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Chair

Mr. Leon Benoit

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● (1100)

[*English*]

The Chair (Mr. Leon Benoit (Vegreville—Wainwright, CPC)): Good morning, everyone. I have enough members to hear a witness, and I'm sure others will come in as we get going. I do want to start to give people ample time to ask their questions and to give our witness today time to be heard, as we're looking forward to that.

What we're doing in the first hour today is continuing our study of Bill C-11, which is an act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings.

Our witness is from the Office of the Privacy Commissioner of Canada, Jennifer Stoddart, Privacy Commissioner of Canada.

Welcome here today, Ms. Stoddart. If you could just make a presentation first, then we'll open right up to questions.

Ms. Jennifer Stoddart (Privacy Commissioner of Canada, Office of the Privacy Commissioner of Canada): Thank you very much, Mr. Chair. Thank you for inviting me today. I'm sorry I wasn't available earlier, but I'm very pleased to be here today.

My presentation is rather perfunctory and is meant to be practical. I'll go immediately to the amendments to the privacy legislation in Canada and make comments on them. Then I'll be happy to take your questions.

[*Translation*]

Mr. Chair, thank you for inviting me to comment on Bill C-11, the Public Servants Disclosure Protection Act.

I have had the opportunity to review the bill and would like to focus my remarks today on clauses 57 and 58 which add discretionary exemptions under both privacy laws to refuse to disclose personal information where a formal request for access has been filed. I will then conclude my statement by offering my comments on clauses 15 and 29 of the bill.

[*English*]

First of all, clauses 57 and 58, the discretionary exemptions to Canada's privacy legislation. Under the Privacy Act, the identity of a person making allegations against another person was considered to be the personal information not of the person making the allegations, but of the person against whom the allegations were made. In essence, the act, as it was passed, contains the right to know your accuser.

This approach became somewhat modified when the Federal Court of Appeal decided, in 2002, that the identity of the accuser can be the personal information of both the accuser and the accused, with one interest outweighing the other, depending on the circumstances. The court in Pirie decided that in the context of administrative investigations, fairness will generally require that the identity of the accuser be disclosed. Under PIPEDA, the Personal Information Protection and Electronic Documents Act of 2000, our offices applied the same principles in dealing with access requests.

The effect of the amendments in Bill C-11, to both the Privacy Act and PIPEDA, is to shift the balance in favour of protecting the identity of the whistle-blower by adding new exemptions to the right of access. These are discretionary exemptions that would presumably operate to protect the identity of the whistle-blower to the extent possible in light of the purpose of Bill C-11. This, in my view as Privacy Commissioner, is a reasonable result in light of the special nature and the sensitivity of Bill C-11's subject matter.

This result is also supported by the wording in clause 11. That clause mandates the protection of the identities of all persons involved in the process, subject to the principles of procedural fairness and natural justice.

The committee may wish to turn its attention to the extent of the applications of these principles. It is possible that in some circumstances the whistle-blower's identity could be revealed by virtue of the discretionary exemption and existing case law. For example, if at the end of an investigation recommendations are being made that could affect an individual's livelihood, fairness could dictate that the identity of the whistle-blower be disclosed. If, however, the allegations could be independently verified and it would add nothing to reveal the identity of the accuser, then that identity might be withheld.

On the whole, looking at these clauses, I believe that clauses 57 and 58 strike an appropriate balance. There are basically two ways, I think, of protecting whistle-blowers—providing anonymity and protecting against reprisals. This bill, to my mind, does both. It has provisions allowing identities to be withheld, and it provides a clear legislative recourse in cases of reprisals. A person who suffers reprisals can, under this bill, approach as appropriate the Canadian Industrial Relations Board or the Public Service Staff Relations Board.

That is my comment on the exemptions to the Privacy Act and PIPEDA, as proposed in this draft legislation.

I'd like to turn now to clauses 15 and 29 and echo the comments of my fellow commissioner, the Honourable John Reid, the access to information commissioner, about the possible impact of these clauses, as they are now drafted.

● (1105)

[*Translation*]

Information Commissioner Reid expresses concern about the effect of clauses 15 and 29 of the bill on his ability to maintain the confidentiality of his investigations. I support commissioner Reid's view and echo his concerns with respect to my own office's investigation.

Clause 15 refers to the provisions of the bill allowing public servants who believe that wrongdoing has been committed to disclose information about it to their supervisors, designated senior officers, the president of the Public Service Commission, or the president of the Treasury Board. Paragraph 15(b) states that these provisions apply despite any restriction created by or under any other act of Parliament on the disclosure of information.

Clause 29 requires chief executives and public servants to provide the president of the Public Service Commission or the person conducting an investigation, with any facilities, assistance, information and access to their respective offices that they may require for the investigation. Sub-clause 29(2) specifies that this, too, applies despite any restriction created by or under any other act of Parliament on the disclosure of information.

I fully support Information Commissioner Reid's view that the very restricted regime for disclosure of information collected by the Information Commissioner during investigations is designed to encourage candour of witnesses and cooperation of departments, and to demonstrate the neutrality of the Information Commissioner as an ombudsman. The Privacy Act and PIPEDA contain essentially the same confidentiality provisions as the Access to Information Act and commissioner Reid's concerns apply equally to my own office.

