that personal information will not be shared with government authorities without their express consent, clear lawful authority, or a warrant.

[*Translation*]

Finally, there is the question of accountability and transparency mechanisms for new forms of surveillance.

There are no requirements in the bill to report on the extent of the use of any of the new powers. I feel that this is of serious concern, especially given the range of officers who can exercise these powers and the possible effects of extending legal immunity. In many other jurisdictions, ongoing reporting is part of the oversight structure. We believe Canada should have similar ongoing measures for reporting.

Thank you for your attention.

I look forward to any questions committee members may have.

● (1110)

[*English*]

The Chair: Thank you, Commissioner, and thank you for providing us with your notes in writing so that every committee member has them.

Our first questioner is from the New Democratic Party, Madam Boivin.

[*Translation*]

Ms. Françoise Boivin (Gatineau, NDP): Thank you, Mr. Chair.

Commissioner, I want to thank you and your officials for being here. I am sure they have had more time than you to read Bill C-13, but I still appreciate your contribution to our study.

On Friday, the Supreme Court is supposed to render a decision in *Matthew David Spencer v. Her Majesty the Queen*. Do you think that could affect the work we are currently doing?

Mr. Daniel Therrien: Ms. Boivin, if that's okay with you, I will ask Ms. Kosseim to answer this question.

Ms. Patricia Kosseim (Senior General Counsel and Director General, Legal Services, Policy and Research, Office of the Privacy Commissioner of Canada): Thank you very much.

The Spencer ruling, which is supposed to be handed down this Friday, will definitely clarify the parameters, interpretation and application to the private sector of paragraph 7(3)*(c.1)* of the Personal Information Protection and Electronic Documents Act, or PIPEDA. We will then find out what disclosure parameters or requirements will apply to companies that disclose personal information to the police without a warrant.

In particular, this decision will clarify the relationship between paragraph 7(3)*(c.1)* and the immunity provision currently contained in the Criminal Code. This is relevant because the Supreme Court's ruling could impact the new provision that would replace the current one.

Ms. Françoise Boivin: Excellent, thanks.

You, at the office of the commissioner, probably analyzed Bill C-30 at the time. How does Bill C-30 compare to Bill C-13?

Ms. Patricia Kosseim: We are pleased to see that the provision that would have allowed warrantless access to personal information, and especially to subscriber data, has been removed and is no longer on the table. That is clearly an improvement.

However, we did have reservations over some provisions of Bill C-30 that are also part of Bill C-13. I think the commissioner has done a good job of presenting our concerns.

Ms. Françoise Boivin: Regarding your request that the bill be split—which is something we called for a number of times—the minister or the government always respond that the two parts go hand in hand. In other words, if we want to end cyberbullying—including the distribution of intimate images—we have to be able to give police officers powers and modernize those powers. In my opinion, splitting the bill does not mean that we want to prevent that piece of legislation from being passed. However, that may imply that we need to conduct a bit more comprehensive of a study.

In committee, I heard some government members say that we have heard from numerous witnesses. I do not claim to be an access to information expert when it comes to information transfers concerning litigants and others. This involves several pieces of legislation. I do, however, get the impression that we are carrying out a very narrow study that focuses strictly on the Criminal Code, while many other statutes could also have an impact in that regard. That may be something our study will be missing.

I don't know whether you are following what I am saying, but I would like to hear your comments on this major source of concern I have in terms of the work we are currently doing in committee—the work on the second part.

Mr. Daniel Therrien: Mr. Chair, our comments are very much in line with the questions asked by Ms. Boivin.

I heard Minister MacKay say that the two parts go hand in hand. If I understand correctly, those types of crimes cannot produce concrete results in terms of charges and other considerations without the legislation governing investigative methods being modernized. I agree, and so does the commissioner's office. Laws on investigative methods should be modernized in a modern world where technological tools, including the Internet, are now used. We fully support the objective of modernizing legislation that governs investigative methods.

However, our concerns relate to the specific methods suggested in the bill. In particular, those methods require fairly detailed and advanced technical notions. We don't think an undue delay would be caused if experts were asked to look into those technical issues, possibly before a House committee. That way, parliamentarians could be better informed of the concrete consequences of legislative measures presented before them and could provide useful investigative tools that would not unduly limit Canadians' privacy.

● (1115)

Ms. Françoise Boivin: I don't know whether you have examined this issue, but newspaper articles are being published around the world about all kinds of events, such as the Snowden case. Some providers of IT, Internet and telecommunications services appear to be trying to tighten their criteria so as to protect their clients. Governments do have some involvement in that. We feel that certain governments, like that of Canada, are trying to obtain as much access as possible, while providers are mobilizing to maximally protect the information.

Am I wrong to feel that the government is using any means available—be it Bill S-4, Bill C-13, or others—to expand access to information involving Canadians without too much difficulty?

Do you have anything to say about that?

[*English*]

The Chair: Very briefly....

[*Translation*]

Mr. Daniel Therrien: Just quickly, I would say that the government appears to be bringing forward legislation that modernizes those legislative measures in order to modernize investigative methods. That seems like a legitimate approach to me. However, we still have some concerns in terms of the specific methods proposed.

Despite the government's laudable goals, I encourage this committee and the House to ensure that privacy interests are well protected.

[*English*]

The Chair: Thank you for those questions and those answers.

Our next questioner is from the Conservative Party, Mr. Dechert.

Mr. Bob Dechert (Mississauga—Erindale, CPC) Thank you, Mr. Chair.

[*Translation*]

Good morning, Mr. Therrien. Welcome to our committee.

[*English*]

Congratulations on your appointment. We're very pleased to see it.

You mentioned a few things you would like to see changed in Bill C-13. One of your comments was that you would recommend that the bill be split into two parts so further study could be done. Frankly we've heard that from a few witnesses.

Have you followed the debate in the House of Commons on this bill?

Mr. Daniel Therrien: I have to some extent, but not as closely as my colleagues.

Mr. Bob Dechert: Okay. Your colleagues certainly can inform you on that.

Are you familiar with the testimony that has been provided to the committee in their last several meetings on this subject?

Mr. Daniel Therrien: Some, but again my colleagues would be better placed.

Mr. Bob Dechert: I can fill you in. There have been 12 hours of debate in the House of Commons on this bill so far. It includes 21 members of the New Democratic Party, which is more than 20% of their caucus. It includes 11 meetings of the committee, including today's. That's 22 hours of study in committee, so the total is 34 hours of debate and study.

The committee has heard from 21 special interest groups: 10 victims or groups representing victims, the police, professors of law, the Canadian Civil Liberties Association, the Canadian Bar Association, the Criminal Lawyers' Association, the Canadian Association of University Teachers, and I could go on. I think you catch my drift.

Who else would you recommend this committee hear from, and I can tell you virtually all the witnesses requested by all parties have been heard from including you. How much more study do you think should be required on this bill and the investigative powers provisions of this bill?

● (1120)

Mr. Daniel Therrien: Thank you for the question.

Mr. Chairman, from the list you describe I readily accept there has been a serious examination of this bill. At the same time I see that many people who appeared before you have suggested the bill be divided, and I would suggest it is perhaps for the reasons I alluded to earlier. Although there have been many sessions on the principles, and perhaps more than the principles, I think there is a need for a more fulsome discussion about the practical impact of this legislation from a technical perspective so parliamentarians and Canadians can know precisely what kind of information would be disclosed through things like voluntary disclosure and so on.

It's more of a technical discussion on the practical import so parliamentarians and Canadians can have a more informed conclusion on this bill.

Mr. Bob Dechert: I asked the same question of the Canadian Bar Association, and they had no suggestions on who else we should hear from. I can tell you, sir, each of the points raised in your comments about your concerns have been raised by several witnesses on several occasions, including all those special interest groups and law professors I mentioned.

Are there any other aspects of this bill you want to tell us about that haven't been mentioned either in the House of Commons or here at committee?

Mr. Daniel Therrien: No. I think it would be useful to have law enforcement agencies and telecommunications companies explain the practical import of what is before you. That essentially is my message.

Mr. Bob Dechert: On Thursday, May 15, you may know the committee heard from Mr. Jim Chu of the Canadian Association of Chiefs of Police, who is the Chief of Police of Vancouver; the Ontario Provincial Police; the Royal Canadian Mounted Police; and the Halifax Regional Police. Each of those agencies told us these investigative powers are necessary, as drafted, to allow them to properly investigate cybercrimes.

Are there any other police organizations you think we should hear from?

