STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

COMITÉ PERMANENT DE LA JUSTICE ET DES DROITS DE LA PERSONNE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Tuesday, October 20, 1998

• 0910

[*English*]

The Chair (Ms. Shaughnessy Cohen (Windsor—St. Clair, Lib.)): We're back, and this is Bill C-208, a private member's bill from Colleen Beaumier, who has risked life and limb to be with us. She got in a car accident on the way to the airport two days ago and still made it today. We're glad she's here, and we're going to let her vote in spite of her altered state.

We have witnesses this morning from the Department of Justice: Michael Zigayer, Brian Jarvis, and Lita Cyr. Welcome.

Go ahead, Michael.

Mr. Brian Jarvis (Counsel, Public Law Policy Section, Department of Justice): Madam Chair, I wasn't quite sure what.... Would you like me to give a brief...?

The Chair: You're the heavy. I'm used to the two Michaels.

Mr. Brian Jarvis: Would you like a statement of—

The Chair: It's up to you—whatever.

Mr. Brian Jarvis: Well, all I would say is having looked last evening at the transcript of what went on before this committee in May on this, I think Madam Beaumier stated the goal of her bill perfectly eloquently and clearly.

The Chair: Okay.

Mr. Brian Jarvis: That is, in the sense of it being to further accountability.

The Chair: All right.

Are there any questions for the Department of Justice from the point of view of the opposition?

Chuck, did you want to address anything?

Mr. Bellehumeur, did you want to address anything?

I have a question, but does anyone on this side have one?

John.

Mr. John Maloney (Erie—Lincoln, Lib.): Do we understand that the department officials are content with this bill the way it sits?

Ms. Colleen Beaumier (Brampton West—Mississauga, Lib.): I believe I had discussed amendments with the department. Could I table those now, Madam Chair?

The Chair: Sure. Why don't we see what we're working with. She's got her amendments, so we can discuss them.

Ms. Eleni Bakopanos (Ahuntsic, Lib.): In two languages?

The Chair: Yes, it's in two languages.

We'll just give colleagues a chance to take a look at the amendments Ms. Beaumier is proposing to her own bill. While we're doing that, did anyone else have...? Colleen, do you want to take us through them?

Ms. Colleen Beaumier: Is Mr. Rubin going to get an opportunity to speak?

The Chair: Yes. We're not going to vote on the amendments right now, but since you've done this work in terms of amendments, we might as well know clearly what we're discussing. If we discuss the old bill and then just do the amendments at the last minute, we won't have a fair dialogue on it.

We'll just take a minute, then, to do our reading.

Did you want to address the changes, Colleen?

Ms. Colleen Beaumier: I think this addresses some of the concerns stated at the last hearing and clarifies the bill a little more.

• 0915

One where I thought I might hang in was the five-year sentencing. However, after discussing it with a number of people I decided I'd be prepared to reduce the sentence—not exceeding two years.

I think that's about it. I'd be open for questions.

The Chair: I notice, though, that the fine remains at a fine not exceeding $10,000, which is quite high, but in keeping with this kind of offence, is it not, Mr. Jarvis, this sort of administrative...?

Mr. Brian Jarvis: Madam Chair, Michael could address that.

Mr. Michael Zigayer (Senior Counsel, Criminal Law Policy Section, Department of Justice): Madam Chair, I'd like to say two things about this.

The Chair: Sure, go ahead.

Mr. Michael Zigayer: First, I think it's important to recognize that the amendments create a hybrid offence. It creates more flexibility in terms of prosecution from the perspective of someone who might have to enforce this legislation.

I think, as well, that there's really only one word in this proposed legislation that causes me concern, and that's the word “cause” at paragraph (d) in proposed subsection 67.1(1). I'd be prepared to explain my concerns with that word.

With regard to the $10,000 fine, well, normally there aren't prescribed fines for indictable offences. That leaves the courts full discretion to impose a fine they feel appropriate. But it's also appropriate, if you feel it's the case, to specify a maximum penalty of $10,000.

The Chair: Well, the number $10,000 sends quite a message, doesn't it.

Mr. Michael Zigayer: It does. I was looking at a news report yesterday having to do with American DNA legislation, where they have a $100,000 fine for the misuse of information in the coded data bank. So we can see that fines can be very high. I think there's some legislation in Canada where there's a maximum of $1 million.

The Chair: Yes. There's a lot of environmental legislation that has those kinds of fines.

Mr. Michael Zigayer: Perhaps in the context of this offence it's an appropriate.... It's certainly gauged to the maximum penalty, I think.

Now, if I could explain my concern with the word “cause”....

The Chair: Yes, please.

Mr. Michael Zigayer: I don't know what it means exactly. Does it mean, for example, counsel, as that term is defined in the Criminal Code in section 22: to procure someone to do something? Or does it mean to compel someone by threats or other fashion? Or does it mean to instruct someone to do something, from the perspective of a person who has been instructed by their superior? Say the poor clerk is instructed by the manager to destroy records and has no real knowledge of what's happening. He's just been given a pile of things and told to go do this. That happens to be the regular job for this person, but in effect they're contributing to the destruction of this information.

So it might be appropriate to define the word “cause” as including—don't make it exclusive or definite, just say it includes things like compelling or instructing. Those are my concerns with that word “cause”, and I think they would be consistent with the intention of the bill.

Ms. Colleen Beaumier: I think that instruct or compel is probably more accurate.

The Chair: Mr. Bellehumeur had a question.

[*Translation*]

Mr. Michel Bellehumeur (Berthier—Montcalm, BQ): When I made a speech on this bill, saying that I supported it, I asked whether we could amend it so that managers—

[*English*]

The Chair: Excuse me. I don't know about anyone else, but I think there's a translation problem. We're getting both languages. We're getting the floor and the English interpretation at the same time.

[*Translation*]

Mr. Michel Bellehumeur: That's real bilingualism for you.

[*English*]

The Chair: She's good. We're getting two languages at once here. Is there someone to check the...?

