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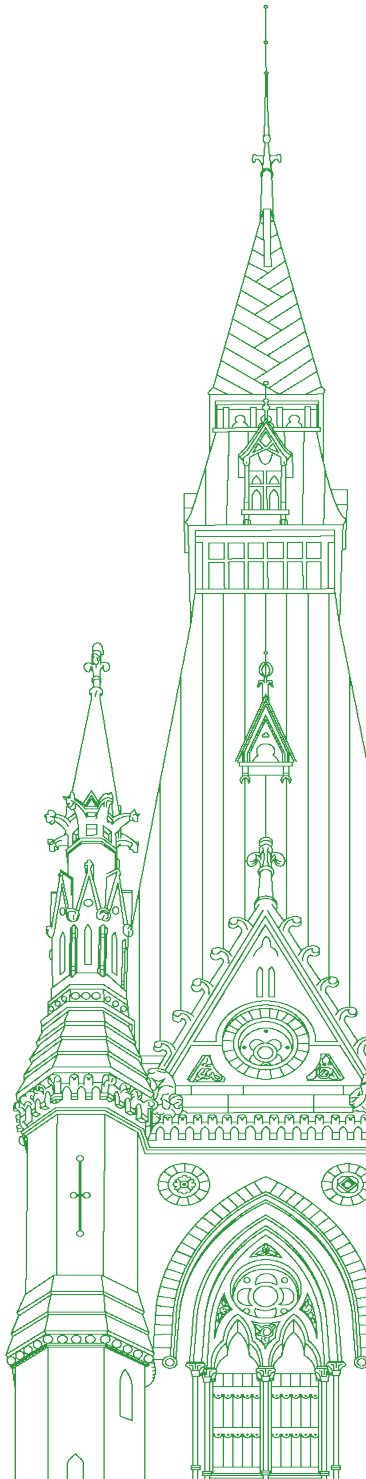

Chair: Mr. Joël Lightbound

Standing Committee on Industry and Technology

Monday, May 27, 2024

● (1105)

[*Translation*]

The Chair (Mr. Joël Lightbound (Louis-Hébert, Lib.)): I call this meeting to order.

Happy Monday morning, everyone.

Welcome to meeting number 125 of the House of Commons Standing Committee on Industry and Technology.

Today's meeting is taking place in a hybrid format, pursuant to the Standing Orders.

Pursuant to the order of reference of Monday, April 24, 2023, the committee is resuming consideration of Bill C-27, Digital Charter Implementation Act, 2022, and we are continuing clause by clause consideration of the bill.

Before we begin, I would like to remind all members and other meeting participants in the room of the following important preventative measures.

To prevent disruptive—and potentially harmful—audio feedback incidents that can cause injuries, all in-person participants are reminded to keep their earpieces away from microphones at all times. As indicated in the communiqué from the Speaker to all members on Monday, April 29, the following measures have been taken.

All earpieces have been replaced. By default, all earpieces will be unplugged at the start of the meeting. When you are not using your earpiece, please place it face down on the middle of the sticker for this purpose that you will find on the table, as indicated. Please consult the cards on the table before you.

These measures are in place so that we can conduct our business without interruption and to protect the health and safety of all participants, including the interpreters. I would like to take this opportunity to thank them for their work.

Thank you for your co-operation, colleagues.

On this Monday morning, we have with us three representatives from the strategy and innovation policy sector of the Department of Industry: Mark Schaan, senior assistant deputy minister; Samir Chhabra, director general; and Runa Angus, senior director. I'd like to welcome you back to the committee.

(On clause 2)

The Chair: As you know, we were at amendment CPC-9.

Mr. Perkins, you had the floor on debate.

[*English*]

I yield the floor to you.

Members, I don't have whoever was left on the list to talk about CPC-9, so please indicate if you're interested in speaking on the amendment.

Mr. Perkins, the floor is yours.

Mr. Rick Perkins (South Shore—St. Margarets, CPC): Thank you, Mr. Chair.

Thank you, everyone, and welcome back.

I know this is going to shock MP Turnbull, but I'd like to begin by moving the motion I put on notice with regard to SDTC. Hopefully we can dispose of this quickly.