Ms. Megan Brady (Legal Counsel, Office of the Privacy Commissioner of Canada): Certainly, the information the police associations have provided provides one slice of the picture. The other information you heard through previous committee hearings was the fact that the Internet Association, representing the organizations actually collecting the data, feels that the data is so sensitive that a higher legal threshold is required.

From that perspective, our view is that given that these organizations are the ones collecting it, they're the closest to it and they understand the sensitivities the best.

Mr. Bob Dechert: The Internet Association was here and they did make those comments.

Mr. Therrien, are you familiar with the cybercrime working group report on cyberbullying?

Mr. Daniel Therrien: I am not at this point.

Mr. Bob Dechert: Well, I'm sure your officials are. It was made up of experts representing each of the attorneys general of each of the provinces and territories. In June 2013 they issued a report entitled “Cyberbullying and the Non-consensual Distribution of Intimate Images”. They said the following:

> Cyberbullying occurs in cyberspace, and the electronic evidence needed to obtain convictions of cyberbullying must be obtained from Internet service providers, content hosts and other social media services. The ability to preserve and obtain such evidence is crucial to every online investigation, and currently Canada’s investigative powers are not robust enough to address the demands of cyber investigations. In this regard, Canada lags far behind its international partners.

They made a number of recommendations about investigative powers in recommendation four of the cybercrime working group. Are you familiar with recommendation four or any of the recommendations of the cybercrime working group?

● (1125)

Mr. Daniel Therrien: Not at this point.

Mr. Bob Dechert: I can tell you that it includes data preservation demands and orders, new production orders to trace a specified communication, new warrants and production orders for transmission data, and other amendments to existing offences as well as investigative powers that will assist in the investigation of cyberbullying and other crimes that implicate electronic evidence.

We are implementing the cybercrime working group report. These are experts from each of the provincial attorneys general saying this is what's needed in our Criminal Code to properly investigate cybercrimes like cyberbullying. Without these, they say the cyberbullying provision of non-consensual distribution of intimate images would be a toothless power.

Do you agree or disagree with them?

The Chair: A fairly quick answer.

Mr. Daniel Therrien: I would repeat that we are in favour of legislation modernizing techniques. My understanding is that the group in question, although they were recommending to modernize legislation on transmission of data, preservation of data, etc., did not make any specific recommendations on the legal thresholds, for instance, for accessing data. That is a key point that I think warrants further review.

The Chair: Thank you for those questions and answers.

Mr. Casey, from the Liberal Party....

Mr. Sean Casey (Charlottetown, Lib.): Thank you, Mr. Chair.

Mr. Commissioner, I think it's been made pretty clear to you that the government has no intent of splitting the bill as you and many other witnesses have suggested, and certainly, that last line of questioning would confirm the government's attitude on that.

You, sir, sent a letter to the committee yesterday and said that if the government isn't inclined to split the bill, that one of the things they should do is to incorporate a statutory review on a regular basis. I know that you've had the opportunity to have a look at the amendment proposed by the Liberal Party that suggests that very thing.

What advice do you have for me or for the committee with respect to that amendment, given that it appears to be entirely consistent with what you wrote to the committee yesterday?

Mr. Daniel Therrien: I actually have not seen the exact language of the motion, but absolutely, as we said in our submission filed before the committee yesterday, we are of the view that if Parliament decides not to divide the bill, which would be ideal from our perspective, the next best thing would be to adopt a clause that would require a parliamentary review of the new statute after a period of time. We suggest five years. I don't know what your motion calls for.

Certainly, when legislation was amended in other countries, in Europe, for instance, government authorities found, after similar legislation was adopted, that there were amendments to be made after the fact, that certain lessons had been learned, and that it would be useful to have a clause requiring a parliamentary review after a certain period, so that these lessons are learned and are the subject of parliamentary debate and possibly amendments after a certain number of years.

Mr. Sean Casey: Thank you.

The amendment that's been put forward calls for a comprehensive review of the provisions after three years.

Would you find that unreasonable?

Mr. Daniel Therrien: That is not unreasonable at all.

Mr. Sean Casey: Thank you.

You referred in your opening remarks, and also in your letter of yesterday, to the lack of transparency reporting by telecommunications companies, which is something we've talked about a fair bit at committee. We've heard that it's actually the norm among Internet providers and that Facebook has a robust transparency reporting requirement. You said that there are no requirements in the bill to report on the extent of the use of any new powers.

Again, the Liberal Party has proposed an amendment to the bill to require that a person engaged in providing telecommunication service to the public shall respect the requests made by peace officers to voluntarily preserve data—this is the data for which they are going to be given an immunity—and that they submit an annual report to the minister, if you will, a transparency report.

I would like your view on that proposed amendment, sir.

Mr. Daniel Therrien: We would agree that a requirement to report would be a useful addition to the legislation. We have referred in our submission to an example of a report on electronic surveillance that has been around for quite a while, since 1977 I understand. We think that kind of report would be very useful. It is quite detailed on the types of crimes for which it is used, and the types of methods used that would enhance transparency significantly.

● (1130)

Mr. Sean Casey: Again, Mr. Commissioner, we very much appreciate your comments and your point of view on the immunity that's proposed in section 487.0195. This is something we've talked to a lot of witnesses about.

One thing that has confused me, even after all the debate and all the evidence we've heard, is that we still haven't found one person, one organization, who said that this immunity is something they were asking for. But to your point earlier, we haven't heard from telecommunications companies in spite of all the time we've spent.

With respect to the immunity granted for the non-consensual distribution of subscriber information without a warrant, your recommendation is that this immunity not go forward, that it be deleted or clarified or changed. Do I have that right?

Mr. Daniel Therrien: Yes.

Mr. Sean Casey: What would be the impact if it were deleted? As you know, we've proposed an amendment to delete that immunity.

We have heard from the minister and we've heard in questions from the Conservatives that the immunity doesn't really mean much. It's already in the code, which begs the question as to why they put it there in the first place.

What would happen if it were simply struck, as we've suggested?

Mr. Daniel Therrien: One of our concerns with the amendment to the immunity clause through Bill C-13 is that it takes away a current requirement that immunity exists in the course of investigations, and that is no longer the case in the clause being proposed to you. To us, that is a concern.

Certainly, to broaden the immunity clause sends a strong signal to telecommunications companies, to enhance the kind of voluntary disclosure that is currently occurring. To us, that has serious privacy implications.

If the purpose of the clause is essentially to codify what existed, the status quo so to speak, then why is it needed? If it is adopted, it does seem to send a signal to enhance, to augment voluntary disclosure—something we are concerned with for privacy reasons.

The Chair: You have one more minute, Mr. Casey.

Mr. Sean Casey: Can you help solve this mystery? We have not had a telecommunications company or a telecommunications industry association appear before the committee. We have not had anyone who has said they have asked for this immunity.

Can you help us understand who wanted this? To your knowledge, is this something the telecommunications companies, which we haven't heard from, were asking for?

Mr. Daniel Therrien: I'm still new to the job. I don't know, but perhaps one of my colleagues can answer that question.

Ms. Patricia Kosseim: No, I don't think we have any personal knowledge of their position or who actually requested that the immunity clause be amended in this way.

Mr. Sean Casey: Nor do we.

Thank you.

The Chair: Thanks for those answers.

Our next questioner from the Conservative Party is Mr. Seeback.

Mr. Kyle Seeback (Brampton West, CPC): Thank you, Mr. Chair.

Thank you, Mr. Therrien, for giving us your views on this, which are important. We've heard lots of competing views on this legislation, particularly with respect to transmission data, the scope of what's included in transmission data, and of course what the standard should be to access transmission data. I think that's what you get when you do an in-depth study like this. You get those competing views and those competing voices.

When you talk about transmission data, what you said in your opening statement was that—and I'm paraphrasing to an extent—transmission data equals personal data. That's why you believe it should be only accessed at the higher threshold of reasonable grounds to believe, right?

Mr. Daniel Therrien: Yes.

Mr. Kyle Seeback: Reasonable and probable grounds....

Now, we had the RCMP and various other police officers here at committee. In their testimony they said:

> The transmission data is very precise. It contains no content on transmissions. It does not reveal substance, the meaning, or the purpose of the communication. It more or less identifies a type direction data—the date, duration, and so forth.

So transmission data is actually a very narrow snippet of metadata. Would you not agree with that, or do you disagree with the police?

● (1135)

Mr. Daniel Therrien: I would say that transmission data goes beyond information that was found in the old phone books. It has that, but it has more than that. It may not have the content of conversations, which is a good thing, but it has information about the location of individuals, sites being consulted, several types of information, which are way beyond what was found in phone books, that I do think is personal data and deserves higher protection than suspicion.