• 0920

[*Translation*]

Mr. Michel Bellehumeur: It's working? I was saying that when this bill was debated in the House, the Bloc Québécois had supported it and had congratulated the member. However, the bill didn't appear to say anything about punishing upper managers or senior officials who order others to destroy or alter records.

I wished to ask about the addition of paragraph 67.1(1)(*d*), "cause any person to do anything mentioned in", but I think that the senior official has just answered. My question was as follows: does this amendment affect the senior officials or managers of whom I spoke? If I understood correctly, you say that this is the case, but that it's not very clear and that this paragraph would have to be made clearer to ensure that such individuals were affected.

An Hon. Member: It could be done.

Mr. Michel Bellehumeur: It could be done, but do you think that, as the proposed provision currently reads, a senior official could be found guilty?

Mr. Michael Zigayer: The French version, "*amener une autre personne*", is perhaps more in keeping with the intention, but I think that the English word "cause" is very broad and vague.

Mr. Michel Bellehumeur: So, we could say: "*donner l'ordre à, demander ou amener*" in the French version. We could be more specific, and this would address the issue.

Mr. Michael Zigayer: Yes, but we shouldn't really sew up the definition.

Mr. Michel Bellehumeur: Okay.

Mr. Michael Zigayer: A person might do something to force another to do something, but this would not be covered by our definition if it were too limited.

Mr. Michel Bellehumeur: I thought I had left with the right bill, but I didn't. We are replacing "five years" with "two years", but there's also paragraph (*b*), which is new.

Mr. Michael Zigayer: Paragraph (*b*)?

Mr. Michel Bellehumeur: Yes, paragraph (2)(*b*). It reads: "an offence punishable on summary conviction". Was it only an indictable offence before?

Mr. Michael Zigayer: Yes.

Mr. Michel Bellehumeur: And this is where we're making it a hybrid offence, that is, it can be prosecuted by way of indictment or by way of summary conviction. Was this addition made at the department's request?

Mr. Michael Zigayer: Yes. Furthermore, when this committee discussed this bill in May, several people indicated that it would be more flexible if it were hybrid and not just indictable. This committee discussed it in May.

Mr. Michel Bellehumeur: We agree that, by creating an offence of this type, which allows the individual to be prosecuted by way of indictment or summary conviction, we are toning down considerably the message we want to send.

Mr. Michael Zigayer: I don't want to contradict you, but I have to say that it's more complicated to prosecute someone if the only way open is by indictment. The intention of the Justice Department was not to tone down the message, but to make the provision more flexible.

Mr. Michel Bellehumeur: How is it more complicated to prosecute someone by way of indictment rather than by summary conviction? The evidence is identical. The file is put together in the same way.

Mr. Michael Zigayer: When an offence can be prosecuted by summary conviction, it would be... The act is discovered and the proceedings are initiated within six months of the act. After this six-month period, obviously the offence can only be prosecuted by indictment.

• 0925 

It's also a matter of flexibility. There may be cases where the individual did have the specific intent required to commit this crime, but the crime has less impact than in another case. It's hard to think of a specific situation, but we're not always concerned with cases where really crucial information is destroyed. Sometimes less important information is involved, and it would be up to the prosecutor to decide whether to proceed by indictment or by summary conviction. The person's background also has to be reviewed.

In any event, all the circumstances must be looked at before proceedings are initiated.

The Chairman: Paul DeVillers.

Mr. Paul DeVillers (Simcoe North, Lib.): I support the proposed amendments. I find that, if we have more flexibility, we no longer run the risk of not being able to prosecute in certain cases, for example when the civil servant is a fairly junior employee or when the offence is not serious enough to be worth the trouble of prosecuting by indictment.

I think that provides more leeway and shows we are taking it even more seriously, unlike what Mr. Bellehumeur contends, namely, that we are less serious because we are giving some leeway.

Mr. Michel Bellehumeur: I'm not sure that I've understood correctly, and the officials could perhaps tell me. Regardless of whether we're talking about prosecuting an indictable offence or an offence punishable on summary conviction, it must still be established beyond a reasonable doubt that the person falsified, mutilated or altered something. It doesn't change anything in terms of the evidence.

Mr. Paul DeVillers: It makes it possible to prosecute even when the consequences are less serious.

Mr. Michel Bellehumeur: When a person deliberately destroys, mutilates or alters records in order to prevent people from having access to information as they should, to my mind, this individual is a criminal and should be treated as such.

If the government wants to proceed by a summary conviction so as to give the Crown the necessary flexibility to prosecute by indictment or by summary conviction, that's one thing, but I think we're weakening the message. We are reducing the sentence from five to two years and we are weakening the message by saying that it can no longer be limited to an indictable offence, but may also be considered an offence punishable on summary conviction. In the latter case, the sanctions are lighter: up to six months and a maximum fine of $5,000.

Ms. Beaumier may have wished to send a stronger message, but what we are doing is weakening it.

Mr. Paul DeVillers: No, I think that we—

Mr. Michel Bellehumeur: The parliamentary secretary had spoken to me about this reduction in the sentence from five to two years. If it had only been a question of three years' difference, there would have been no problem with adopting the bill, but there's more. We are providing an alternative to an indictable offence, with all the consequences this has, because there's not just a fine, there's also a criminal record, etc., and the trial procedure is different. What we are doing now is making it an offence punishable on summary conviction, and I believe we are weakening the message. I don't agree with you, Mr. DeVillers, but perhaps I didn't understand your introduction clearly.

Mr. Paul DeVillers: It is important to consider what was destroyed. We have the necessary flexibility to act according to the seriousness of the offence. The Crown can decide to proceed by way of indictment or by way of summary conviction.

[*English*]

The Chair: Thank you.

Let's let Michyael Zigayer respond and then we'll come to you.

• 0930

Mr. Michael Zigayer: Madam Chair, the bill has been changed in two ways, but I think we have to look at them separately and distinctly.