While I understand that the government did not intend clauses 15 and 29 to extend to the investigative records held by officers of Parliament and other investigative bodies, I believe that this should be clarified in Bill C-11. Therefore, I support commissioner Reid's proposed amendments to clause 15(b) and subsection 29(2). I will quote his suggestion:

> Both of these provisions should end with the words “except those listed in Schedule 1.” A schedule would then be required containing reference to the confidentiality provisions in the statutes of officers of Parliament and other investigative bodies.

[*English*]

Those are the essentials of my remarks today.

Mr. Chair, in closing, I would like to indicate that I support the intention of the bill to provide a positive environment for whistle-blowers to perform their very important public interest function, a function with which unfortunately my office has had a lot of experience in the past years.

Thank you very much. I'd be happy to try to answer your questions.

The Chair: Thank you very much, Ms. Stoddart, for coming with specific recommendations. We do appreciate that.

We'll open up to questions. Seven minutes, Mr. Preston, followed by Madame Thibault.

Mr. Joe Preston (Elgin—Middlesex—London, CPC): Thank you, Chair.

Thank you, Ms. Stoddart, for coming and thank you again for verifying what we've said here.

It's becoming one of my favourite questions, so I'll just start right off with it. Were you asked for input into Bill C-11 while it was being constructed or while it was being written—before the bill was written?

Ms. Jennifer Stoddart: No, we weren't.

Mr. Joe Preston: Do you find that perhaps out of sync, as Mr. Reid did?

Ms. Jennifer Stoddart: Perhaps I should go back, honourable member. Last winter we were consulted informally at a later stage on the predecessor to this latest version of Bill C-11, the title of which was somewhat similar to this.

Mr. Joe Preston: So you had input into Bill C-25?

Ms. Jennifer Stoddart: Yes, we basically had a telephone conversation and were told what might be in it. I received a telephone call saying that this bill was going ahead in this way, but I don't think that's really a consultation.

Mr. Joe Preston: I wouldn't call that input. I would call that information sharing.

● (1110)

Ms. Jennifer Stoddart: Right. I just wanted to be precise.

Mr. Joe Preston: You have made the same recommendation for amendments as Mr. Reid did—

Ms. Jennifer Stoddart: Yes.

Mr. Joe Preston: —by pointing out what needs to change in clauses 15 and 29 and adding a schedule as to how to modify it.

Ms. Jennifer Stoddart: That's right.

Mr. Joe Preston: You stated in your comments that you'd like to indicate that you support the intention of the bill to find a positive environment for whistle-blowers to perform their public interest function. Does this bill do that?

Ms. Jennifer Stoddart: My purpose in coming here is to try to shed some light on the changes to Canada's privacy legislation, because generally a privacy commissioner, of course, opposes any changes to privacy legislation that are contrary to the protection of privacy in the act. So I started off my comments on clauses 57 and 58, and they are what I feel most qualified to comment on. In terms of clauses 57 and 58 and the changes to the definition of personal information, I think this bill is an appropriate way to go forward.

Mr. Joe Preston: If I can get you to go further on what you've just said, your understanding is that the privacy legislation in the case of whistle-blowing...and we've had some conversations around this table on that. But certainly for a whistle-blower to come forward there needs to be some thought for anonymity, so that they're not going to be found out partway through the process. Perhaps after the fact, when all the protection is in place, it would work.

Do the changes to clauses 57 and 58 give them that type of privacy?

Ms. Jennifer Stoddart: I've tried to be as precise as possible in my prepared remarks because this is not a question on which I can give you an absolute answer, because it depends on the context, of course. That is what the Federal Court of Appeal said in the Pirie decision, with which we must now interpret the Privacy Act—and PIPEDA, by implication.

I think it goes a good way towards protecting the anonymity of the whistle-blower. I've suggested in my remarks, which my staff and I considered carefully, that there may still be situations in which a whistle-blower's identity would be revealed at the end of the day. I think we can't rule that out. I wanted to put that on the table for you so that you would know that seems to be the interpretation of the Privacy Act and PIPEDA.

But that being said, it does provide significant additional protection for whistle-blowers, and given the importance of this problem of providing a kind of safe haven in which whistle-blowers can feel free to come forward, I'm satisfied with this way of moving forward.

Mr. Joe Preston: You mentioned in your statement that, “In essence, the act...contains the right to know your accuser.” But do clauses 57 and 58 exclude that, to a degree, until the end? Is that what you're saying?

Ms. Jennifer Stoddart: That's what we're trying to pinpoint. It certainly excludes it to a very large degree.

What we're saying to you is that I don't think anybody can absolutely say to you, given the Privacy Act and the way it's been interpreted, that the identity of a whistle-blower in all circumstances would never ever be revealed. I think that should be said. But in most circumstances, we think this gives enough protection that it would be an unusual situation that the whistle-blower—

Mr. Joe Preston: I think if we can say that, then at least we're going to have whistle-blowers feeling a little safer about coming forward. I agree with what you're saying, or at least you're saying pretty clearly that we can't guarantee it 100%—at least not throughout the whole day—and at the end of the day, perhaps it may come out. But what you're saying is that you think it provides a legislative base for it not to happen right upfront in every case?