Mr. Kyle Seeback: You don't agree with the police, though, when they say it's very precise. You disagree with that. I'm summarizing. You think it's much more than that.

Mr. Daniel Therrien: It's more than phone book data, for sure, and it contains important sensitive personal information.

Mr. Kyle Seeback: But you would be okay if it was at a different threshold, right, which was reasonable and probable grounds?

Mr. Daniel Therrien: Yes.

Mr. Kyle Seeback: Then you're okay with that.

Mr. Daniel Therrien: Yes.

Mr. Kyle Seeback: You're clear on that. But then you also said in your statement that this should be the standard unless a case has been made to, as in your words, lower the standard. So if you think a compelling case was made, then reasonable suspicion is an okay standard.

Mr. Daniel Therrien: Mr. Chair, that goes back to the suggestion that I'm making for further review of the specific details of what this bill entails from a practical perspective.

You're referring, sir, to testimony by the police, which tends to understand the definition of transmission data in a very narrow way. I don't doubt that this is their perception, but we think that transmission data does include, again, some elements of sensitive information, and it is exactly that point I think that deserves further examination.

Mr. Kyle Seeback: I understand that.

So we heard from all kinds of people. We heard from the RCMP. We heard from the OPP. We heard from the Canadian Association of Chiefs of Police. We heard from the Halifax police chief. We heard from victims who are also lawyers. They all said clearly and unequivocally that the appropriate standard for obtaining transmission data is reasonable grounds to suspect.

So I take it what you're suggesting is that all of those people who have come to this committee have not made a compelling case that we need this information. Despite victims' groups, police officers, all these people saying we need this, you're saying that's not a compelling case.

Mr. Daniel Therrien: I have not, I must admit, read their testimony, being new to the position. I do think that there are issues that still require some examination. Perhaps Madame Kosseim would like to elaborate here.

Ms. Patricia Kosseim: Thank you for the question.

Yes, there were many witnesses, as has been pointed out, who have testified before the committee. Quite a number of them as well have advocated in favour of the higher threshold. So in fairness, there are competing views here.

One area that I think would benefit from greater light is the viewpoint of expert technologists. Even internally, in our office, we were having discussions right up until this morning about the technological implications of transmission data and how to contain it in the way that is attempted in these amendments, but it is very difficult to contain that in real, concrete terms.

I think this is the kind of study that was being suggested—a more practical, concrete examination of the data. Elements put together in the aggregate over the long term and amassed over aggregate periods of time and volume can reveal much more personal information.

● (1140)

Mr. Kyle Seeback: But to go back, you're saying you disagree with the police that they need these powers. They haven't made, in your mind, a compelling case to have these powers. Is that correct?

That's what you're basically saying; this is a sort of yes or no.

Mr. Daniel Therrien: If you don't mind, it will be just a little more than yes or no.

We agree that the legislation on techniques needs to be modernized. We think, though, that there is a need for further study of the practical consequences of what is before you. That is our position.

In the meantime, until such time as this further study is completed, we err on the side of reasonable grounds to believe. It is possible that a case can be made for some transmission data to be accessed on a lower threshold, but absent that demonstration, we err on the side of reasonable grounds to believe.

Mr. Kyle Seeback: [*Inaudible—Editor*]...a police officer or a crown attorney to investigate and prosecute these types of cases?

Mr. Daniel Therrien: I have not.

The Chair: That is Mr. Seeback's time.

Thank you, Mr. Seeback. Thank you for those questions and answers.

Our next questioner, from the New Democratic Party, is Madame Péclet.

[*Translation*]

Ms. Ève Péclet (La Pointe-de-l'Île, NDP): Thank you very much, Mr. Chair. I also want to thank the commissioner for joining us today.

I just wanted to echo what my colleague said.

It's great that we have had several hours of debate in the House of Commons and in committee. However, I think it's important to mention that most of the experts agreed on one matter. They felt that the study of the bill should have been carried out in a more comprehensive manner when it comes to the provisions on access to information. Unfortunately, we could not examine the provisions of other bills, especially Bill S-4.

Although we have carried out a good study, we could have considered the issue in more depth. We could have taken into account other bills that could have an impact on the application of Bill C-13.

My first question is about your presentation. You talked about a lack of accountability mechanisms. In fact, Bill C-13 contains no oversight mechanisms or provisions for notifying individuals whose data has been shared.

For instance, section 184.4 of the Criminal Code was struck down by the Supreme Court, not because those mechanisms made it possible to share information obtained without a warrant through wiretapping, but rather because that section did not provide for any oversight or notification mechanisms. The people who were tapped by police officers were never notified of that fact.

I will make a comparison with section 188, which allows for a quick examination by a judge owing to the urgency of the situation. So the Supreme Court ruled that section 188 was valid, since it included an oversight mechanism.

Could you expand on the requirement, in Bill C-13, to comply with, on the one hand, section 8 of the Canadian Charter or Rights and Freedoms and, on the other hand, the ruling of the Supreme Court that calls for such a mechanism?

Mr. Daniel Therrien: We are clearly in favour of such mechanisms.

As for your legal question, I will ask Ms. Brady or Ms. Kosseim to answer.

Ms. Patricia Kosseim: I will begin.

I just want to say that the amendments that have been made to increase accountability and transparency, under the provisions you mentioned, are indeed good news. That's a nice example of amendments that have been made to increase transparency, while recognizing that the objective was worthy.

So we feel that this is a good model. It could be reused in this case to increase transparency and accountability, while making it possible to pursue the bill's important objective.

I don't know whether Ms. Brady would like to add anything.

● (1145)

Ms. Ève Péclet: Do you have any examples of oversight mechanisms that, in your opinion, could be useful in this case?

Ms. Patricia Kosseim: The court's permission is clearly very important. What we are discussing today is the threshold, which has to be assessed and examined very thoroughly. However, the court's participation is already a major factor.

The kind of report we talked about is also an important transparency and accountability factor that could enlighten Parliament and Canadians on the practices and their magnitude on a daily basis.

Ms. Ève Péclet: Commissioner, in your presentation, you mentioned the threshold for obtaining a warrant. You said that the criteria police forces should meet to obtain personal data could be, for instance, reasonable and probable suspicions or grounds to believe an offence would be committed.

Do you think we should use the bill currently before us to make the criteria for obtaining warrants more exacting, or should we simply increase the criteria for data preservation? Do you think the same criterion should apply to everything?

Mr. Daniel Therrien: As I explained in my opening remarks, when it comes to the preservation of certain data, we feel that reasonable grounds to suspect are sufficient. The idea is to preserve potential evidence that could be useful in investigations.

We feel that the problem has to do with access to information owing to the sensitive nature of certain information items that could be disclosed. We think that reasonable grounds to believe should apply instead of reasonable suspicion when access requests are made.

Ms. Ève Péclet: But the bill does not contain any provisions on data destruction, for instance. So an individual would not be notified that their information may have been disclosed on grounds of reasonable suspicion. In addition, there would be no obligation to destroy that data.

Do you think a relevant provision should be added, so that an individual's privacy can be respected?

Mr. Daniel Therrien: The preservation of evidence applies to a certain period of time. Once that period has elapsed, the data is destroyed. However, when it comes to access, you are talking about something else.

I don't know whether my colleagues have anything to say about data destruction. As for the preservation of evidence, unless I am mistaken, the evidence is destroyed by default once the set period has elapsed.

[*English*]

The Chair: Okay.

I'm sorry, that's your time. Thank you very much, Madam Péclet, for those questions.

Our next questioner from the Conservative Party is Mr. Dechert.

Mr. Bob Dechert: Mr. Therrien, you have mentioned a couple of times the so-called immunity provision in the bill. I believe it is proposed new section 487.0195 of the Criminal Code.

Are you familiar with section 25 of the Criminal Code of Canada?

Are you familiar with some of the case law under section 25, including the decision in R. v. Ward, the judgment of Mr. Justice Doherty of the Ontario Court of Appeal?

Mr. Daniel Therrien: No, I am afraid not.

Mr. Bob Dechert: Are you familiar with the Spencer case that Madam Boivin—?

Mr. Daniel Therrien: In a general sense I am, yes.

Mr. Bob Dechert: All right.

We previously heard from Mr. David Butt. He represented the Kids' Internet Safety Alliance. He's a former prosecutor and has argued many cases before the Supreme Court of Canada.

He said a number of things about the bill. He said that we should all ask precisely what pre-existing privacy rights bill C-13 takes away, and the answer is, precisely none.

He went on to say that the bill does not expand police powers to obtain information without a prior court order. So any suggestion that Bill C-13 authorizes more invasive warrantless cyber-snooping is an urban myth.