As members will recall, as part of our work plan we had scheduled one more meeting on SDTC with four witnesses, which we had passed through a motion here. They were Veena Bhullar, the former liaison between SDTC and ISED; ADM Andrew Noseworthy; Navdeep Bains, minister at the time of the change of the chair; and Gianluca Cairo, the former chief of staff.

We asked for those witnesses to appear after the former CEO Leah Lawrence's testimony. She spoke quite a bit to the interaction she had with those individuals about the conflicts that the chair had and the objections and concerns that the management was expressing relative to the proposed appointment.

In fact, some of these departmental officials came back and said, well, that's okay, they'll manage through the conflict. Others of these officials were actually part of that process, according to the former president, in doing this. As well, ADM Noseworthy sat in on all the board meetings, and there has been, I think, a bit of contradiction between what he said versus some of the other testimony.

Mr. Rick Perkins: For that, we said we would like to have these witnesses back for a meeting in May, and the clerk duly invited them. All of them declined to appear before the committee. When I tabled the motion to summons them and put them on notice, miraculously Mr. Noseworthy said, “Okay, I guess I will come. As an official, I won't get summonsed.” I think that's a dark comment on parliamentary respect, that these former ministers and chiefs of staff declined to appear.

I will read the motion that I have on notice:

> That the committee summon the following witnesses to speak on matters related to allegations of conflicts of interest at Sustainable Development and Technology Canada:
>
> (a) Veena Bhullar, former liaison between ISED and SDTC,
>
> (b) Andrew Noseworthy, assistant deputy minister on clean technologies,
>
> (c) Navdeep Bains, former Minister of Innovation, Science and Industry, and
>
> (d) Gianluca Cairo, former chief of staff to the Minister of Innovation, Science and Industry;
>
> and that the witnesses be asked to appear at a time determined by the chair but no later than June 7, 2024.

The reason is that we gave them more than a month to appear. Mr. Noseworthy has agreed to appear, so we don't need to summons him, but we do need to summons the others who are refusing to appear.

I would hope that the committee will deal with this expeditiously and agree with me that it is a slap in the face to the parliamentary process that the other three, (a), (c) and (d), on that motion are refusing to appear and must be summonsed to appear on this important matter.

This does not add any meetings to our schedule. It was already scheduled as part of our approved steering committee report, which was approved by this committee.

Mr. Chair, I will leave it there, and there might be a few questions or comments, but hopefully we can move on. It would be (a), (c) and (d) who would be summonsed, not Mr. Noseworthy.

● (1110)

The Chair: Thank you, Mr. Perkins.

I will yield the floor to Mr. Turnbull, but just before, as a small clarification, it's not clear that all the witnesses listed have refused to appear. Some have not yet replied, so I just wanted to clarify that. It's true that it has been quite the process trying to get this meeting on SDTC organized. We have been trying with the clerk for some time now.

Go ahead, Mr. Turnbull.

Mr. Ryan Turnbull (Whitby, Lib.): That's what I was going to ask, Chair. I'd like clarification on what invitations have been sent out and when they were sent out, and a bit of information to provide context to Mr. Perkins' motion.

I think it matters, because I don't think that we should use summons lightly. I think it's a step to be taken only when the committee really feels that it's the only option left at its disposal. Often, in some committees, we have had multiple invitations before we summons individuals.

Thanks.

The Chair: I might yield the floor to the clerk, and correct me if I'm wrong, Madam Clerk.

We're still waiting for a response from Veena Bhullar. Andrew Noseworthy has agreed to appear on June 5. Mr. Bains is not available on June 5 due to a prior commitment, but that's for that specific date. In the case of Gianluca Cairo, we're still waiting for a response for June 5, but he has been invited. He was not available in May. We're still waiting for a response for June 5. That's where we stand.

I have to say that the witnesses were invited for different dates in May as well. We pushed it back to June 5 to try to accommodate them. So far, only one witness is confirmed. In the case, for instance, of Veena Bhullar, there's no indication that she has refused. We are just waiting for an answer. We haven't received anything.

Go ahead, Mr. Gaheer.

Mr. Iqwinder Gaheer (Mississauga—Malton, Lib.): Thank you, Chair.