Ms. Jennifer Stoddart: Exactly. It provides a very serious legislative base. As Privacy Commissioner, I wanted to make sure the committee was aware of the way the privacy legislation operates. In most cases, I think the identify of the whistle-blower could be withheld until the very end; but I can't say that it provides for that in all cases forever.

It gives us parameters, I guess.

Mr. Joe Preston: The other piece is that we've also talked a lot during this legislation about wrongful whistle-blowing, about people coming forward with information maliciously, if you will. Where does privacy protection leave the person who has been falsely accused?

● (1115)

Ms. Jennifer Stoddart: In terms of the operation of the discretionary exemptions, if somebody comes forward maliciously and in bad faith, and this is the conclusion of the investigation, this might be one of the occasions where it could be considered appropriate to reveal the whistle-blower's identity, because it was malicious and done in bad faith for ulterior reasons, and so on. Presumably, this would have done some harm to somebody who was maliciously and falsely accused of wrongdoing.

These are serious issues, though.

Mr. Joe Preston: I believe the Information Commissioner said pretty clearly on clauses 15 and 29—which you have also asked about or recommended changing or amending—that he couldn't see a reason why they were written the way they were, unless it was to hide information or to put information away for a good period of time.

Do you see the same thing?

Ms. Jennifer Stoddart: On clauses 15 to 29?

Mr. Joe Preston: Sorry, it was clause 55 in his case. He said he doesn't feel that clause 55 is intended to protect the identities, “but is designed to keep the details about alleged wrongdoing secret....”

Ms. Jennifer Stoddart: Mr. Reid is the access to information commissioner and is specialized in that, so I won't second-guess Mr. Reid.

From the point of view of the protection of personal information or the identity of the whistle-blower, I think it's undeniable that this does add an extra layer of protection to the person who comes forward and divulges a wrongdoing.

Mr. Joe Preston: But does the extra layer of protection also put up another wall in the investigative process?

Ms. Jennifer Stoddart: Well, the extra layer of protection, as I understand here, in the Access to Information Act, means that the other information is not accessible for a period of 20 years.

Mr. Joe Preston: Right.

The Chair: Okay, thank you, Mr. Preston.

Madame Thibault, and Monsieur Sauvageau, followed by Mr. Boshcoff.

[*Translation*]

Ms. Louise Thibault (Rimouski-Neigette—Témiscouata—Les Basques, BQ): Thank you, Mr. Chair. Did we require that Mr. Reid's public statement be sent to Ms. Stoddart so that she could comment? I know I did not make that request.

Ms. Stoddart, it would have been very interesting if you had been given a copy of this statement so that you could know what Mr. Reid suggested. Each of the commissioners, in his or her respective role, could have given us their opinion. I would like this to happen eventually.

Ms. Jennifer Stoddart: Honourable member, I did read Mr. Reid's remarks, although I do not have a copy right here. I did mention in my opening remarks that I support the commissioner's amendments to clauses 15 and 29, because the impact is the same on the Privacy Act.

Ms. Louise Thibault: What about clause 55?

Ms. Jennifer Stoddart: I did not comment clause 55 in my opening remarks because it amends the Access to Information Act.

Ms. Louise Thibault: I see. I was taking a broad view of the bill. Bills sometimes have an impact on the responsibilities of both commissioners. It is important that this link be made clear so the public and employees get a good grasp of what it is all about.

Mr. Preston asked you whether you had been formally consulted, and you said no. Did you feel concerned when this bill made public? Did you or your staff present your thoughts about it or submit a document on Bill C-11, since you had not been consulted, to ask questions or clarifications or to make suggestions?

Ms. Jennifer Stoddart: Honourable member, I gave you today the conclusion of our reflection. The essence of it is my opening remarks.

Ms. Louise Thibault: Did you send these remarks to the president of the Treasury Board when you realized the Bill C-25 of the previous session would be introduced as Bill C-11?

● (1120)

Ms. Jennifer Stoddart: No.

Ms. Louise Thibault: May I ask another question?

The Chair: Of course.

Ms. Louise Thibault: On page 4 of your remarks, you wrote in the last paragraph of the first part:

> A person who suffers reprisal can approach, as appropriate, the Canadian Industrial Relations Board or the Public Service Staff Relations Board.

I do find this very reassuring. Do you think this piece of legislation provides adequate protection? Should we not be more proactive? We should not be saying it would be too bad if an employee suffered reprisal. In this bill, we should minimize the risk of this happening. I do not find any solace in the fact that a person can approach a board if he or she suffers reprisal. I would like us to deal with this risk of reprisal so that this bill can have teeth. I would like your comments on this.

Ms. Jennifer Stoddart: Honourable member, I totally agree with you. The sentence you quoted says that the bill provides specific legal remedies when reprisals do occur.

I do not find this clause right now, but the bill provides rather strong consequences for reprisals. The Canadian Industrial Relations Board is not the only remedy. The bill clearly states that reprisals are forbidden.

Ms. Louise Thibault: I asked this question to several witnesses, including the Public Service Commission president and the Treasury Board president. I think a proactive approach is important. If it becomes necessary and in order to avoid any reprisal, we should go as far as offering a transfer or a leave of absence to the person involved in such a process. He or she would feel more free and would know he or she did what was required.