Specifically on the point of section 25, he asked whether the police can ask ISPs to provide voluntarily information about the Internet profile. Again, the answer is very little—just a subscriber's name and address. That is all.

It was his view that this bill, and the provision we're talking about, simply codify section 25 and the case law. Do you agree or disagree with that?

● (1150)

Mr. Daniel Therrien: I would go back to the view I expressed earlier; that is, that this provision, we find, would send a signal to telecommunications companies to voluntarily disclose to law enforcement agencies more information than is currently the case. Our view is that this kind of activity should take place under defined parameters, under clear legal thresholds, with transparency mechanisms, and with reporting mechanisms.

The concern we have with this particular provision is that it lacks these standards or safeguards, which we think are very important.

Mr. Bob Dechert: The Department of Justice officials appeared before our committee and made the case that section 25, taken with case law and R. v. Ward and other cases, simply codifies and does not expand the law on this point.

Do you agree with the Department of Justice officials?

Mr. Daniel Therrien: I would ask Ms. Kosseim to answer this, please.

The Chair: Go ahead, Ms. Kosseim.

Ms. Patricia Kosseim: Thank you, Mr. Chair.

Thank you for the question.

There are two competing views on the impact of the immunity clause. One is that it is inserted for greater certainty and in fact doesn't change anything. On the other hand, a competing view is the question that is before the Supreme Court right now, and that is whether this immunity clause in its current form creates a new source of lawful authority for the purposes of PIPEDA, our enabling legislation.

Mr. Bob Dechert: So you would agree that it is arguable, and it is an argument that many people hold, that this provision does not expand the law.

Ms. Patricia Kosseim: We argued that in fact it should not be interpreted or applied that way. In that case, it was actually interpreted and applied in a way to create a new source of lawful authority.

Those are the two competing arguments before the court, and we will await their decision to see what the outcome is.

Mr. Bob Dechert: That's fair enough. So will we all.

Are you familiar with the testimony of Mr. Gilhooly, who testified before the committee a few weeks ago?

Mr. Gilhooly is a former corporate counsel. He was also a victim. I believe he was formerly corporate counsel to a large media company. When I asked him what, without this provision, he would advise, if he were advising his client whether or not they should comply with a police request, his response was that as corporate counsel his job is to protect the client, so he would advise not to disclose.

Just so you know, I too was in that position many times—advising corporate clients—and I can tell you that my instinct would be to do likewise, to not disclose if there were any possibility that the company could be held liable, criminally or civilly.

What is your comment on that?

Ms. Megan Brady: I think fundamentally the issue boils down to the lack of clarity around what the provision in PIPEDA 7(3)(c.1) amounts to in practice. In our view the current protection against liability in section 25 is probably sufficient and the best source for directing energies toward clarifying the law would be better interpreting 7(3)(c.1).

Mr. Bob Dechert: I would say in response, as a former corporate counsel, I disagree with you, and so did Mr. Gilhooly, and so, I think, many other corporate counsel.

Mr. Therrien, I would like to ask you about the time required to obtain a search warrant.

Mr. Butt, in his testimony to the committee, gave us an example. He said if we had to go to get the subscriber name and address via a search warrant, which he contends is what is generally provided by Internet service providers when requested by law enforcement, it would take routinely 60 days to do that.

How quickly do you think investigators need to act to obtain the information about who sent the cyberbullying message, perhaps with an image attached, in the Internet age? How quickly do the authorities need to act in your opinion?

● (1155)

The Chair: Mr. Commissioner.

Mr. Daniel Therrien: I don't know the exact time period. I will say that preservation orders are meant to protect that period to obtain that information. I don't know if my colleagues have anything to add further to that, but that's what preservation orders are for.

The Chair: Thank you very much. Thank you for those questions and answers.

Our last questioner is Mr. Jacob from the New Democratic Party.

[*Translation*]

Mr. Pierre Jacob (Brome—Missisquoi, NDP): Thank you, Mr. Chair.

I want to thank the witnesses for joining us today.

My first question is for the commissioner.

A recent statement titled "Ottawa Statement on Mass Surveillance in Canada", which was signed by many professors and representatives of various organizations, indicates that the powers of the Privacy Commissioner should be proportional to the quasi-constitutional nature of privacy rights.

Do you agree with that?

Mr. Daniel Therrien: I think that the Privacy Commissioner's powers should be considerable and that privacy rights are of a quasi-constitutional nature.

Mr. Pierre Jacob: Okay.

Do your current resources and powers enable you to adequately protect the privacy of Canadians?

Mr. Daniel Therrien: Allow me to pass this question to Ms. Kosseim, since I have only been with the office for three working days.

I have an amazing team behind me. However, I cannot say at this point whether it is large enough.

Mr. Pierre Jacob: In 2010, your office published a reference document titled "A Matter of Trust: Integrating Privacy and Public Safety in the 21st Century".

So an analytical framework was developed to assess measures that affect both public safety and privacy protection. As you said, the goal of the exercise was to strike the right balance.

Do you think that Bill C-13 provisions are consistent with the rights guaranteed by the Canadian Charter of Rights and Freedoms?

Mr. Daniel Therrien: I have not performed sufficient analysis to comment on the constitutionality of this bill. However, this morning, we have shared some of our concerns about privacy protection, and I will leave it at that.

I think the bill could be improved to take those concerns into account.

Mr. Pierre Jacob: On a priority basis, what amendments do you suggest to the committee?

Mr. Daniel Therrien: We told you about four concerns.

The issue of legal immunity is very important. We feel the relevant provision should be removed or amended in accordance with the written submissions we made yesterday.

The reporting and accountability mechanisms are also very important.

Mr. Pierre Jacob: Thank you.

Do you share—and we would like to know why—the concerns raised by the information and privacy commissioners of Alberta, British Columbia and Ontario, who felt that Bill C-13 would authorize and potentially encourage the private sector to disclose more data without a warrant to law enforcement by granting extended immunity with regard to such practices?

Mr. Daniel Therrien: Of course, every commissioner has their views on this matter. My opinion is in line with that of others in two areas.

The criminalization of cyberbullying makes sense. As I was saying, that's a good move. However, like some commissioners, I am worried by certain measures related to the modernization of investigation laws.

I think my colleagues and I are on the same page.

● (1200)

[*English*]

The Chair: Thank you very much.

[*Translation*]

Mr. Pierre Jacob: Thank you very much, Mr. Therrien.

[*English*]

The Chair: Thank you for those questions and those answers.

Mr. Commissioner and his supporters, thank you for joining us today. We are going to clause-by-clause after this.

Mr. Commissioner, based on my reading I understand that you have 32 years of experience in the public service. Most people after 32 years would be looking for retirement. Congratulations on your retirement job as the Privacy Commissioner of Canada.

Voices: Oh, oh!

The Chair: Welcome and congratulations on that appointment. Good luck in the future.

Mr. Daniel Therrien: Thank you. I don't see that as retirement at all. I intend to be active. Thank you.

Voice: Oh, oh!

The Chair: We're going to suspend while we get ready for the next piece on clause-by-clause.

● (1200)

(Pause)

● (1205)

The Chair: I'm going to call this meeting back to order. We are going to do clause-by-clause on Bill C-13. I want to thank each and every one who has submitted amendments on this and on time. I know there were a few slight changes last night that needed to be made.

I also want to welcome Ms. May to the table, who has submitted pieces for amendment as a private member—she might like to call it something else—and we will deal with them as we go. As a member she will be, when it comes to.... As common practice has been I think, Ms. May will get a minute to talk about her amendment that she's proposing on Bill C-13. I might even have started it, I'm not sure, in a previous bill.

I will read out where there is a conflict. So when I say a "line conflict" that means that if this passes, the others will be out of order —not passable because we've already done something with that line. I should let the committee know that I'm not ruling on any amendments as out of order to begin with. They were all in order, so there you go. Thank you for that.

Ms. Françoise Boivin: Good job. We work hard.

The Chair: But there are consequential amendments that if one passes or fails, a whole bunch of others fail, and I'll try to read those out. I'll likely have to go somewhat slowly on a few things to make sure I'm on track.

Mr. Bob Dechert: Mr. Chair, I have one important piece of committee business.

The Chair: Yes, sir.

Mr. Bob Dechert: If memory serves me correctly, tomorrow is Madam Boivin's birthday. So I'd like to, on behalf of our side and everyone here wish her *bon anniversaire*.

The Chair: Happy birthday.

Ms. Françoise Boivin: Thank you.

Some hon. members: Hear, hear!

The Chair: It's 35 again, Madam Boivin?

Ms. Françoise Boivin: If you'd permit me, thank you for the gift of having to debate prostitution on the day of my birth.

