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Chair

Mr. Anthony Housefather

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● (1635)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Welcome, everybody, to this meeting of the Standing Committee on Justice and Human Rights. It was a little late starting, because there was an incredibly moving apology in the House of Commons that all parties joined. I think it was historic. For that reason, I'm glad we're starting our meeting late, because it was something well worth seeing and being a part of.

We were asked by the chair of the Standing Committee on Finance to weigh in on a couple elements of part 4, division 20, in clause 686 of Bill C-86, a second act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures.

We are commencing our study today. I think one meeting will suffice.

We would like to welcome from the Department of Justice, Mr. Mark Scrivens, Senior Counsel. Welcome, Mr. Scrivens.

Mr. Mark Scrivens (Senior Counsel, Department of Justice): Thank you.

The Chair: From the Office of the Director of Public Prosecutions, we Mr. Jeff Richstone, Senior General Counsel and Director General, Regulatory and Economic Prosecutions and Management Branch.

Welcome, Mr. Richstone.

Mr. Jeff Richstone (Senior General Counsel and Director General, Regulatory and Economic Prosecutions and Management Branch, Office of the Director of Public Prosecutions): That's quite a mouthful.

The Chair: Yes, it is quite the title. I hope they pay you by the letter.

Mr. Jeff Richstone: I'll think about that. I'll use that as a new bargaining chip.

The Chair: Absolutely.

Mr. Scrivens has a few words, and then we'll do a round of questions from the committee.

Mr. Scrivens, the floor is yours.

Mr. Mark Scrivens: Thank you, Chair.

Division 20 of the BIA, no. 2 deals with amendments to the remediation agreement regime in the Criminal Code. As I'm sure this committee is well aware, our remediation agreement is a voluntary agreement between an organization accused of committing a listed offence and a prosecutor to stay the proceedings related to that offence if the organization complies with the terms of the agreement.

On application by the prosecutor, the court may, by order, approve, modify, terminate or declare that the agreement has been successfully completed. If the court orders that the agreement be terminated, the prosecution could be recommended against the organization for the charges originally laid against it. If the court declares that the agreement has been successfully completed, the charges related to the criminal proceeding are stayed.

The regime was, of course, introduced in BIA, no. 1 and came into force on September 19 of this year.

BIA, no. 2 deals with some proposed amendments to that new regime. The regime is set up so that the publication of a remediation agreement and related orders like a variation order is done as soon as practicable, unless a judge issues a non-publication order. A non-publication order can only be issued where non-publication is necessary for the proper administration of justice.

Currently, subsection 715.42(2) of the Criminal Code gives a judge broad discretion to set out any rules or conditions, including a time limit, for the review of a decision not to publish a remediation agreement or related order. However, during its pre-study of these provisions in BIA, no. 1, the Standing Senate Committee on Legal and Constitutional Affairs observed that a non-publication order might result in victims or other parties never being informed of the outcomes and recommended that remediation agreements and related orders be published at the earliest opportunity.

As a result, BIA, no. 2 contains amendments to address this observation. These amendments would, first of all, make it clear that a non-publication order or related decision could be subject to a time limit. This would help ensure that remediation agreements are published once the interests of justice no longer require that they remain confidential.

These amendments would also allow anyone, including victims, to bring an application to ask a court to reconsider its non-publication decision or related decision.

Finally, the amendments would make it clear that a decision not to publish a remediation agreement must be published even where the underlying agreement itself remains confidential, so that it will be clear to everyone that a non-publication order has been issued.

The Chair: Thank you very much. That was very clear.

We'll go to Mr. Nicholson or Mr. Cooper. Do you have any questions?

Hon. Rob Nicholson (Niagara Falls, CPC): I think it is an excellent suggestion here to do this. I think it remedies any of the issues that arose when this was initially proposed. We're completely supportive of it.

The Chair: Fair enough.

Hon. Rob Nicholson: Thank you for your testimony and your illumination of of this, but....

The Chair: See, this is why we miss having Mr. Nicholson at the committee.

Some hon. members: Oh, oh!

The Chair: Our meetings wrapped up so much more quickly.