This bill should include a provision on the steps that should be taken in these situations. That would be a proactive approach. Do you have any similar suggestion?

Ms. Jennifer Stoddart: Honourable member, I did not consider this. I stayed in my field of expertise, which is the protection of personal information. But I think your suggestion is good.

Ms. Louise Thibault: I am thinking about the person as a whole, and not only about the protection of information.

Ms. Jennifer Stoddart: I agree with your suggestion that the person should be offered a position where no reprisal would be possible. I agree with you.

Mr. Benoît Sauvageau (Repentigny, BQ): Welcome, Ms. Stoddart.

Thank you for your concrete recommendations. My question deals with the autonomy of the position what will be established. The president of the Public Service Commission is mentioned. Some of my colleagues object to this. I do not remember who is in this position right now.

Ms. Jennifer Stoddart: Mr. Keyserlingk.

Mr. Benoît Sauvageau: Thank you. Mr. Keyserlingk also said that this should be an independent officer of the House. This is your own status.

There are three options, I would like to know which one you prefer.

The bill states that the president of the Public Service Commission should exercise these functions. It has been said during our proceedings that the authority should be an independent officer of the House. More recently, I and other people have suggested that we should have an independent officer who would work with the Auditor General to give more prestige to Bill C-11, along the model of the Commissioner of the Environment and Sustainable Development, and this would be an independent officer of the House.

Since we already have the Privacy Commissioner, the Information Commissioner, the Ethics Commissioner, the Official Languages Commissioner, and others that do not come to mind, should we create another similar position? To make whistle-blowing easier or promote whistle-blowing, should we associate this position with the Auditor General office?

Ms. Jennifer Stoddart: These are important issues. I do not pretend to have any particular knowledge on all aspects of the machinery of an adequate whistle-blowing process. There are many aspects. There is not only the status of the head of the organization, but also the organic links with a financing source, the legislation that defines his or her duties, and these are only two important aspects.

So, maybe we should—

● (1125)

Mr. Benoît Sauvageau: Forgive me for interrupting, but I was just reading in your documents that you can receive complaints from the general public. I am a member of Parliament, and I get that information just today. If I wanted to make a complaint, I confess I would not know how to do it.

I have a great deal of respect for your work, and I do not mean to be critical, but the public and government employees know very well the role of the Auditor General because she tables reports that attract attention in the media.

If the popularity or the notoriety of the Auditor General were associated with Bill C-11, we could say that this independent officer will be under the Auditor General office so that he or she can use its services and expertise. In a case like the sponsorship program, there was a direct link between whistle-blowing, bad management and the role of the Auditor General.

Would it not be easier and more natural, for employees who want to register a complaint to make a direct link between this legislation and a better known officer?

Ms. Jennifer Stoddart: I cannot speak for the employees. The mandate of the Auditor General office is to audit administrative and accounting procedures. It may have gained more importance because of the situation we all know about. But having in that office an officer responsible for the disclosure of wrongdoings, that would often involve employees, senior officials, and co-workers, is not the only alternative. This issue concerns the administration of the public service and the rules of human resources management in the public service. So, this issue has several aspects.

[*English*]

The Chair: Thank you, Ms. Stoddart.

Mr. Boshcoff, followed by Mr. Martin.

Mr. Ken Boshcoff (Thunder Bay—Rainy River, Lib.): Thank you very much, and welcome, Commissioner.

My first question will be on the nature of consultation in general. From your understanding, when legislation is proposed and drafters get down to pen and pencil and start putting these things together, what is their role? Is it kind of a shotgun or blanket approach where people are told, if you have some thoughts on this, come forward and help us put some sentences together? Or is it an initiative of the government where they state in a nutshell what they'd like to do before they bring it to first reading, send it back to committees, and so on, and receive input?

How do you view the legislative process?

Ms. Jennifer Stoddart: I guess I've been fairly recently involved in the legislative process in Ottawa. My understanding is that instructions are given to drafters, before which any consultations would have had to take place, or after there is a first draft that can be circulated.

One of the things I've noticed in the time I've been in this position is that my office is not systematically, or indeed often, consulted in any kind of formal way on legislation that involves privacy. My impression in the last few months has been that we are consulted so late—sometimes we just learn about it when it's in front of the House of Commons—that it's hard to give as meaningful an input as we would like to.

That is why, for example, we come before you today with these comments; we didn't have an opportunity to make them earlier.

Mr. Ken Boshcoff: On the one hand, then, there seems to be some kind of systemic problem in terms of privacy in general for all legislation, not putting you on the checklist of involvement, say, from the beginning, which is probably beyond this committee's role.

● (1130)

Ms. Jennifer Stoddart: Yes.

Mr. Ken Boshcoff: On the other hand, we've now had this referred to this committee so that people like you could make their comments. Is that not satisfyingly democratic in terms of input?

Ms. Jennifer Stoddart: It is one way to go. I guess it depends on the interest of the committee for any suggested amendments. I think it's preferable that comments be made ahead of time. It's perhaps a more optimal environment in which to weave in privacy protection, for example. But the alternative certainly is to call people like me. We can make the comments then, and the committee can decide if they want to entertain them.