Some hon. members: Oh, oh!

Mr. Bob Dechert: It was the very least I could do.

The Chair: Okay, we will go back to the business at hand. Is everybody okay and ready? If I make an error, make sure you point it out to me.

The short title we postponed to the end of the discussion.

On clause 2 there are no amendments put forward. Shall clause 2 carry?

(Clause 2 agreed to on division)

(On clause 3)

The Chair: On clause 3, we have a whole slew of amendments. We're starting with NDP-1. Just to let you know, there is a line conflict with PV-1 and PV-2. *Parti vert* —I'm guessing that's what PV stands for. If NDP-1 is adopted, PV-1 and PV-2 cannot proceed.

I'm assuming the floor is yours, Madam Boivin.

[*Translation*]

Ms. Françoise Boivin: Thank you, Mr. Chair.

We did propose an amendment to clause 3 of the bill, which aims to replace lines 20 to 23 of subsection 162.1(1) of the Criminal Code. The amended provision begins as follows: "Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person...". The rest of the paragraph would be replaced with the following: "with the intent of injuring, embarrassing, intimidating or harassing that person, is guilty".

The reason for the amendment is very simple. A number of people have talked about this, but the representatives of the Canadian Bar Associations presented the most compelling argument. They talked about the notion covered under clause 3 of Bill C-13, which states the following: "...knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty".

According to them, it would be preferable to refocus on the notion of mens rea, or criminal intent.

That is more or less what various ministers called for at the federal-provincial-territorial conference. They wanted an offence to be created for the distribution of the image. In some sad events that have taken place in Canada, the image was mainly used to intimidate, harass, harm or embarrass.

I think the legislation would be clearer, and it would be easier for law enforcement officers and crown prosecutors to issue an indictments if clause 3 did not create a legal uncertainty.

● (1210)

[*English*]

The Chair: Thank you.

Are there any other comments to this amendment?

Mr. Dechert.

Mr. Bob Dechert: Thank you, Mr. Chair.

The government opposes this amendment. In our view, adding the specific intent element here would make the offence more difficult to prove, as it would require the prosecutor to also prove the intent of the accused. We heard testimony from a number of victims, especially about people distributing these images recklessly, and we believe that is the appropriate standard. In several cases we heard from the parents of several of the individuals who unfortunately are no longer with us.

It is not at all clear to me and to the government that with this change in the definition that there would be the ability to get a conviction in those particular cases. So on that basis, in order to protect the rights of the persons whose images are being distributed in a case where there is a reasonable expectation of privacy and the individual is reckless as to whether or not this would embarrass and harass the individual who is depicted in the image.... We think that it would be quite a significant watering down of what we're intending to do here and on that basis we'll be opposing this motion.

Thank you.

The Chair: Thank you.

Ms. May has her hand up. I need unanimous consent of the committee to let Ms. May speak to each amendment. She can speak to her own, but not to others. She's not part of this committee.

Ms. Françoise Boivin: That's all right with me.

Mr. Bob Dechert: Mr. Chair, I could make a suggestion. Because of the volume of amendments we have to deal with and the volume of provisions we have to deal with today and on Thursday, I would suggest that Ms. May perhaps be given an appropriate period of time to introduce all of her amendments.

The Chair: We do that by clause. She gets to do it as the clause comes up.

Do you want Ms. May to speak to this amendment or not? If I don't get unanimous consent I'm not allowing it because she's not a committee member.

Mr. Bob Dechert: Then we don't—

Ms. Françoise Boivin: It's not as if she's going to get 30 minutes to speak. Since she has a couple of amendments that are going to fall or just—

The Chair: This particular one does not.

Ms. Françoise Boivin: Didn't you say that two and three had an impact...?

The Chair: On line conflict it does, but that doesn't mean it.... If this....

Ms. Elizabeth May (Saanich—Gulf Islands, GP): [*Inaudible—Editor*]...clarification.

The Chair: You are next.

On amendment NDP-1, all those in favour?

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Now, for the Parti vert, Madam May, the floor is yours.

Ms. Elizabeth May: Thank you, Mr. Chair.

Because it seems to me that perhaps some members of committee have in the last number of months forgotten why it is I'm here, I just seek to remind you that this wasn't my idea. This process is not a process I sought. I'm summoned here based on a recommendation and in fact a motion that was passed by this committee, and an identical motion that has occurred in 20 other committees.

I've just run here from the committee that was looking at Bill C-22, where I had to provide clause-by-clause amendments in order to ensure that I not be precluded from the rights that I have on paper in O'Brien and Bosc. But for those motions passed, which I imagine came to us from the PMO, since they were identical in content in 20 different committees.... But for those, I could present my amendments as substantive amendments at report stage. That's why I'm here, and that's why I get to speak to every one of my amendments. I appreciate the opportunity.

I'm very taken with what the Canadian Bar Association has said about the current drafting. That's why my amendment is identical to that of the NDP. It's the language recommended to us. Madam Boivin and I share a number of things. Our birthdays are right next door to each other, and on top of that, we are both lawyers. The advice of the Canadian Bar Association is not something to be dismissed out of hand.

The concept of criminal responsibility involves *mens rea*. It involves an intent. The way the bill has been drafted it's so broad that in the example used as a hypothetical by the Canadian Bar Association, someone could be found criminally responsible for having lent somebody else their laptop, someone who, in a series of events, opens files and ends up incidentally sharing images with no intent on the part of the person who owns that laptop. The Internet age opens up numerous possibilities for inadvertence—not with negligence and not with intent—so when the term cyberbullying is a very clear term with an intent to hurt others, that has to carry through with intention to the various aspects of criminality. That's why my first amendment, Green Party-1, is an amendment that seeks to ensure we don't inadvertently ensnare completely innocent people in criminal liability.

● (1215)

The Chair: Are there further questions on PV-1?

Madam Boivin.

[*Translation*]

Ms. Françoise Boivin: I just want to urge the government once again to think about this issue before rejecting this extremely important amendment out of hand.

Victim representatives have appeared before our committee. They said it was extremely important for this part to be adopted, but also for this part to be able to withstand scrutiny in court. The danger we are seeing in this, and we are not just trying to be

[*English*]

a pain in the butt of the Conservatives. It has been deemed by specialists so *floue*, so grey, so not clear, and so easy to contour, that I'm afraid all the work the government thinks it's doing on cyberbullying will be completely wiped out, just because of....

As a lawyer, I can see so many ways of getting out of clause 3 of this legislation that it's unreal that the government doesn't take a moment to reflect and realize the importance of maybe addressing the real issue, which is distributing intimate images for the reason of really harassing, intimidating, embarrassing, and annoying. Those are words that say what this says. When I look at the case of Rehtaeh Parsons, and when I see the case of Amanda Todd, I can see that you have no problem seeing exactly that in those cases.

It's a big danger. I think it's a big red light for the government to maybe not be too bullheaded and insist that it has to be their own words or no words at all. Honestly, for all the victims, I think it's something that I truly believe in. If we want to do our work well, at least on that part, we have to make sure that we're not giving ammunition to people to play lawyers in front of the courts.

The Chair: Thank you very much.

Mr. Dechert.

Mr. Bob Dechert: Thank you, Mr. Chair.

The government, I can assure Madam Boivin, has considered this very carefully and very significantly, and as with her previous amendment, which is very similar to this one, our purpose is to protect the privacy of the person depicted in that intimate image. We believe this amendment would provide a narrower protection to those people, and we believe it would place an additional burden on the crown to prove the intent of the accused. On that basis we will not be supporting this motion.

The Chair: Seeing no further discussion, the question is on PV-1

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Madam May, on PV-2....

[*Translation*]

Ms. Elizabeth May: Thank you, Mr. Chair.

[*English*]

Looking at this amendment, we're still on page 1 under clause 3, revising proposed section 162.1. What my amendment does is remove the words—this is relating to consent—"or being reckless as to whether or not that person gave their consent to that conduct". Again, this speaks to advice from the Canadian Bar Association that there's an unreasonable onus being created here on the person who receives an image to ascertain consent before sharing the image.

The purpose of the bill is to criminalize those people who are using images for the purpose of bullying someone. If you don't know who is in the image, the chances are you're not aware of their identity, so how can you be a cyberbully if you've received their image? The burden in the current Internet age to determine consent is really quite an unreasonable onus, and the advice from the Canadian Bar Association's brief was to remove this language. That's what my amendment PV-2 tries to do.

● (1220)

The Chair: Thank you.

Is there further comment?

Mr. Dechert.

Mr. Bob Dechert: Simply to say, Mr. Chair, that the government doesn't support this. We believe the recklessness standard is the appropriate standard.