Yes, the maximum penalty on indictment has been reduced. That's one issue, and that I'm not going to address right now. The other issue is changing it from a straight indictable offence to one that's a hybrid offence, where the prosecutor has the discretion to decide whether to prosecute this crime by way of indictment or by way of summary conviction. Sometimes the decision is going to be made for him, simply because he's outside of that six-month window since the gesture was made, the destruction of the information. In that case he has to proceed by way of indictment.

I'd like to maybe just as a parallel refer the committee to section 430 of the Criminal Code, which sets out mischief, which again can involve the destruction of property. You'll note that in this section 430 of the Criminal Code there are hybrid offences. For example, if the property destroyed is property that is of a value exceeding $5,000 or is a testamentary instrument, then the hybrid choices are to proceed by way of an indictable offence, with a maximum penalty not exceeding ten years imprisonment, or a summary conviction offence. The choice is there for the prosecutor to make. And of course the court has the ultimate discretion of imposing anything in the range from zero to the maximum.

I'm just addressing the prosecutorial discretion that's created by making a hybrid offence. I think that's a significant improvement to the legislative proposal.

The Chair: Put them on the Attorney General. They don't like to pay for high court trials.

Ms. Beaumier.

Ms. Colleen Beaumier: I had a quick question. There was some confusion, and I've somewhat sorted it out.

The Chair: Could I just.... My questions are all getting asked. You go ahead, Eleni.

Ms. Eleni Bakopanos: I was just going to propose an amendment to paragraph 67.1(1)(*d*), but if you have a question I'll wait.

The Chair: Okay.

When you were discussing this in the department and taking a look at it, did you take into account section 464 of the Criminal Code, on counselling?

Mr. Brian Jarvis: Yes. I believe counselling was raised when the committee considered this last time.

The Chair: Yes.

Mr. Brian Jarvis: Now, Madam Chair, do you mean in relation to...? Let me start again. What I took from the discussions at the committee in May was that some of the members were concerned about what Monsieur Bellehumeur just mentioned, which was the situation in which a superior, somebody with a higher position, can tell a person with a junior position to destroy the document. The concern essentially was that there would be a kind of a gap between the *mens rea* and the act.

The Chair: Yes.

Mr. Brian Jarvis: My approach was to add paragraph 67.1(1)(*d*)—cause any person to do any of the things—to capture that situation. Now, I suppose the concept of counselling in the code could also do it, but it seemed to me preferable to put in right in the—

The Chair: I agree with you, but I'm worrying about the word “cause” in the language.

Mr. Brian Jarvis: I see what you mean.

The Chair: I see it all the time in legislation in my practice, but I've never litigated the word.

Mr. Brian Jarvis: Madam Chair, I don't want to sound as though I'm disagreeing with my colleague, but my thought when the drafter suggested “cause” to me.... At one point we discussed the concept of “incite”, but what I thought we should capture was something quite broad; that is, not just somebody instructing a person, not just somebody counselling, but something where maybe a senior official says “Go and shred that for me, would you please”, and the junior person goes to the shredder and knows nothing more about it than that he or she was told to go and shred it.

• 0935

In that case, I would be afraid that if we specified “incites” or “counsels”, the senior person would say “I just told my secretary to go and shred that for me. I didn't counsel anything or incite anything.”

That was my thinking in the way of choosing a broad word, such as “cause”, but if the committee would like to follow up on my colleague's suggestion that some examples would be helpful, I'm perfectly agreeable. I don't know what, for example, Madame Beaumier would think.

The Chair: We have—and I'll table it in a minute—a letter from PSAC, who didn't appear, and they have some very interesting things in it. One of the things they point out is that they support the spirit of this private member's bill. And then they go on to say that they think it's as much of an offence to counsel someone to do something, even if they don't do it—in other words, to order someone or to say to someone "Here, destroy this record that I don't want to have disclosed". Then the underling says "I'm not going to do that" and blows the whistle, that kind of a situation.

Section 464 of the Criminal Code says that anyone who counsels another person to commit an offence, even if the offence is not committed, is guilty. What I'm asking you is would you agree with me that section 464 could be used to charge that senior official or supervisor who orders the underling to take that step?

Mr. Brian Jarvis: I guess that's more Michael's area. I believe you're right, but....

Mr. Michael Zigayer: I would just take us back to subsection 22(3) of the Criminal Code, which defines "counsel" for the purposes of the Criminal Code as including "procure, solicit or incite". And that's not an exhaustive list. However, if you want to make it absolutely clear for the purposes of this other legislation, you could specify "instruct", which I think would address the concerns of PSAC.

The fact that you've instructed somebody to do something, whether or not it's committed, would seem to me to be a complete offence.

The Chair: There's a difference, though. Section 22 talks about counselling where the other person actually does it. So you say to me....

Mr. Michael Zigayer: It's just a definition for the term we referred to in section 464.

The Chair: No, I get that. But you read the definition in section 22.... I don't want to play law school here. And it's hard when you have to stand 40 feet back from the book in order to read it too. But section 22 says "Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence...". Section 464 is different. In section 22 you counsel them to do something and they do it. In 464 it says you can be convicted if you counsel another person to commit an indictable offence. If that offence is not committed, you're still guilty. So if you tell me to do something and I don't do it, you're still guilty under section 464 if the facts are found to be true.

I'm just trying to see if we can use 464 to convict a person who orders an employee. My view is that we could use it.

Mr. Michael Zigayer: Well, in general terms, I would say I think so. I was reading the exchange in this committee when it was looking at this back in May, and there was a reference to section 126. So last night I hit the books and I found the case of the Queen v. Perrault, which deals with this. It's essentially the use of this other Criminal Code offence as a penalty for the breach of another piece of legislation.

This being said, I would think that section 464 is broad enough to have general application in other areas, because it doesn't say "this act". It says "Except where otherwise expressly provided by law...". It would seem to go beyond the Criminal Code.

• 0940 

The Chair: You might want to go back and speak to Mr. Mosley about the very glaring conflict between section 22 and section 464, which I've never noticed before and probably no one's had any reason to look at before. Anyway, that's neither here nor there for this.

Eleni Bakopanos.