Mr. Ken Boshcoff: Is it usually done after first reading, or second or third? Is there a time during which further input and drafting and fine tuning occurs, and amendments?

Ms. Jennifer Stoddart: I'm maybe not the most qualified person to tell you about this, but from my experience, we're called when it's at committee stage.

Mr. Ken Boshcoff: Later on, then, this committee could actually deal with the government operations part, involving privacy, as part of a recommendation to the rest of government on involvement right from the get-go.

Ms. Jennifer Stoddart: I think the people in charge of the drafting perhaps could give you more satisfactory answers than I can on that.

Mr. Ken Boshcoff: Okay.

Let's just deal with the confidentiality protection right. There are two points of view, and I'd like to know which one you think is right.

The Information Commissioner said that the bill's confidential provisions go too far, and that they actually will provide sufficient protection for those who disclose. Then we have the public service integrity officer, who recommended that the bill should go further.

Who's right?

Ms. Jennifer Stoddart: I think in my remarks I say that the way is perhaps somewhere in between them. We think the protection for whistle-blowers is sufficient in this, and we think the bill is an appropriate balance, but we can't always predict what is going to happen. The identity of the whistle-blower cannot be protected in all cases.

Why do we not suggest going further? Perhaps because my mandate is to interpret the Privacy Act as it was passed by the legislator and as it was interpreted by the courts. I'm giving you the position given by that mandate.

Mr. Ken Boshcoff: Yes, okay.

Madam Thibault essentially asked that question, on whether it was adequate. In essence, you agreed that it was, that the provisions here protect the identities?

Ms. Jennifer Stoddart: Yes. My office has looked at this. As you know, the people in my office were in a very difficult position a couple of years ago. I asked the staff at my office, do you think this, as drafted, would be adequate? These people, who were involved in this situation, and very credible, said, yes, they'd looked at the legislation, and it seemed to them to provide that much more protection that they'd feel comfortable with it.

Mr. Ken Boshcoff: You also used the phrase, and I won't put words into your mouth, that this was essentially striking a balance between openness and confidentiality. Does it seem that the drafters got that part right?

Ms. Jennifer Stoddart: Yes, it does.

Mr. Ken Boshcoff: Okay.

Let's take just one little step backward in terms of safeguarding personal and investigative information. I know Mr. Sauvageau mentioned this too, that through the course of the hearings we've been trying to list the number of agencies involved in dealing with certain aspects of personal protection. Right now we're probably close to ten or so. It seems that Parliament is addressing the question of safeguarding information, or investigative information, in many different ways. In fact, now we're at a stage where we can't name them all, and we're getting a bit confused by who should do what.

In terms of protecting privacy, it seems a lot of people are keen to do that. Maybe I could just get your feelings about the plethora of organizations, or the adequacy of the number of organizations, now dealing with this issue, and disclosure in general on the investigative side.

● (1135)

Ms. Jennifer Stoddart: I believe you're referring to the impact on organizations that would be carrying out investigations.

Mr. Ken Boshcoff: Yes.

Ms. Jennifer Stoddart: There seems to be a plethora, yes. I don't have a comprehensive list of these investigative bodies, but I think it could be drawn up. I think there are quite a few. What is important is that they all carry out these functions and they would all be affected, probably unintentionally, in the same way. But it is possible, I think, to find a list of those organizations.

Mr. Ken Boshcoff: Thank you very much.

The Chair: Thank you, Mr. Boshcoff.

Mr. Martin.

Mr. Pat Martin (Winnipeg Centre, NDP): Thank you, Mr. Chair.

Thank you, Ms. Stoddart, for being here. Although I wasn't here to hear your presentation, I've viewed it.

I think what caught our attention as a committee was the presentation here by Mr. Reid, the Information Commissioner. As other committee members have raised, it was quite a bombshell he dropped, the lack of confidence he had in the proposed bill to protect the identities of whistle-blowers for any long term. He made specific reference to clause 55 of Bill C-11, which would enable government institutions to suppress, for 20 years, instances of wrongdoing. He doesn't believe the identities of the whistle-blowers could in fact be protected and guarded.

Are you satisfied that in the context of this 20-year protection the identities can be safeguarded?

Ms. Jennifer Stoddart: That was what I tried to focus on in my prepared remarks, and that was one of the reasons I wanted to come to you. It was to say the way privacy legislation in Canada is currently written and interpreted, particularly between 2002...I don't think we can say they can always be absolutely, forever, in all cases, totally protected.

Mr. Pat Martin: Well, once that comment gets out, that pretty well kills the idea of a whistle-blowing bill. Even with you stating those qualified reservations you have expressed and couching them in very gentle terms, the ripple effect throughout the entire public service will be for people to say, oh well, there's no absolute guarantee; therefore, why would I risk my job, my future, my family's future, my house, and my car to come forward and do the honourable thing?

Is there nothing you can recommend to us that would then enable you to say, if you do this, then we can absolutely guarantee the privacy of the complainant?

Ms. Jennifer Stoddart: Well, what I tried to say—and, believe me, we thought about this at some length and very carefully—was that probably in most cases where people came forward in good faith about this kind of situation, yes, their identity would be protected.