We heard a number of examples from witnesses, including those who were connected to victims, about the recklessness standard. On behalf of UNICEF, a hypothetical is put forward that a person would loan his friend his laptop computer on which he had stored intimate images of his girlfriend. He would tell that individual, "Don't look at those photos, don't do anything with them," and then the case that he hypothesized was that the individual who had received the use of the laptop computer would then look at the pictures, contrary to the instructions, and distribute the images. That was the example that UNICEF gave as their concern about how it might ensnare young people.

Frankly, we think that is a very clear example of the kind of thing that we're trying to protect here. Recklessness is a well-established mental state in criminal law. We don't believe it criminalizes careless, inadvertent, or negligent behaviour, and as one of our witnesses said, he holds his 10-year-old son to the recklessness standard on a regular basis and he thinks that's appropriate.

On that basis, Mr. Chair, in order to protect the rights of those whose images are distributed on the Internet, we will not be supporting this amendment.

The Chair: Thank you for that.

Our next commenter on PV-2 is Madam Boivin.

[*Translation*]

Ms. Françoise Boivin: I would have thought that, because the government would not adopt amendments NDP-1 and PV-1, it would have been more open to amendment PV-2.

The provision could lead to many situations where it would be difficult for crown prosecutors to move these files forward and approve them as indictments. This offence is liable to five years of imprisonment for recklessness. I can already see the debates that will arise from those concepts.

Once again, the government is playing with fire. It will just support defence mechanisms that will clog up the courts, instead of doing what it told victims it wanted to do. I think it's unfortunate this concept will not be removed, as it is probably the most criticized aspect of the first part of Bill C-13.

We will see what will come of this in the near future. I hate to say in two or three years, as that makes me feel so old. At that point, I could say, I told you so.

[*English*]

The Chair: Finally, Mr. Casey....

Mr. Sean Casey: To be very brief, Mr. Chair, I really think that on matters like this, involving the standards of proof, we ignore the advice of the Canadian Bar Association at our peril.

The Chair: Thank you for that.

Just a reminder, we're on PV-2.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Madam May, PV-3 is next. I would remind the committee, there's a line conflict with PV-4 and PV-5. If PV-3 is adopted, PV-4 and PV-5 cannot proceed.

Ms. Elizabeth May: Thank you, Mr. Chair.

● (1225)

The Chair: You have one minute.

Ms. Elizabeth May: What I thought I'd like to do, picking up some of what I'm sure Mr. Dechert would appreciate, is that since PV-3, PV-4, and PV-5 speak to the same problem, I'll speak to it as a policy problem. You can take it from me that amendments PV-3, PV-4, and PV-5 speak to this policy problem. I will attempt not to go over a minute, and I won't try to accumulate it to three minutes. That's my intention.

What we have here again, the problem that we've referred to in the previous two attempts on PV-1, PV-2, and also NDP-1, is that the bill is overly broad. The way it's drafted, it could ensnare activities that are not within the scope of the purpose of the bill. So we don't, for instance, want to criminalize journalists if they are publishing an image that's in the public interest, if it's the kind of normal operation of journalists to publish images of, for instance, public figures, celebrities. That's not cyberbullying. We may have other public policy reasons for why we don't like that behaviour, but that's not the intent of the act.

This was identified by the Canadian Bar Association in their brief, that the way that Bill C-13 is currently drafted we could actually create a chill in media that when images are in the public interest they can't be published for fear of cyberbullying. The way in which amendments PV-3, PV-4, and PV-5 are drafted is to ensure that no person shall be convicted of an offence under this section, if they're essentially doing it as part and parcel of what we would consider normal journalism. We may not enjoy seeing those images. Goodness knows, I'd have been happy never to have seen Rob Ford smoking crack in his basement. But that kind of image, not that it was an intimate image.... But you can see the direction of the thought.

We really don't intend under this bill to criminalize journalists, and those amendments fix that.

The Chair: Thank you for that.

Anything on PV-3?

Mr. Dechert.

Mr. Bob Dechert: Thank you, Mr. Chair.

The government will not be supporting this amendment. The existing defence of public good in our view would likely cover any situation that this amendment deems to address. As Ms. May will no doubt know, the defence of public good currently appears in two other places in the Criminal Code, in subsection 163(3) with respect to obscenity, and section 162(6) with respect to voyeurism. It's been interpreted to mean necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest.

In our view, replacing the well-established defence of public good with a new statutory defence of public information or public interest would simply add confusion and remove clarity from the law. On that basis, we will be opposing the amendment.

The Chair: Anything else on PV-3?

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Now, those were line conflicts, not conflicts of the whole clause, so PV-4 and PV-5 are still on the floor.

On PV-4, Ms. May, anything further?

Ms. Elizabeth May: I consider I've spoken to all three, Mr. Chair.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: On PV-5....

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: On PV-6, Madam May....

Ms. Elizabeth May: Thank you, Mr. Chair.

This amendment deals with the problem that, again, the way in which the bill is drafted fails to take into account the fact that the world of Internet means that some of those people who could be caught up in this bill have no possible way in which they would know of the content. Specifically, Internet service providers could be found culpable under this act when they simply are neutral service providers. They may in fact provide a search engine that indexes content on various websites. They don't know what's on it. They're not existing for the purpose of disseminating intimate images without consent. We think this criminal liability on neutral service providers.... This was certainly the view, I want to emphasize, of the Canadian Bar Association, which believes that this provision is actually so unreasonable that it wouldn't survive a charter challenge or charter scrutiny. You certainly can't find moral culpability or *mens rea* on the part of Internet service providers who could get caught up under this section.

So my amendment number 6 attempts to deal with that problem by following the advice that the bar association made at page 8 of their brief, that no person who is a provider of telecommunications services, information tools, and so on, shall be convicted of an offence under this section.

The Chair: Thank you, Ms. May.

Ms. Boivin.

[*Translation*]

Ms. Françoise Boivin: Mr. Chair, if you will allow it, I would like to ask my colleague a question about her amendment PV-6.

When she talks about telecommunications services providers, am I to understand that this group does not include Facebook?

I understand that the amendment creates subsection 5, but I am wondering about something. Is this not establishing something of a right?

For instance, I am thinking of the comment made by Rehtaeh Parsons' father. He said before the committee that they had tried to have an image removed from its location, but that Facebook representatives told them the image did not violate the service's community standards.

Is this amendment not too narrow? I am trying to understand it better.

● (1230)

Ms. Elizabeth May: I thank my colleague for her question.

[*English*]

The Chair: Yes, the floor is yours.

[*Translation*]

Ms. Elizabeth May: The goal of my amendment is to protect Internet companies against crime. However, tools must also be provided to protect young people like Rehtaeh Parsons.

[*English*]

It seems to me that what we want to do is not criminalize the organization, the Internet service provider of a social media site like Facebook, but have the tools to ensure that Facebook removes images if required to do so. The way proposed section 162.1 now reads, it's not a question that they won't act, but it's a question that their very existence in disseminating images could result in criminal sanctions. That's why my amendment is exactly taken from the bar association brief. I do appreciate the opportunity to clarify. I think we absolutely have to have the tools. On social media sites, the criminality isn't placing the image there, not in the functionality of a service provider for social media sites.

The Chair: Mr. Dechert.

Mr. Bob Dechert: This government does not support this amendment. In our view the proposed new offence does not expose Internet service providers to liability unless they meet all of the elements of the proposed offence. I'll remind Madam May that the elements include that, in addition to the transmission being non-consensual, the prosecutor must prove that the accused knew that the image was an intimate image, that it depicted nudity or sexual activity, that it was taken in private, and that it was an image in which the depicted person had a reasonable expectation of privacy.

I can't imagine, Mr. Chair, how a telecom provider, an ISP provider, would know all of those things if they weren't somehow implicated in trying to use that image for the exact purposes that we're trying to protect people against in this bill. So on that basis, we would not be supporting the amendment.

The Chair: Okay, thank you for that.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Madam May, PV-7....

Ms. Elizabeth May: Thank you, Mr. Chair.

This amendment goes to the issue of the lifetime punishments for certain offenders. Again this is a concern that was raised in evidence from the bar association, but my own concern is the absolute prohibition on the Internet for prolonged periods of time. A blanket prohibition to be lawful shouldn't exceed five years. The reason for this is that access to the Internet is not a trivial access in our society. Actually a lifetime barrier from using the Internet could, for instance, preclude that individual from ever applying for jobs if the job application site is an Internet-based site.