Ms. Eleni Bakopanos: Thank you, Madame Chair.

Along the same lines, I was going to recommend that we try to amend paragraph 67.1(1)(*d*)—and Ms. Beaumier is in agreement, after what the department officials told us—by replacing the word "cause" by the words "directs and counsels".

[*Translation*]

In French, it would be "directs and counsels"

[*English*]

The Chair: Keep in mind that this is not a motion that's on the floor at the moment.

Ms. Colleen Beaumier: You certainly know when you're out of your league when you sit with a bunch of attorneys. However, at the risk of looking like a complete idiot, I like "cause". There are other ways: instruct, counsel, put the documents with other documents that you know are going to be destroyed. "Cause" encompasses all sorts of things that would be left out if we used "instruct" or "compel". You know, to put something in the to-be-shredded pile causes the document to be destroyed.

The Chair: Can I just point out that "cause" then won't catch the circumstance where you tell me to do it and I don't. So I think that's where—

Ms. Colleen Beaumier: Could we put "cause or instruct or compel"? I just think that "cause" should remain.

The Chair: How does "causes, directs or counsels" sound?

Michel.

[*Translation*]

Mr. Michel Bellehumeur: If I understand correctly—

[*English*]

The Chair: We've got a problem again. We have the same problem with the translation. We can hear the English, but we can also hear the French at the same time. The floor is coming through the microphones.

[*Translation*]

Mr. Michel Bellehumeur: I agree with Ms. Beaumier as far as the word "causes" is concerned. I think it's the most inclusive term. However, according to what you said, a senior civil servant could order an employee to destroy a specific record. He could also propose: "An opposition party is looking for such and such a record; it must never get its hands on it." He could propose various things and make his employee or subordinate realize—

He could also counsel, as you say: "I advise you to make that record disappear, because it must never be found in your file." There would also be a broad term: "causes".

You are more familiar than I am with legislative drafting and you have a much more comprehensive overview. If paragraph 67.1(1)(*d*) read as follows: "direct, propose, counsel or cause any person to do anything mentioned in any of paragraphs (*a*) to (*c*)", would that answer the questions you are asking?

Mr. Michael Zigayer: You would have to add, after "person", "in any manner", in order to provide for ways that we do not foresee today.

Mr. Michel Bellehumeur: Okay. So, it would be "direct, propose, counsel or cause any person in any manner to do anything mentioned in...".

[*English*]

Ms. Eleni Bakopanos: Okay.

The Chair: Is there any further discussion?

Colleen, can I just informally ask if you are comfortable with that rewording?

Ms. Colleen Beaumier: I'm comfortable with that.

The Chair: We'll work on that for a moment, and I'll ask the justice officials to step down and we'll bring Mr. Rubin forward.

• 0945

Mr. Rubin, it's nice to meet you. Did you want to make a statement?

Mr. Ken Rubin (Individual Presentation): Yes. I guess, Madam Chairman, before I do—and I see perhaps this bill is well on its way, which is good news—I would like to request distribution of some copies of cases and a further statement that I made to the committee, if that's possible.

Mr. Reg Alcock (Winnipeg South, Lib.): How long have you had access to this information?

Mr. Ken Rubin: Being a fellow Manitoban, we all believe in openness.

Mr. Reg Alcock: We do, don't we? You knew he was sitting right up there?

Mr. Ken Rubin: You mean Louie?

Mr. Reg Alcock: Yes.

Mr. Ken Rubin: He seemed to have been criminally prosecuted.

Is that fine with the chair?

The Chair: I think everything has been distributed.

Mr. Ken Rubin: Oh, I see; it's a *fait accompli*.

The Chair: It's already done.

Mr. Ken Rubin: Okay.

Madam Chairman, I agreed on short notice to appear, and I'm glad that I did, because this is a very important bill. It might seem like a drop in the bucket, but it sends a clear message here in Ottawa, and a message is clearly needed.

Over the last 20 years I have appeared in front of this and other parliamentary committees on access and privacy issues, and I myself have experienced and been the victim of record alterations and destructions, so I applaud this committee review on the issue. I believe most Canadians want record abuses stopped and penalties enacted for abusers that include fines and jail terms.

The time has come for Parliament to criminalize actions with the intent to deny access to information, coupled with the destruction, falsification, or mutilation of records. Government by manipulation and shredding is not an accountable operating principle for expecting openness. There are no real penalties in the current access act to end this manipulation and sleazy gamesmanship at the highest levels of government.

For cabinet, whose own ethics guidelines after all are hidden from the public, to produce a government solution to record abuse is just not happening in Ottawa. If anything, recent official investigation of leaks of cabinet proposals on TAGS and youth offender programs send a chill aimed at zero tolerance of open policy discussion in Ottawa. Rather than pushing to punish those who manipulate and cover up questionable actions undertaken, some of our most senior officials need lessons in democracy and the spirit of public access and transparency.

No one is saying by this that all public officials are deliberately tampering with government records, for indeed there are still officials who are willing to actively serve the public and are free to do so.

Bill C-208 has its impetus in well-known record abuses in the Somalia cover-up affair and with the destruction of the Canadian Blood Committee records. But matters continue today with record alterations and destruction associated with what went on in matters of security and dissent at last year's APEC conference in Vancouver. Just as protest signs of APEC demonstrators are grabbed to put them out of sight of foreign leaders, so are records about such orders gone from public view.

• 0950

I bring as well to the committee's attention in the pile of documents I've given you.... I'm good at producing piles of documents for people; I hope they use them. I bring to the attention of the committee other more recent examples of record abuses, like the National Capital Commission's destruction of transcripts of their decision-making meetings and their ending the practice of taping their meetings. This was coincidentally at the time I applied, because I found out they were taping their meetings. Then two weeks later their policy was never to tape their meetings again.

I also refer the committee to records obtained under the Access to Information Act where fisheries officials sought earlier this year, in February, to impose a deal on the fisheries House committee whereby foreign observation reports were not only to be submitted in camera, but only after a commitment to never keep a record of such proceedings and to never tell the public of such discussions.