I guess I have a question regarding whether this is even the proper committee to be hearing this assessment. We have the AG's report that's going to come out on this issue. It's going to go to public accounts. I think that would be the proper committee for this to be discussed at. We have an important bill in front of us, important legislation, and this is just delaying our discussions on that topic.

The Chair: Just before we get into a debate, we voted unanimously on a steering committee report that calls for one more meeting on SDTC with the witnesses listed. It's an agreement to have this meeting before the end of the session that this committee agreed to. Ideally, it was supposed to be in May. Now we're in June. To me, this meeting is locked in. We have agreed to it.

[*Translation*]

Mr. Garon, the floor is yours.

Mr. Jean-Denis Garon (Mirabel, BQ): I have one question. If I remember correctly, we agreed to hold two additional meetings, one on Rio Tinto and one on SDTC, and to hold them outside the committee's normal hours, which requires additional resources. Is that correct? That way, we would be completely on track with the agenda we had planned, without in any way impeding the progress of the study of Bill C-27, as promised by everyone. Did I understand correctly? At the end of the day, the essence of the debate is whether we should call these people or wait.

The Chair: Exactly.

As chair, I would like to make a humble suggestion. Now that this motion has been debated by the committee today, the message has been sent. We could wait until Wednesday's meeting to see if Mr. Perkins wants to move his motion again at that time. That would give the witnesses two days to come forward.

Mr. Perkins, you have the floor.

[*English*]

Mr. Rick Perkins: Look, we moved this motion. This is the second time under this study that we've asked former minister Bains to come. The first time he refused. Now he's been ragging the puck.

This is five weeks since we passed this motion. They were given all of May. The motion that this committee approved said to appear in May. I think we've been more than generous to these witnesses to try to accommodate them without further delaying. We do have another piece of legislation, MP Singh's bill. That is most of our hearings in June. We had an agreed schedule, agreed to in the steering committee, unanimously, including by the Liberals, that included this meeting before the end of May.

In order to accommodate, as the chair has said and as MP Turnbull and MP Gaheer have said, we've given them all this time. The first invitations went out at the beginning of May, when we passed the motion. It was public. They have been saying that they can't do this date, they can't do that date, they can't do this date. It's clear that they are refusing to appear through delay tactics, hoping that the summer comes and everybody will forget about this.

This has nothing to do, MP Gaheer will recall, with whatever it is the Auditor General is doing. We have our own inquiry, which we've done on this and which we still cannot do a report on until we've had these witnesses. That's part of the process that we all agreed to. It's amazing to me that the Liberals would want to go back on what they had agreed to in the steering committee before, that they would want to go back and not have the meeting that we agreed to when we passed this motion almost five weeks ago.

A summons is strong, but five weeks of trying to get these witnesses to appear has been more than accommodating. It's time to use that hammer. That hammer is the only thing that got ADM Noseworthy to agree to come.

● (1115)

The Chair: Mr. Turnbull.

Mr. Ryan Turnbull: Mr. Perkins, I agree with you on one thing, which is that we agreed to have a meeting on SDTC. We didn't necessarily agree to these particular witnesses.

Mr. Rick Perkins: They were in the motion that we passed.

Mr. Ryan Turnbull: We said we'd invite them. We didn't agree to summons them. We all know that the Auditor General's report is coming out relatively soon and that this issue of SDTC and the discussion of what to do is not just going to evaporate into thin air. It's going to be a conversation that we need to continue to have.

Why do we need to summons these witnesses now, when one of them hasn't even gotten back on the June 5 date?

Mr. Rick Perkins: They refused to get back.

Mr. Ryan Turnbull: Well, it seems a bit heavy-handed, to me. I believe it is. I mean, I recognize that your desire here is to have those witnesses, but when I spoke to other committee members, they expressed that they weren't all that interested in studying SDTC until the Auditor General's report came out.

In fact, I think it's a bit heavy-handed to go with a summons at this point—

Mr. Rick Perkins: You're breaking the deal we had on the subcommittee agenda.

Mr. Ryan Turnbull: I'm not breaking any deal. The deal we had was to have a meeting on SDTC and to invite—

Mr. Rick Perkins: Before the end of May. That was the schedule. What's the date today? Oh, look; it's May 27.