I'm all in favour of punishments that suit the crime and making sure that someone who's cyberbullying is properly and appropriately punished, but surely we should have some exemptions. So that's why this amendment speaks to "subject to any conditions or exemptions that the court considers to be necessary to avoid causing undue prejudice to the interests of the offender". I think that explains it.

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

Are there any comments?

Mr. Dechert.

Mr. Bob Dechert: Thank you, Mr. Chair.

The government will not be supporting this amendment. As Ms. May will know, the court can, in making any prohibition order, weigh the individual personal circumstances of the accused as part of the sentencing process. She'll also know that any condition can be subsequently buried at a later date if there are circumstances in which the change would be desirable, to take her point about getting a job or something of that nature.

Typically, I find it kind of ironic looking at this particular amendment, Mr. Chair, because typically the opposition is telling us to grant greater discretion to the court. In this case they're actually asking us to take discretion away from the court.

So, on that basis, Mr. Chair, we will not be supporting this amendment.

● (1235)

The Chair: Is there any further discussion?

Seeing none, I'll call the question on PV-7.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Amendment PV-8, Madam May....

Ms. Elizabeth May: Thank you, Mr. Chair.

This is the same concern. PV-8 ensures that the prohibition may be for any period that is "reasonable", and then it goes on to itemize them.

Just in response to Bob for a moment, I don't think what was being proposed, or what is being proposed here, reduces the discretion of the court. It is asking the court to make an order in what it views as "reasonable", and in the previous amendment, "conditions or exemptions that the court considers to be necessary".

Again, there's a certain amount of judicial discretion, but it's the role of Parliament to give the judiciary guidance in applying this law. I don't think any of us would want somebody who's been found criminally responsible, has been appropriately sentenced, and has served their sentence to be unable to continue to basically rehabilitate themselves and have the opportunity to access such things as jobs through the Internet.

That's why the court, in my amendment, is given the opportunity to consider a prohibition based on what's reasonable under the circumstances.

The Chair: Are there any comments on PV-8?

Mr. Dechert.

Mr. Bob Dechert: Mr. Chair, the government opposes this amendment. We don't believe this will have a substantive impact on the interpretation of the provision.

As Ms. May will know, the Criminal Code—in section 380.2, for example—uses the word “appropriate” in similar circumstances. In our view, changing “appropriate” to “reasonable” would create an inconsistency within the Criminal Code and would cause confusion.

On that basis, we will not be supporting this amendment.

The Chair: Is there any further discussion?

Seeing none, I will call the vote on amendment PV-8.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: We're now on amendment NDP-2.

Just so the committee understands, assuming that amendment NDP-2 is moved, that deems PV-9 also moved, because they're absolutely identical. So whatever happens to NDP-2, we don't need to deal with PV-9.

I'll turn the floor over to Madam Boivin, because I'm sure she'd like to speak to her amendment.

[*Translation*]

Ms. Françoise Boivin: Thank you, Mr. Chair.

Since my birthday is approaching, I am feeling generous. So I would say that great minds think alike.

Amendment NDP-2 is in line with what we have heard over the last few minutes. The committee has heard testimony of various groups that have appeared before it.

It is nice that the Parliamentary Secretary to the Minister of Justice —who has more often than not introduced bills that provide mandatory minimum sentences—is giving the court a degree of discretion.

I am not talking about minimum sentences here, but rather about the idea of imposing a cap. That's the objective of Bill C-13. It was a good idea to stipulate “for any period that the court considers appropriate”, but it would be much more reasonable to specify that this period could not exceed five years. In this context, that would also provide guidance.

[*English*]

The Chair: Is there any further comment?

Mr. Dechert.

Mr. Bob Dechert: Mr. Chair, the government does not support this amendment. As in the previous amendment, we believe it does unduly restrict the court's discretion. We can certainly imagine cases, in terms of distribution of child pornography and other things, where five years would not be a sufficient length of time. We would want the court to prohibit the continuing distribution of such images by that individual beyond that period of time. It restricts judicial discretion.

Further, as I mentioned earlier, any condition imposed on the offender can be buried in the future, upon application to the court, where there's a change in circumstance that renders the change desirable.

On that basis, we will be opposing this amendment.

● (1240)

The Chair: Thank you.

A final word, Madam Boivin...?

[*Translation*]

Ms. Françoise Boivin: With all due respect, I would retort to the parliamentary secretary that clause 3 that follows ensures that people can always return to the court to change the conditions. The legislation does not take away a judge's discretionary power, but the judge can order an individual not to use the Internet for a maximum period of five years. If other requirements are involved, that individual could always come back before the court.

That's probably more prudent. The presumption of innocence is a fundamental principle the government sometimes forgets, but this clarification will guarantee that, across Canada—which is a large country—justice will be served in the same way, regardless of the location. While providing the court with broad discretion and the possibility to make an individual appear again in order to change the conditions imposed on them, this meets all the criteria set by the government and establishes a safeguard. That approach is more consistent with the state of the law in Canada.

[*English*]

The Chair: Thank you very much.

Any further discussion on NDP-2? Seeing none, all those in favour?

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: This means that PV-9 is removed, of course.

There are no more amendments on clause 3 and there were none that carried.

(Clause 3 agreed to on division)

(Clauses 4 to 7 inclusive agreed to on division)

(On clause 8)

The Chair: Now we're at NDP-3.

Madam Boivin, the floor is yours.

[*Translation*]

Ms. Françoise Boivin: The objective of the amendment is to establish a timeframe. Under the circumstances, it is important to make the provision more reasonable. This was confirmed by various witnesses concerned with a balance between the offence created and tool modernization.

Clause 8 should be amended by replacing line 3 on page 7 with the following:

> related to the execution of the authorization, that the urgency of the situation requires the warrant or the order and that it can be reasonably executed or complied with within 60 days.

This amendment aims to restore balance and show once again that, while condemning the distribution of images and taking into account tool modernization, the authorities respect privacy and act in a reasonable manner.

[*English*]

The Chair: Thank you for that.

Monsieur Dechert.

Mr. Bob Dechert: Mr. Chair, the government does not support this amendment. In our view, it is counterproductive to other proposals in Bill C-13 that seek to harmonize the periods of validity of warrants and orders that are used in conjunction with wiretap authorizations.

As Madam Boivin will know, in the context of section 184.2 of the Criminal Code with respect to consent wiretaps, which are primarily used for undercover operations in the organized crime context, such a limitation makes little sense and would create an inconsistent approach between consent wiretaps and regular wiretaps. On that basis, we will not be supporting this amendment, Mr. Chair.

● (1245)

The Chair: Anything further? Seeing none, all those in favour?

(Amendment negatived [See *Minutes of Proceedings*])

(Clause 8 agreed to on division)

(Clauses 9 to 11 inclusive agreed to on division)

(On clause 12)

The Chair: We have an amendment. It's NDP-4 and it's from Mr. Garrison.

I'm going to give you the floor, Mr. Garrison, to speak to your amendment.

Mr. Randall Garrison (Esquimalt—Juan de Fuca, NDP): Thank you very much, Mr. Chair. I'm very pleased to be here today.

When I saw Bill C-13, it was interesting to note that clause 12 opened up the hate crime section of the Criminal Code to add additional grounds for prohibited discrimination. It seemed to me that this would be an appropriate place to have an amendment to add “gender identity” to the hate crime section of the Criminal Code.

This is half of my private member's Bill C-279, which passed in the House of Commons more than a year ago and is stuck in the Senate. It's also half of the previous private member's bill, which passed in the previous Parliament. So twice the will of Parliament has been to include gender identity in the hate crime section of the Criminal Code.

When this matter was raised with the minister when he was here, I believe that he said to Madam Boivin that he had no problem in principle with this. So I was optimistic that we could make this amendment in this committee and until just a few minutes ago a majority of the members present at this committee had voted in favour of the bill. But there appears to have been some changes on the government side, so now I am concerned. Those who are the most subject to hate crimes in our society are transgendered individuals and it is more than past time that we add this to the hate crime section of the Criminal Code. It will certainly serve the purposes of public education and of denunciation, and help provide some protection to a group who, as I said, have some of the greatest difficulties in our society.

I'm hoping the changes on the other side of the government don't indicate an intention to defeat this amendment because that would be to thwart the will of Parliament as twice expressed before. So I'm remaining cautiously optimistic.

Thank you.

The Chair: Thank you, Mr. Garrison, and thank you for your optimism.

Is there anything further?

Mr. Dechert.

Mr. Bob Dechert: Thank you, Mr. Chair.

We do not support this motion at this time on this bill. As Mr. Garrison will know, there was no witness testimony heard by the committee on this point. He's pointed out that this is contained in Bill C-279, which is currently before the Senate. Therefore we believe that it would be inappropriate to bring it here where we haven't heard witness testimony. We should allow the Senate to complete its work on that matter.