From the documents that you in fact have before you I quote a February 5, 1998, fisheries department memorandum briefing note to the minister on treatment of observer reports under the Access to Information Act. On page two it says:

> In that event, Legal Services recommends that we seek assurances that the information would be for the use of the Committee only, in an “in camera” situation, that no transcripts be kept, and that information not be made public.

Well, Madam Chairman, I was the person who went after the Speaker of the House with the archivist and made a deal that at least in camera proceedings of committees such as this after 30 years be available for the public, and went and looked at all of those. Under this arrangement that officials want, there would be no records, no future knowledge of the situation.

Record abuses are done elsewhere and have come to light, such as the missing Solicitor General and Ontario Provincial Police records associated with Ipperwash events in the OPP slaying of Dudley George. And as we meet, the RCMP investigation into the destruction of the Canadian Blood Committee records continues.

In Bill C-208 we have a private member's bill that has come this far with a rare opportunity to succeed. It is an issue we all can agree on to build better public trust and assurances. I say to the committee and Parliament, do not let this opportunity pass by.

As much as I would like the Access to Information Act drastically improved, I do not believe that reforms to open government in total are around the corner. After all, this committee suggested such reforms for opening up government further in its non-partisan *Open and Shut* report over ten years ago. I do remember I was a witness in front of this committee, the first witness after the government testified, asking for reforms. I was very heartened at the time that this committee, on a non-partisan basis, said yes. Now we are more than ten years later.

Bill C-208 does not and cannot correct all the underlying problems with the Access to Information Act, namely an act that operates on delaying and hiding records, without too many enforceable means, including provisions for a tough, independent information commissioner with binding powers.

As well, the problem that greater computerization in government causes in record deletion and alternation and the urgent need to improve and tighten lax record management standards cannot be addressed through Bill C-208. The Access to Information Act, by the way, did in part spark an end to totally chaotic record practices, just as Bill C-208 can make officials think twice about losing and erasing every record in sight.

That the basic secretive ways of Ottawa need correcting is no secret. In the meantime, passing Bill C-208 in the House and the Senate sends a message that official Ottawa itself has not been willing to give. But Parliament, on a free-vote basis, can give it.

I am suggesting once again that it's better to pass this bill with a few amendments rather than throw it out. I believe its passage is better than no bill at all, as a powerful signal on this matter that there no longer be tolerance in Ottawa of record alteration practices.

The basic changes that I'm suggesting.... I know some amendments have already been put forward, and I'm not in disagreement with the amendments already proposed and the writing of amendments to put forward for Bill C-208. One that I think is captured in what is already on the floor is the amendment that ensures that superiors directing or counselling another person to destroy, mutilitate, or alter a record, whether or not that other person does the destroying, mutilation, or alteration, are targeted.

• 0955 

The only comment I have on hearing the discussion before is I would add as many words as possible, because knowing official Ottawa the way I do, you don't necessarily order somebody to do something. You might put someone in front of a computer screen, with modern technology: “See that? Then erase it.” There are subtle ways in Ottawa of getting someone to do your dirty work for you.

The more words you use to capture this, and the intent, as Madam Chairman put it, even if it isn't carried out—because I think that's equally of a criminal nature—is important to capture in the amendment. And I think you will capture it.

I agree in my second point, and it's been put forward with a degree of reluctance, that the two years in prison maximum instead of a five-year maximum is a good compromise. You need flexibility between indictable, summary, and hybrid offence. I prefer fines of more than $10,000. I heard the Department of Justice say that in the United States, for one type of offence, there are fines of $100,000. Let me ask that you do one thing at least. If there's a $10,000 penalty, I want you to make sure that it does not come out of the consolidated revenue fund, but that it comes out of the pocket of the person who has committed the offence. Let's send the signal where the signal deserves to be sent.

My third point is making penalties found under section 67 for obstructing the information commissioner similar to and consistent with penalties Bill C-208 imposes. In other words, under the current section 67 of the Access to Information Act, obstructing the information commissioner is punishable by a fine of up to $1,000. It seems to me you have to put in a parallel arrangement making it consistent with what you're proposing here in Bill C-208. That's not a major change.

My fourth point is important, because I deal in both the Access to Information Act and the Privacy Act, and as you know, they're fairly similar. I think that this very valid amendment to the Access to Information Act should equally apply to the Privacy Act. People's lives, their reputations, their health records, what have you, are at stake, and for people to maliciously alter or destroy records.... It's very important to have a criminal sanction in back of it.

Fifth, I would add a clause to the three listed grounds, which even in the amendment are the alteration, falsification, or concealing. There are always more tricks to the trade, as I well know, in Ottawa than just those three, in terms of record abuses. So if you have a sort of general clause, something to the effect of “for other grounds of record abuse”, you would have (*a*), (*b*), (*c*), and then (*d*), other grounds, and then you can go on with your current proposed (*d*) and make it an (*e*).

I'll give you three examples of other record abuses, just so you see that you haven't captured it all. Believe you me, just like when the Access to Information Act was put in and people learned creatively to avoid it, they'll creatively learn how to avoid these and still have the criminal intent to cause abuse.

The first example I would mention is hiding records or claiming records are missing. I'll have an example of that in terms of air safety in my package.

My second example is deliberately preventing the creation of information for machine-readable records. And you have to remember that in Ottawa many records are now computerized and there are new games that can go on with those kinds of records, which were not possible with manual records, or done more crudely. You know, erasing part of a manual record is not quite as easy as on a computer.

The third example I would mention is deliberately maintaining substandard record-keeping practices. There are some parts of branches of departments that deliberately do not follow the Treasury Board or archivists' guidelines in terms of record-keeping. Lo and behold, gee, we can't find that record; that's amazing. I'm dealing with the tax department right now. As

you know, there's a bill in front of Parliament. They want to create a new agency. They're saying to me that they can't find these records that have been created in the last year and a half because their records aren't quite in order. That's not excusable.

Mr. Reg Alcock: It's not acceptable.