Are there any questions from the Liberal side?

Mr. McKinnon.

● (1640)

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): I'm just curious about what goes on in these circumstances. Can you give us a concrete example of such an agreement and why it might not be able to be published or you wouldn't want it to be published?

Mr. Mark Scrivens: As I've indicated, the regime has been in place only since September 19 and we have no real life experience with it yet. We must remember that one of the reasons for the regime is to encourage corporations to co-operate with investigative authorities and prosecutors and to provide information and perhaps evidence, if they agree to it, that would assist in the investigation or prosecution of others involved in corruption or bribery. There might be an ongoing or related matter, an investigation or prosecution, and some of the information contained within the agreement—the assertions as to the underlying facts—might, if made public, interfere with an ongoing investigation or prosecution. It might be necessary to have a confidentiality order for a short period of time for that reason.

Mr. Ron McKinnon: If it happens that there's a non-publication order but we identify that the remediation order exists, does that not kind of counteract the confidentiality, the fact that people know there is such an order but they can't know what it's all about? It seems to me to be a potential problem.

Mr. Mark Scrivens: My colleague is a prosecutor who deals with these issues on the ground. As someone who was a prosecutor many years ago, I would say that in cases like this, the investigators and the prosecution often have some leeway in the timing of matters and can arrange things so as to minimize any risk that might arise from the context you've outlined.

Mr. Ron McKinnon: Thank you. Those were my questions.

The Chair: Thank you very much.

Mr. Rankin.

Mr. Murray Rankin (Victoria, NDP): Thanks.

I know it's new and it's been in place less than two months, but can you tell us the pros and cons of publication? I'm trying to get my head around when it would be appropriate and when it wouldn't be appropriate for publication to occur.

Can you give us an example of when it ought not to be published, in your view?

Mr. Mark Scrivens: I think it's important to remember that the entire design, almost the default, is publication. The entire design is to emphasize transparency. That was very much intentional. When you're dealing with the prosecution of criminal matters, it's anathema to do it behind closed doors. When you're dealing with holding, potentially, a large corporation responsible for an offence like corruption or bribery, the public would demand that there be transparency and that they would understand what's taking place. That's very much the default, very much the expectation for the application of this regime.

I see it as a very exceptional instance when a confidentiality order is issued. A judge would issue it, and judges, in my experience, are also very aware of the need to be transparent and open in their proceedings. I see it as being a very exceptional case that a judge would be convinced that, for some short time period, in order to assist the police or the prosecution in another matter.... It's difficult to come up with somewhat speculative scenarios, but we wanted to leave that open for a judge to so order. If the disclosure of the contents of the remediation agreement—which will disclose the facts that, as agreed upon, established the culpability of the corporation—would interfere with an ongoing investigation, given that the purpose of this whole thing is to advance investigations, we thought it was sensible to allow the judges to have that discretion to order a confidentiality order.

● (1645)

Mr. Murray Rankin: I want to pursue that, because I agree with you that the default should always be openness—the open court principle, public confidence in the administration of criminal justice and all of those good things. However, I'm having a hard time understanding why a judge would ever need to be able to order non-publication.

I think the example you were beginning to lead to was where a corporation is being prosecuted and you may want to leave open the possibility of going after the individual directors at a subsequent time. That might be the case.

I have two questions. First, when all of the prosecutions of the individual directors have occurred, could the public fully expect to be able to find out what the disposition was against those individuals?

Second, if openness is the default, are you confident the drafting makes it clear that's the default position? You say it's your expectation and that the judges are aligned with that view, of course, but I want to make sure that expectation is reflected in the drafting of the provision.

Mr. Mark Scrivens: To answer your second question first, I am confident that it's drafted to that standard. There's a necessity standard at stake. That's a high standard for a judge, and they well know what that means. It's very high. The standard is not whether it would be convenient or useful. It's a necessity standard, so it's high.

To your first point, in the vast majority of such rare cases, the scenario you've outlined would be the one at play. In other words, it would be information related to closely associated directors of the company, because that's the type of information the corporation or company would have.