Mr. Pat Martin: There's that word “probably” again. I'm a former union rep, and let's suppose one of the members of my bargaining unit had come to me and said, I have this information; should I divulge it or not? Frankly, if I had heard you, the Privacy Commissioner, say “probably” they could be shielded and guarded, my recommendation to my union members would have been to just clam up. You're better off to just hold your nose, go to work, and live with it, because if they can't guarantee your protection, your first obligation is to your family, frankly, and that means taking care of your job, taking care of your own backyard.

And there's a culture of that attitude in the public service now.

Ms. Jennifer Stoddart: That's why I thought I had to raise this with you. We've looked at it and we think, as I say, that in most cases confidentiality would apply. I also go back to my prepared remarks, because we chose those cases carefully: there might be some cases where in the end the identity of the whistle-blower would be divulged.

● (1140)

Mr. Pat Martin: It has to be revealed in order to follow through, in order to finish the job, in other words.

Ms. Jennifer Stoddart: Yes, and also in order to be consonant with the Privacy Act and with the interpretation of the Federal Court in the case I mentioned to you.

Would you wish to go beyond that? I haven't asked this question; legal experts would have to look at it, but I would think you would have to go back and change the definition of "personal information" in the Privacy Act, which would have repercussions other than in the whistle-blowing legislation.

Mr. Pat Martin: There'd be consequential repercussions throughout, yes.

Ms. Jennifer Stoddart: I just want to make sure this is on the table for your consideration.

Mr. Pat Martin: Are there any other jurisdictions you know of that have wrestled with this and satisfied the privacy concerns? You have some exchange with your counterparts in other countries.

Ms. Jennifer Stoddart: I haven't looked into the definition of personal information. Whistle-blowing? Certainly other jurisdictions may define personal information in a different way. I know the jurisdiction where I formerly worked did define it in a different way, but that has implications not just for this kind of legislation but for other legislation. Different legislatures may choose to define personal information in different ways. There are other models you could then look at, but again, the implications are very broad in terms of the definition, not just for this possible act but for others.

Mr. Pat Martin: Do you think this initiative has any hope of realizing a whistle-blowing regime that's going to actually protect public servants, or are we doomed?

Ms. Jennifer Stoddart: Well, I don't know if you were here, honourable member, when I stated before that I myself had asked this question. I thought some very credible members of my staff were the people to serve as a good barometer on this issue, given what the Office of the Privacy Commissioner had lived through. They, people who had studied the legislation and the ones who helped me prepare my presentation today, said yes, they would feel confident about going forward under this legislation although they had lived through negative experiences where staff members hadn't felt they would have protection to go forward. They finally only went forward under confidence to a House of Commons committee, as you know.

Mr. Pat Martin: And even then, they brought their own lawyers with them for added protection. That was one of the saddest things about the whole Radwanski affair, that even those well-meaning whistle-blowers, who had made up their mind that they would in fact come forward to a House of Commons committee, felt they had to bring legal counsel with them, that even we couldn't give them absolute assurance they'd be okay. It's a sad thing.

Thank you.

The Chair: Thank you, Mr. Martin.

Mr. Preston, followed by Mr. Szabo.

Mr. Joe Preston: I just have a couple of additional questions. The legislation sets aside the Canadian Armed Forces, CSIS, and the RCMP under some security issues; I believe that's the indication there. What are your views on that?

Ms. Jennifer Stoddart: Perhaps ideally they would be in. However, it's increasingly evident that the kind of information that circulates in terms of national security concerns is highly sensitive information. What I would look for, then, is equivalent protection within the regime of those organizations that deal with highly sensitive classified information.

Mr. Joe Preston: The same, but separate.

Ms. Jennifer Stoddart: That's right.

Mr. Joe Preston: We've discussed an example here on a couple of occasions. Say it's an Environment Canada office in Timmins, a two-person office. How do you protect the privacy of a whistle-blower in a very small office, one that's isolated in a region rather than being in the large bureaucracy we may call Ottawa?

Ms. Jennifer Stoddart: I don't have a quick answer for that one. Yes, there are situations where, from a simple description of the events, you can probably deduce who the whistle-blower was. That's one of the challenges of whistle-blower measures in general, that if the whistle-blower doesn't want to relocate, there isn't a quick solution for that kind of situation.

● (1145)

Mr. Joe Preston: Finally, this is just to verify something; I believe Mr. Sauvageau asked you the question. Throughout this we've had witnesses continue to come back to us to say having an independent officer of Parliament is the right way for us to go from the point of view of identifying who whistle-blowers would go to. Did you state an opinion on that issue?

Ms. Jennifer Stoddart: No, I didn't per se. I think I said you'd have to look at several things, including the type of legislation. This will be new legislation if it's put into place. What would it bring that's new? You have the autonomy of the organization, how it's financed, and the way the head of the organization is named, so there are a few other aspects to look at.

Mr. Joe Preston: Also in the legislation it requires the employee to, if possible, work through the chain of command in the organization they're in, and there would be a wrongdoing officer or somebody in each of the organizations. Does that add additional difficulty from a privacy point of view? The employee may now take two or three different routes in order to report a wrongdoing. How are we sure their privacy is being protected on each of the routes?