Mr. Ken Rubin: It's not acceptable.

Mr. Reg Alcock: Absolutely.

Mr. Ken Rubin: Thank you.

• 1000

I would tie penalties in Bill C-208 to the public's right to access public records, as found in sections 2 and 4 of the Access to Information Act. After all, this is an amendment to the Access to Information Act, and I think the right of access is what this is all about.

I won a case against Nation Air in the Federal Court of Appeal that said the spirit of the act is the most important thing, not the exemptions, not what public officials think. They are not placed above the law. Certainly this gives criminal sanctions to the fact that they're not placed above the law. I think it's very healthy to refer back to what the main thrust of this legislation is.

Lastly, I would add that the information commissioner must undertake to prepare oversight reports on record abuses and fines and penalties imposed that are made publicly at least annually and referred to the Standing Committee on Justice and Human Rights for consideration.

I can give you examples, like reports on air safety to the Department of Transport, where I have to go through the Access to Information Act to find out which airline company is penalized or not. They make it very hard for me to do that. They go and consult every airline company. This is ridiculous, because these are publicly imposed fines. I'm saying to you that for the deterrent of publicity in this section to operate, people have to know that it's being operated and you as a committee have to know to monitor that it's being operated.

I note, by the way, the total silence on record destruction issues, including the APEC records. The current information commissioner has not spoken out, as the previous commissioner did, on record abuses.

There are other examples of record abuses that I'm providing to the committee, from missing air safety records to destroyed breast implant records. You'll notice as part of your package—and this goes back some time—a headline that reads “Gov't altered records on possible hazard of implant, paper says”. It's a *Citizen* story done out of the *Montreal Gazette*, March 29, 1989. Then I had the memo I got under the Access to Information Act that Pierre Blais, who was a scientist at the Department of Health, got from his superior, Dr. Hinberg. It says “Please destroy all copies of the attached.” This is direct and incriminating evidence. What was done at the time? Nothing. What you're doing here will be something.

These are despicable examples, because hiding health and safety matters from the Canadian public by crassly altering and destroying records are cover-ups of a devastating nature.

Equally damaging is the growing trend to excluding whole sets of safety records, such as those of NAVCAN, from access coverage. Here we have all these incidents, including as late as this morning, of wiring problems or other problems, and one of the key component agencies within the whole realm of the Transportation Safety Board, the Ministry of Transport, and so on is no longer covered under the Access to Information Act. The public's right is not there, unfortunately.

Altering records without public notice, as was done with meat inspection reports that watered down inspection efforts, is another unacceptable practice. Let me perhaps briefly explain. After winning a Federal Court of Appeal case with others, I got meat inspection reports from the meat packers plants. So what did they turn around and do? This had sections you could tick off for sanitation, for hygiene, for the condition of the plant, and it had a section for comments of the inspectors, who after all are professional people. The industry might have been concerned they were subjective. So what did they do? They permanently removed that part of the report that had the inspectors' observations, which from the public's view was probably the best kind of record. This had intent, and I think it has not served Canadians well.

Another example of this problem is the recent dismantling of Canada's health protection by doing away with many of the internal government labs and much of the internal research capacity on food and drug products, with the resulting self-testing and self-regulatory records being excluded and in the hands of private industry. People want to know that the air we breath and the food we eat is healthy and so on. We're finding less and less the capability of finding that out as things are transferred willy-nilly to the private sector without thinking about how the public reassurances and the records are going to be maintained. There are other jurisdictions that are trying to take care of this problem.

• 1005

There are other issues about Bill C-208, but I think we'll just have to live with them. One of them, which perhaps the committee hasn't addressed, is the idea that the prosecution for record abuses, because it's a federal matter, will be done by the federal justice officials after RCMP investigations, and hoping there'll be no resulting compromises on imposing penalties when needed. This the committee should monitor.

Another issue is the need to protect whistle-blowers going public on record abuses through a separate legislative enactment. Remember, though, some of the record abuses that have occurred have only been discovered after thorough inquiries. If you can't even protect the honest public servant who says his superior ordered him to destroy the records, alter them, or what have you.... Those people need protection in Ottawa. I know there have been many calls, through private members' bills or other things, for that kind of legislation.

One final issue—and I see that it's been removed from the proposed redraft of the bill—is the idea of required records, which I thought was the most radical element of the bill. In a different context, but I think for another day and another act, we need a clear legislative basis: the brand-new public records act that would define what constitutes public records, including those that are required to be kept and not to be destroyed or not to be simply done orally without a written record.

For instance, I believe that cabinet minutes should be totally transcribed, by law, as should all official senior management and board decision-making meetings—the kinds of records that the Canadian Blood Committee and the NCC have seen fit to destroy.

I feel if you don't have a solid information record basis of sound policy—and the policies of the record management of the Canadian government are not on a sound basis, but are on a very shaky foundation.... It isn't even a matter of criminal intent; it's a matter of retrieval, of professional management of your records. This is for future generations as well. I think that's an important point, which this committee can't solve today.

I wish you could solve more than you have. I know you've got your plate full of many issues of a justice nature. A large number of them are on law and order subjects. Well, this is not law and order; your committee is now justice and human rights, and one human right that's been added in the last twenty-odd years is the right of public access, the right to privacy protection. In order for this to be more permanently inscribed, it's come to the point, when these aren't isolated incidents, that you need some criminal sanction for those who step out of line.

I say to the committee that I commend the bill. I commend Colleen Beaumier for introducing it. I commend all parties for taking part in the debate and supporting it. I think it's a go. I hope the Senate sees it the same way; I'm sure they will. Second sober thought I think will reflect that.

In conclusion, those who scheme to erase and manipulate records from public access need to be called to account. That's the basis of all of this. Bill C-208, with some amendments, will do Parliament credit and be remembered as the time when Parliament exerted itself for the public's protection and benefit.

Thank you.

The Chair: Thank you, Mr. Rubin.

Mr. Cadman.

Mr. Chuck Cadman (Surrey North, Ref.): I really don't have any questions. I'd just like to thank Mr. Rubin for his submission.