Mr. Murray Rankin: Not to belabour it, but I have a last question. You have a situation—and what you're proposing makes perfect sense—where the corporation is subject to a DPA. It's left confidential; no one knows about it, but the judge has agreed that the necessity standard has been met. You then go after the individual directors. At some point, they either are or aren't found guilty and disposed of accordingly.

I need assurance that at that point we will know the whole story. Can you conceive of a situation where we would never know the disposition of those subsequent prosecutions against the individual directors?

Mr. Mark Scrivens: I cannot conceive of such a situation, because the necessity standard would always apply. Anyone, including a member of the media, can bring an application to review this order. Any judge ruling on the extension or prolongation of such an order would have to assess whether it continues to be necessary. They would have to hear evidence, say after six months or a year, that the investigation is ongoing or has concluded or whatever, and make their assessment. Contextually, it's my view that the scenario where it would go on forever and be forgotten is impossible.

Mr. Murray Rankin: Excellent. Thank you.

The Chair: Are there questions from anybody on this side?

Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): I'd like to thank the officials for being here. I was going to put forward a motion—

The Chair: Can I ask one question? It's just intellectual curiosity based on Mr. Rankin's questions. I'm totally supportive of the amendments.

In a hypothetical scenario, I guess it wouldn't be when a current director is also prosecutable, because a current director would find out as soon as the corporation was notified of an action against it, and there would be ongoing discussions that would involve or implicate the directors. I could see it if it were the case of a past director or a past employee.

I would hazard a guess that this would be used in the event, for example, there were a Canadian company acting as an agent for a large U.S. multinational and that large multinational was violating the U.S. Foreign Corrupt Practices Act. The Canadian agent, at the behest of the U.S. company, was out there offering bribes to foreign government officials in violation of both Canadian and American law, but it was a small player acting at the behest of a large company.

In order to assist the U.S. in its prosecution of the larger company, we may want to settle with the smaller Canadian company without letting the large U.S. multinational know that we were seeking to go after it, or that the U.S. was. In co-operation with U.S. authorities we might say, “Let's not let them know about it until the U.S. can finish its investigation.” Is that not why we would do that?

● (1650)

Mr. Mark Scrivens: I hadn't thought of that, but it might be a scenario that would apply, yes.

The Chair: That was just out of curiosity.

Mr. Fraser, you had a motion.

Mr. Colin Fraser: Thanks very much for being here.

The Chair: Yes, thank you again, to both gentlemen. It's been very helpful

Mr. Colin Fraser: I would move:

> That, in relation to the study of the subject matter of clause 686 (Part 4, Division 20) of Bill C-86, A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures, the Committee does not send recommendations to the Standing Committee on Finance.

The Chair: Would you be able to add that the chair so advise the chairman of the Standing Committee on Finance, by letter, of that conclusion?

Mr. Colin Fraser: Yes, please add that.

The Chair: Thank you.

I call will the vote.

(Motion agreed to)

The Chair: Thank you very much. I will sign a letter to the finance committee letting them know that we have no comments.

Thank you, gentlemen.

Before we move to an in camera meeting related to the continuation of the review of our report on trafficking, I would like to advise the committee that your subcommittee met yesterday to discuss the business of the committee, and agreed to make the following recommendations. The clerk wrote it up, and I have it right here:

> That for the study of Bill C-78, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act, the Committee invite to appear the witnesses suggested by the parties, as well as the organizations that requested to appear

—that is, if somebody offered to appear on behalf of an organization or a group, they would also be invited—

> provided that, should an additional meeting of testimony be required, it can be added at the Chair's discretion;

That is because we had agreed by motion to hold four meetings.

There's a second thing that we agreed, as follows:

> That the Committee staff be instructed to select a photograph that could be used to illustrate the cover page of the eventual report on human trafficking in Canada, provided that the committee approve said photograph.

Is everyone okay with that recommendation?

(Motion agreed to)

The Chair: Great, that's unanimously approved. I will sign it.

Thank you very much.

We need a short break to get set up before we go in camera for the trafficking report.

[*Proceedings continue in camera*]