Ms. Jennifer Stoddart: I thought this was one of the areas in which this draft legislation had incorporated responses to some of the problems with the previous legislation, where you had to go through the internal mechanisms. It seems to me, as I remember, there's an opting out, which to my mind—-

Mr. Joe Preston: It does allow you to opt out, but it doesn't force you to or tell you that you must.

Ms. Jennifer Stoddart: That's right, so people who are concerned about their identity being divulged have a choice of ways to go forward, and this is a positive aspect.

Mr. Joe Preston: That's where that independent office would come in.

Thank you very much.

The Chair: Thank you, Mr. Preston.

Mr. Szabo.

Mr. Paul Szabo (Mississauga South, Lib.): Ms. Stoddart, it's nice to see you again.

Anonymity and autonomy are concepts that probably capture a lot of the concerns we've been wresting with.

Subclause 13(1) of the bill says that a public servant "may disclose" a wrongdoing, etc. In your testimony you talked about allegations and the privacy implications going both ways. If subclause 13(1) were changed so a public servant "must disclose " rather than "may disclose", then a public servant would be put in a position where they had no recourse, as Mr. Martin was saying, as to whether they did it or not. If it was "must", would that not shift the position of who the alligator is to the commissioner, for instance, who is responsible for this, because the employee was required by law and by their oath?

Ms. Jennifer Stoddart: It would seem to me to place a very great burden, honourable member, on the individual members of the public service if they are required to come forward. I would think this has, in a more philosophical sense, privacy implications.

Mr. Paul Szabo: Okay.

I raise it because that's how the Canadian Institute of Chartered Accountants works. Any member who becomes aware of any information, simply an allegation—they don't have all the information—must report. If subsequently it's determined that they knew or ought to have known and did not report, they are equally culpable. It's not simply philosophical. The word "must"...or "should"...maybe there's a middle word there. But the issue is that if there is an allegation, however that might be defined, being attributed to a person, that person may be identified at some point. That's the hurdle.

I'm trying to find out whether or not there is a way people can be part of the solution to help those responsible to do investigations and to determine the facts and to determine whether or not there is a viable allegation. Employees haven't got those resources to do it, so they're being characterized as someone who has made an allegation even if they only have second-hand knowledge. Second-hand knowledge, as you know from even the Radwanski situation, was significant and very relevant to the ultimate resolution of the difficulties.

● (1150)

Ms. Jennifer Stoddart: It's interesting that you bring up a professional organization, because yes, indeed, several professional organizations impose on their members the obligation to come forward. But those professional organizations, I think, are very different because they work on a *primus inter pares*model, everyone is equal. They are all members of these professional organizations and they all have these...you know. The public service has a very broad group of employees working at very different levels and so on. I think that would be the difference. Whatever that may be, I don't see that the extent of the obligation, if such was put on, or the suggested duty that is a use of a "should", would change the definition of personal information.

Mr. Paul Szabo: Okay. What if it were determined that an employee had full information of a clear black-and-white wrongdoing, as defined, and it was subsequently found out that they knew and didn't report? Do you think they should be subject to a reprisal?

Ms. Jennifer Stoddart: To a reprisal?

Mr. Paul Szabo: Yes.

I'm sorry, to a consequence, because they... If they found out that they knew but did not report, I mean something very serious that impacted the wrongdoings as defined, do you think there should be a sanction against that employee? I raise it in the context—

Ms. Jennifer Stoddart: I'm not sure that I—

Mr. Paul Szabo: —that they be co-conspirators on something.

Ms. Jennifer Stoddart: Yes.

Mr. Paul Szabo: Do you understand?

Ms. Jennifer Stoddart: Yes. This goes far beyond issues of personal protection and personal information. There are many reasons people may want to remain silent. Another honourable member alluded to the stress on one's self, the stress on one's family, and so on. That's one extreme. The other extreme is that you stay silent because you are in fact profiting from this situation, directly or indirectly.

Mr. Paul Szabo: Hopefully, most of those cases will come out in the investigation of the principal allegation.

Finally, because this anonymity issue is so sensitive and there are some people, I'm sure, as Mr. Martin said, who will not risk one iota becoming identified, anybody who has been around long enough knows that even if you say something as simple as "Gee, that person is late again", that in itself could trigger some reprisals that you would never even know about. So even the simplest of suggestions, such as "Not a team player", etc... This bill does not address brown envelope allegations. Should it? Should the commissioner, or whoever, be obligated to investigate and follow up on anonymous allegations of wrongdoing?

Ms. Jennifer Stoddart: I'd be surprised, although I don't quite remember, that the bill does't allow the president to investigate.

Mr. Paul Szabo: It doesn't specifically get into "allow", but it does not require acting upon it specifically.

Ms. Jennifer Stoddart: Okay.

I think that's a matter of judgment, honourable member, discretion. You may get many brown envelopes. Is it appropriate to act on all of them? Many things may arrive in brown envelopes, some of them serious allegations and not. To the extent that the discretion is lodged in the authority, you hope that person, as it goes now, is a person whose appointment is approved by Parliament, who exercises that discretion appropriately and investigates brown envelope denunciations when it's appropriate.