I think you've succeeded in pointing out a lot of areas where we really have to have some serious concerns. I think a lot of us tend to think of records in terms of hard copy. I'm particularly interested in what you had to say about computer files and things like that.

I'm not too sure that Bill C-208 is the place where we want to address everything Mr. Rubin has brought forward. And I'm not so sure we want to wait for the unlikelihood of more private members' business to bring this all forward. I would really suggest the government take a long hard look at some of the things Mr. Rubin has brought forward here in terms of their own legislation.

Again, I have no questions. Thank you for a very thoughtful submission.

The Chair: Thank you, Mr. Cadman.

Mr. Bellehumeur.

[*Translation*]

Mr. Michel Bellehumeur: No questions.

[*English*]

The Chair: Madam Bakopanos.

Ms. Eleni Bakopanos: I have two questions for Mr. Rubin. And thank you, Mr. Rubin.

Would the amendment Mr. Bellehumeur proposed in any way not cover records such as computer records and so forth? I feel that would probably cover destruction of e-mail or any types of records that are not handwritten. We talk about “compel, counsel, instruct in any way”.

• 1010 

Mr. Ken Rubin: I believe it would more accurately cover it. What I would prefer to do.... I notice that in the original bill there were, as there can be with bills, explanations on the side as to what it covered. If the message is clear, given the nature of how records are going, I think that is one of the intentions the bill had in mind. I think that would be useful for future people to understand and lawyers arguing this case in court to understand.

Ms. Eleni Bakopanos: So you'll agree with me that it will be up to the court case to provide the evidence of what was destroyed and how it was destroyed.

Mr. Ken Rubin: Yes.

Ms. Eleni Bakopanos: But this paragraph (*d*) would in fact allow for the crown or for the defence to be able to cover situations where somebody destroys the computer records or any other type of record.

Mr. Ken Rubin: Yes.

I was just looking for something, and I don't know if I can find it among my stuff. In British Columbia, the commissioner recently ruled on e-mails and the fact that somebody had destroyed them and whether in fact it was available somewhere else. In the back-up tapes they found out that there was some evidence of these records, and it did prove helpful in resolving that particular case.

So this is what you are up against with the technology that has to be determined. In fact, as you will see in the documents I gave you, I went back to the Canadian Blood Committee records and asked the Department of Health.... There were provincial representatives that sat on the committee, and there might be other records, so I asked if there were any diskette copies or copies other than the transcript that was destroyed kept, inadvertently or otherwise, by people who were on the committee. One should never discount the fact that people do squirrel away these things.

I think it's wise to cover these things off as best you can.

The Chair: May I just point out that you always have to go back to the definition section of the act, which defines “record” as including any machine-readable record. So I think it's covered.

Ms. Eleni Bakopanos: I have a second question. You are, as they say in the newspapers, out to embarrass the federal government and make them look like fools. I don't think you're out to make the public servants look like fools. Is that basically your aim? How does Canada fare, in terms of other countries, in terms of access to information and privacy law?

Mr. Ken Rubin: Well, I think I'm more out to make public officials more accountable—

Ms. Eleni Bakopanos: Accountable, definitely.

Mr. Ken Rubin: Sometimes it is embarrassing for them, but that's democracy. There are mistakes made, and they should be admitted; they should be apologized for. Too often none of that happens.

How do we shape up? I think I give us a failing grade, basically, but there aren't too many other regimes that are necessarily better. There are other jurisdictions, like New York, where

they have seen fit to put open meeting requirements along with freedom of information requirements. There are many advances we could make that perhaps have nothing to do with today—

Ms. Eleni Bakopanos: But you'll have to agree that the Privacy Act and and the Access to Information Act.... A lot of jurisdictions do not in fact have any type of legislation that would cover any situation.

Mr. Ken Rubin: I don't think the current acts cover a lot of situations. They don't apply to the private sector. They don't apply to certain professional groups. They don't apply, for instance, to universities provincially. We have a long way to go, but we have had some 15 to 20 years of experience.

We don't necessarily have the Watergate affair to gel us. We do have Somalia, and we do have the Canadian Blood Committee to gel us, at least in this particular situation. But we sure as heck need something to gel us to understand that the public has been frustrated right now about the access to their personal information and to public policy records by the current rather complicated and delaying exemptions that occur under both of these acts, unfortunately.

Ms. Eleni Bakopanos: Thank you.

The Chair: Mr. Bellehumeur.

[*Translation*]

Mr. Michel Bellehumeur: I would like to make one thing clear for the committee's information and to answer a question asked by the witness as to the definition of "record". In Ms. Beaumier's bill, we read, in paragraph (*a*): "destroy, mutilate or alter a record".

• 1015

I asked officials whether the term "record" is defined in the Act. I was told that it was defined very clearly and that it was very, very broad. To answer the question asked by the witness, there is no medium mentioned, and the French definition is even more explicit than the English definition, which is very broad, even with regard to computer records.

Ms. Eleni Bakopanos: She indicated that earlier.

Mr. Michel Bellehumeur: I must have been absent.

[*English*]

Mr. Ken Rubin: If I could just perhaps make a follow-up comment, in fact I would agree that the definition of “records” in the Access to Information Act and the Privacy Act is fairly broad. But stretch your imagination. It isn't just computer records, as opposed to manual records.

One of the key records applied for under the United States Freedom of Information Act was the rifle used to assassinate President Kennedy. I know I've run against things where locating something in microfiche, through a map, or through some other medium, rather than the traditional medium that we think all the time is the key record or document, is equally important. So address your concerns and situations to a huge variety of different types of records, and records that perhaps, given technology, are still being created.

The Chair: Any other questions?

Thank you, Mr. Rubin.

Mr. Ken Rubin: Thank you.

The Chair: I think we're ready.

I just want to say that we have tabled with the committee a letter from the Public Service Alliance of Canada, and I just want to read a couple.... There are some things in here that are not directly relevant to what we have before us today, but I just want to read a couple of things into the record.