So that's our position and on that basis we will not support this amendment at this time.

The Chair: Okay, thank you.

Madam Boivin.

Ms. Françoise Boivin: I'm utterly shocked because honestly I think this is, again with all due respect, a lame excuse. The minister was very clear. I took the time to ask the minister and when the minister tells you that he has no problem with the concept of amending to make sure that it complies with what has already been adopted by Parliament, to now put it back to the fact that it's in front of the Senate.... I'm really shocked. I mean, why not do right now what we already all agreed to do? So it's just making sure that we won't have to come back later to just make sure that the two laws

[*Translation*]

are saying the same thing. Seriously, either the minister said something false when he appeared or something else...

I am being told that we have not heard from witnesses concerning this, but I think the best witness is the Minister of Justice, and he accepts the amendment. If that is not enough for the government members, I would have a few words for the Minister of Justice regarding his credibility with his colleagues.

[*English*]

The Chair: Okay.

Mr. Garrison.

Mr. Randall Garrison: Thank you very much.

With regard to the parliamentary secretary's comments about not hearing witnesses, it was in fact this justice committee that heard the witnesses on my private member's bill in this same session of Parliament. So the witnesses have been here. The testimony has been in front of this committee.

As for the fact that the bill's in front of the Senate, precisely what happened with the first version of this bill is that it died in the Senate without the Senate acting on the bill. So the Senate has now had my private member's bill for coming up on 16 months and has failed to pass the bill.

It would be, I guess, a way for the government to hide their opposition of this bill by having it defeated by inaction in the Senate. But as I said, the House of Commons has twice pronounced on this very point. This committee heard the evidence during this session of Parliament, and I would urge the government to reconsider that position.

● (1250)

The Chair: I see no other interventions on NDP-4.

Those in favour of NDP-4?

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Shall clause 12 carry unamended?

(Clause 12 agreed to on division)

(Clause 13 to 19 inclusive agreed to on division)

(On clause 20)

The Chair: The next one is NDP-5 and it is moved by Madam Boivin.

[*Translation*]

Ms. Françoise Boivin: Thank you, Mr. Chair.

People who are here will remember having heard a number of witnesses, all of whom were experts in this area, including those from the Canadian Bar Association, say that the terms used in Bill C-13—namely “peace officer” and “public officer”—were much too broad and should be narrowed. For the entire clause of the bill, the term “peace officer” should be understood in the sense of paragraph (*c*) of that term's definition contained in section 2.

I had some fun during a discussion—but I no longer remember on which bill—just reading all the instances of “peace officers” and “public officers”. It was quite unbelievable to see on how many pages those expressions appeared.

It would be important to narrow the scope of those expressions, so that they would apply mostly to law enforcement. The goal of the amendment is to define those terms within the meaning of section 2, paragraph (*c*).

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

[*English*]

Mr. Dechert.

Mr. Bob Dechert: Thank you, Mr. Chair.

The government does not support this amendment. In our view, there's no reason to unnecessarily limit the definition of peace officer to those listed in paragraph c.

In doing so, it would mean that military police, customs officers, fisheries officers, and a number of other peace officers, who currently enforce other acts, would no longer have these tools available to them. Part of our intention here is to update the Criminal Code to the digital age and to give all of our peace officers, who have to properly enforce the criminal laws of Canada, the same tools. It would be counterproductive to limit that definition. I would also point out that, although mayors are included in the definition of peace officer, it's always up to a judge to decide whether an application is appropriate, or whether he or she will issue the order in the circumstances.

On that basis, Mr. Chair, the government will not support this amendment.

The Chair: Madam Boivin.

Ms. Françoise Boivin: I think Mr. Dechert just made my point on why we should have divided the bill. Honestly, it starts.... We haven't decided on the title of the bill, but when you see that its short title is actually the “protecting Canadians from online crime” act and it's mostly to create the infraction of distributing intimate images, the argument that I just heard is about fisheries and different aspects. I understand that we use the opportunity to modernize pretty much every tool under the sun, but that was the point. It's not necessarily how the bill was presented and what its objective was supposed to be. In the words of the mother of Amanda Todd, that's the danger of this whole bill, that it's distracting from the essential and central part of what we were supposed to do. Those are such good examples.

My amendment was to try to centre it a bit more toward what we were supposed to be doing, and honestly, if we want to change all the tools at the disposal of

[*Translation*]

of peace officers and public officers

[*English*]

for any type of legislation, that proves also the point of the Privacy Commissioner that we just heard.

We need to have a much more thorough and inclusive type of study, a study with the point of addressing cyberbullying, because it has been deemed the cyberbullying bill. Again, I'm hearing about fisheries and different types of things. That's what I find the biggest danger with this bill. I don't think we have, around the table, or even with the witnesses that we heard, any expertise on how things are done in all those other fields, because we were studying cyberbullying, which was in front of us. This is not what it's about. I find it's a bit sad that we don't at least focus, and if we want to do other modernizing, maybe we should send it to the right committee to do so and not through the justice committee on a cyberbullying bill.

● (1255)

The Chair: Very briefly, Mr. Dechert....

Mr. Bob Dechert: Mr. Chair, I think Madam Boivin did point out in her comments that the title of the bill is "protecting Canadians from online crime", not simply "cyberbullying".

For example, with the military police, about Canadian Armed Forces personnel sending these kinds of images from their computers while on a mission overseas, the military police would need this power, not simply the Canadian domestic police forces. In a similar vein, customs officers investigating terrorism acts, which she also knows is part of the purpose of this bill, would limit them from having the same powers. As she can see, those are legitimate reasons for those officers to have these powers. In addition, we heard from many witnesses on this point and I think it has been thoroughly considered.

On that basis, again, we will not be supporting this amendment.

The Chair: Okay.

I want to give notice to all committee members that we have about three minutes left in this time slot for today. Otherwise, I need a motion to extend, or we talk about something else, or we finish this on Thursday morning.

Madam Péclet.

[*Translation*]

Ms. Ève Péclet: Regarding our amendment, it is important to mention something. During his press conference, when he introduced Bill C-13, the Minister of Justice clearly said—and is still clearly saying—that this bill was only supposed to legislate a specific issue—cyberbullying. I am referring to a number of provisions here.

It is important to remind the committee that the Minister of Justice said several times that Bill C-13 was not an omnibus bill and that its only goal was to legislate in the area of cyberbullying. I put questions to police associations and, according to them, it was clear that law enforcement should be left up to peace officers.

However, the parliamentary secretary told us that not only peace officers would be in charge of enforcing the new legislation. Military police officers and customs officers would also have that responsibility. What the parliamentary secretary is saying—and I see that he is nodding in agreement—is that the provisions of Bill C-13 will not be used only by police officers, but also by other individuals who have not necessarily received the required training.

Various witnesses I questioned on this issue told me that people who do not have the required training to exercise these powers should not be called upon to do so. I am now worried because we are told that the powers vested in the police will be much wider and will also be exercised by federal public officers covered by the definition of the term "public officers", set out in section 2.

I am sounding the alarm today. People who are concerned about the exercise of these kinds of powers should know that they will be conferred on all public officers and not only on peace officers.

● (1300)

[*English*]

The Chair: Okay.

Is there any further discussion on this amendment?

Very briefly, then we can call it a day.

[*Translation*]

Ms. Françoise Boivin: To add to what Ms. Péclet just said, I would like to specify that, every time we asked that the bill be divided, the government—through the minister or committee members—responded that the cyberbullying issue could not be addressed without police officers being provided with the modern tools they needed. I do want to accept that reasoning, but the problem we are facing is more serious. By voting against our amendment, the government is showing that the rationale behind its refusal to split the bill does not hold water. The problem is not the provision of modern tools to police officers to enable them to fight cyberbullying, but rather the fact that all the powers of peace officers and public officers are being changed for the purpose of the legislation. That's important.

To my knowledge, this has not been considered in committee.

[*English*]

That's something that will hang over this government for years to come.

The Chair: Thank you very much.

I'm going to take the vote on amendment NDP-5, and then we'll call it a day. We'll start on amendment NDP-6 on Thursday when we first get back at 11 o'clock.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: It fails.

Thank you very much. It is now slightly after one o'clock—

Ms. Françoise Boivin: Is there another word than "fail"?

The Chair: I'm sorry. It was defeated.

Ms. Françoise Boivin: Defeated, I much prefer defeated.

Mr. Kyle Seeback: Did not succeed...?

The Chair: We'll see you Thursday.

Thank you very much.

The meeting is adjourned for today.