Mr. Paul Szabo: I hope it would be a last resort for those who have information but have some serious concerns, whether it be because of a small office or because their career is already in jeopardy or they have a lot to risk, that at least there was a venue in which they had confidence that if they were to provide information, there would be someone there to at least read it and would at least take reasonable steps to determine whether there was any foundation to what was stated. Is that unreasonable?

Ms. Jennifer Stoddart: No, I think that's a reasonable expectation.

The Chair: Thank you, Mr. Szabo.

Mr. Scarpaleggia.

Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.): Thank you, Mr. Chair.

In your statement, Ms. Stoddart, you said: This Bill...has provisions allowing identities to be withheld, and provides a clear legislative recourse in cases of reprisals. A person who suffers reprisal can approach, as appropriate, the Canadian Industrial Relations Board or the Public Service Staff Relations Board.

Once something gets to either of those two boards, does the accuser's identity not have to be revealed? I don't know if you understand my question. Once you get to that stage, is the whole thing blown open?

● (1155)

Ms. Jennifer Stoddart: Yes. I haven't looked into how those legislations function, but generally I would—

Mr. Francis Scarpaleggia: In other words, and this is an extreme case, let's say you wanted to smoke out your accuser; you have an incentive to get them to go to either board. That's one question.

The second is regarding the protection of the identity of the accused. In your view as the Privacy Commissioner, at what point does the accused no longer have a right to that kind of protection?

Ms. Jennifer Stoddart: Both your questions, honourable member, have to do with the way our justice system functions more broadly and the fact that no matter how heinous the act, at some point as a basic principle of our justice system, you have to know where these allegations come from and who is responsible for them. It's a huge tension in our justice system, and we're trying to resolve it one way here. It's always very difficult to know where you reveal those identities, how this does not jeopardize the system itself, how you protect the whistle-blower or the alleged victim, perhaps, from reprisals, but how you ensure that the person is not falsely accused. There's no one easy answer to that, I would think, and it's always contextual.

So I don't think there is a point at which, if you look at this act and how it functions, identities are necessarily revealed or not. I think there's a large discretion given to those who carry out the investigation to reveal that, if necessary, and at the appropriate time, given the objective of the act, which is to protect whistle-blowers and to encourage wrongdoing to be denounced in the public service.

Mr. Francis Scarpaleggia: Do you think clause 55, which allows certain information to be protected for 20 years, upsets that balance?

Ms. Jennifer Stoddart: Clause 25 is an amendment to the Access to Information—

Mr. Francis Scarpaleggia: Sorry, clause 55. Is that the one we've been discussing with information?

Ms. Jennifer Stoddart: Yes. I think it's a legitimate question raised by the Information Commissioner. Could it be reduced? Does all information have to be withdrawn from access for 20 years? There may be another way to go. There may be other legislative approaches. If, as I understand it, this is to protect the person who denounces the identity of the whistle-blower, I don't know that other legislative approaches haven't been explored.

Mr. Francis Scarpaleggia: To bring this back to something a little more concrete, back to the Canadian Industrial Relations Board and the Public Service Staff Relations Board, once a case gets there, does it not have to become public?

Ms. Jennifer Stoddart: My understanding is that at some point it does. It can be later on in the process rather than upfront, I would think.

Mr. Francis Scarpaleggia: Thank you.

The Chair: Ms. Stoddart, I have a question. Earlier on, you sounded quite confident that the measures in this bill would protect the identity of whistle-blowers, yet when Mr. Szabo suggested that you should change the requirement that an employee "may" disclose wrongdoing to "must", you expressed concern. It seems to me, on the surface at least, to be contradictory. I'd simply like your explanation of those two apparently different positions.

Ms. Jennifer Stoddart: Thank you.

They're not meant to be contradictory, Mr. Chair. I certainly stand by the remarks, which were carefully thought out. I simply express concern on a functional level, not on an identity-related or personal information-related level, about a clause that would oblige people to come forward.

In a sense, I say that as Privacy Commissioner, dealing with the aftermath of what happened in the office. It was very difficult for employees. Looking at that, if some of them had been obliged to come forward, I can't imagine what the human cost might have been. Whatever the legislation, there can be difficulties for different individuals being involved in a very public or litigious or conflicted process. Not all individuals are equally suited to be involved in that process. It was from that point of view that I expressed my opinion.

● (1200)

The Chair: In the case of your office, had this new legislation, as presented, been in place, you said that you're confident that the identities wouldn't have been disclosed. Why would you still have a concern that the requirement of "must report wrongdoing" would be in place?

Ms. Jennifer Stoddart: It is because, in my own observation, some individuals feel comfortable going forward. Other individuals feel less comfortable, no matter what the protections are. I'm simply trying to raise the issue that it's a matter where some people don't want to get involved in such painful processes.

The Chair: Thank you very much, Ms. Stoddart, for coming today. I appreciate your presentation and your answers to questions. We wish you the very best in the continuance of your job. You're still relatively new to the position.

Ms. Jennifer Stoddart: Yes. Thank you, Mr. Chair.

The Chair: We'll suspend for a few minutes, and then we'll go in camera to discuss future business of the committee.

[*Proceedings continue in camera*]

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