It's signed by Daryl Bean, who says:

> ...PSAC and our members who work for federal departments and agencies which are subject to the Access to Information Act fully appreciate that Bill C-208 amendments were drafted to fill a legislative void that needs to be filled. We understand, and fully support, the notion that access to information needs to be free from covert acts that are designed to thwart the public's right to know. And we accept that people who work for the federal government who deliberately alter or destroy government records to keep them from public scrutiny should be subject to sanction. As a result, we have found absolutely no difficulty supporting the principle upon which Bill C-208 was founded.

They go on to say that they are concerned about the language of the bill, and their concerns and the framework for the amendments they propose are as follows:

> Bill C-208 appears to have been drafted on the assumption that a person who (a) destroys, mutilates or alters a record, or (b) falsifies a record or makes a false entry in a record acts alone or on his or her own initiative.

So they wanted us to address the issues that we did address or that Colleen Beaumier has addressed in her amendments to make sure that we covered things like a situation where somebody orders destruction and to make sure we weren't catching people who were doing so either inadvertently or innocently.

Finally, they wanted the other amendment I indicated earlier: that if they direct or counsel destruction and the destruction doesn't occur, that they still be liable.

Then they went on to question making it an offence for a person not to keep required records. Colleen has dealt with that in her amendments.

So this will be tabled as part of our submission. This gives me an opportunity to say publicly that we do take written submissions. It's not always necessary to appear in front of the committee. We do take written submissions seriously.

There are some other concerns in there, which in my view are peripheral. I commend that letter to you for your reading.

All right. Are there any other comments before we deal with clause-by-clause? Okay.

Ms. Beaumier, do you want to make a formal motion, or do you want to table a different...? How are we going to do this? You have new amendments. Do you want to make them all yourself?

• 1020

Ms. Colleen Beaumier: I would like to move the amendment, but is someone going to propose a change to paragraph 67.1(1)(*d*)?

The Chair: I'd like to sort that out, so that you can do it as one package. Okay?

Ms. Colleen Beaumier: Right.

The Chair: Have we done that, the new language?

[*Translation*]

Mr. Michel Bellehumeur: There is an amendment.

[*English*]

The Chair: Mr. Bellehumeur, go ahead.

[*Translation*]

Mr. Michel Bellehumeur: I have an amendment to section 1, which I drafted earlier. I propose that we amend proposed paragraph 67.1(1)(*d*) by replacing the word "cause" by what follows: "direct, propose, counsel or cause any person in any manner", and the rest of paragraph (*d*) stays the same: "anything mentioned in any of paragraphs (*a*) to (*c*)".

[*English*]

The Chair: Okay. So the English would be “directs, proposes, counsels or causes any person in any way”.

Just give me a second here to consult on how I'm going to get through this.

Ms Beaumier, what we have is a subamendment from Mr. Bellehumeur to your amendment. Do you accept that subamendment?

Ms. Colleen Beaumier: Could you read that, please?

The Chair: It would be “directs, proposes, counsels or causes any person in any way”.

Ms. Colleen Beaumier: Just a moment, please.

The Chair: Sure.

Ms. Colleen Beaumier: We're just looking at semantics here. Can we say “in any manner”?

The Chair: Sure. It's the same thing—“in any manner”.

Ms. Colleen Beaumier: Yes, “in any manner”.

The Chair: Because it doesn't change the French.

Do you agree, Michel?

[*Translation*]

Mr. Michel Bellehumeur: Yes.

[*English*]

The Chair: Okay. In English, then, the subamendment—if you accept it, Ms Beaumier—is “directs, proposes, counsels or causes any person in any manner”. I'll try it *en français*:

[*Translation*]

"ordonner, proposer, conseiller ou amener de n'importe quelle façon..."

Ms. Eleni Bakopanos: Bravo!

[*English*]

The Chair: Thank you.

[*Translation*]

Ms. Eleni Bakopanos: He has to be encouraged, Michel.

[*English*]

The Chair: The old dog and the new trick.

Who called me a dog?

Do you accept those amendments?

Ms. Colleen Beaumier: I accept those, Madam Chair.

The Chair: That subamendment?

Ms. Colleen Beaumier: Yes. I propose the amendment, as amended.

(Amendment agreed to)

(Clause 1 as amended agreed to)

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill as amended carry?

Some hon. members: Agreed.

The Chair: Shall I report the bill with amendment to the House?

Some hon. members: Agreed.

The Chair: Shall the committee order a reprint for use at report stage?

Some hon. members: Agreed.

The Chair: Thank you.

Congratulations, Ms Beaumier.

I want to also thank the justice department officials for working so closely with us. We appreciate that very much. We've done some good work.

Ms Bakopanos, did you want to say something?

• 1025 

Ms. Eleni Bakopanos: Yes. I just want to make a point, because it's a problem I'm going to run into again. Every Monday afternoon three members of this committee sit on the custody and access committee. I would really appreciate if we had no meetings on Monday. This is the report stage of the custody and access committee. Its recommendations I think are very important in the process of the custody and access legislation. So I would appreciate very much if everybody would agree not to meet on Mondays. I've made this point before Mr. Mancini, Mr. MacKay, and two or three other members who sit on the custody and access committee. Please. I can't be in three places at one time.

The Chair: Let me just reiterate that it's not our policy to meet on Monday afternoon. We only do it when we're backed up with our schedule, which is what happened this week. So we'll try not to do it. However, I don't think we're in a position to say we won't ever do it.

Ms. Eleni Bakopanos: No. I am asking for a firm decision.

The Chair: Well, you'll have to bring a motion then.

Ms. Eleni Bakopanos: Okay. I'll bring a motion then.

The Chair: I don't think we're in a position to do that.

Ms. Eleni Bakopanos: I think it's only until November, Madam Chair, because the access committee is going to sit.

The Chair: Well, it's your work that we're trying to get through the committee, your department's work.

Ms. Eleni Bakopanos: I'll bring a motion.

The Chair: Okay.

This afternoon we have the victims report. Be here and be clear.

Thanks. We're adjourned.