Mr. Ryan Turnbull: Yes, okay, but the chair didn't end up being able to schedule the meeting until June 5. Is that my fault? That's not my fault.

Mr. Rick Perkins: No. That's not the first—

The Chair: Colleagues, this is not how the committee works. If you want the floor, you'll have to—

Mr. Ryan Turnbull: Mr. Perkins is suggesting that somehow this is as a result of my breaking some deal, which is not the case. That is absolutely not the case.

Mr. Rick Perkins: We had a deal—the end of May. They were approached—

The Chair: Mr. Perkins, if you want the floor, you'll have to seek it. I'll recognize you so that you can speak.

Mr. Ryan Turnbull: You can speak next, Mr. Perkins, if you disagree with me. You're more than welcome to disagree with me. We've had lots of disagreements in the past, and I'm sure we'll continue to disagree on things. Occasionally, we agree on something. It's always a nice, serendipitous moment when Conservatives and Liberals agree. Let's see if we can get there on this.

I don't agree with a summons as being necessary at this point. I think it's premature. Perhaps we need to consider adjourning debate on this today and coming back to it.

I'll leave it to other committee members to weigh in. We haven't heard from Mr. Masse to see where he stands on this. I would be very interested in any comments he has to provide.

The Chair: Thank you.

Mr. Masse.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair.

I'll be honest with you. At this point I just want to get it over with. It's a distraction.

I'll agree with the motion to get this done and move on, because there is lots of good work that needs to happen. I could see this going in circles continuously, and I don't want to revisit this in another motion in another few weeks.

We did agree to have a meeting, and it's taken this long. I understand where the parliamentary secretary is coming from, and I understand the clerk and the chair have done their due diligence, but I don't see how we can get this completed and done, which we said we'd do. I don't want to go into that or have a special session in the summer related to this, and that's where I see this going. I don't want to have more parliamentary resources and summer meetings just because we can't get an answer on things.

● (1120)

The Chair: Thank you, Mr. Masse.

Mr. Turnbull.

Mr. Ryan Turnbull: If I may, I'd like to ask Mr. Masse for clarification.

Are you agreeing to summon these witnesses, and is that an appropriate step you think we need to take at this point? I'm just asking for clarification, because I think that's what I'm hearing you say, whereas I think that's a bit premature, but those are my sentiments on it.

Mr. Brian Masse: Yes, I don't know what else to say, other than we're in this situation because of decisions other people have made.

I don't like the idea of summoning people. That's not something I prefer to do. At the same time, I have a bigger concern with regard to the time we have at this committee, the resources of the House and respect for our process, that supersede that. I don't know what else to do other than one of two options.

We can just get this done. They made their own bed, to some degree, either by not responding or responding in a way that doesn't really accommodate the committee.

Second of all, I also know this is going to come back again, and I don't really feel like spending parliamentary resources on special committee meetings or having summer sessions to accommodate. I haven't heard a good reason from the people coming back, saying they even propose another date they would be here.

I don't know what else to do. I don't like it, but there's lots I don't like.

The Chair: Mr. Masse, trust me, there is nothing I want less than having to come back to Ottawa for a meeting on SDTC this summer to chair in person, so I appreciate your concerns.

That said, colleagues, I have a bit of a proposition. I'm looking at Mr. Perkins, and I'm coming back to this proposition.

It's up to the committee to decide, but I too think a summons should really be the last resort.

I understand your frustration, Mr. Perkins. I share your frustration in many ways. With the clerk, we've been trying to invite these witnesses for some time now, but now that we've debated it and your motion states that we can go to June 7, I would propose that maybe we ask the clerk to look for any additional resources that we can find next week. We offer a variety of time slots to the witnesses for next week, and whatever works with the witnesses.... They'll be on notice that there is a summons being debated here at INDU and that it's most likely going to be voted on on Wednesday if they don't co-operate and find some time in their schedule to appear before committee next week.

That would be my middle-of-the-road proposition, so that we get back to this first item of business on Wednesday when we meet, and that gives one last opportunity for the witnesses to co-operate.

Mr. Perkins.

Mr. Rick Perkins: I appreciate the middle of the road, but I think we've been more than generous, and I would prefer to do a vote.

The Chair: You want to put it to a vote, Mr. Perkins.

Mr. Rick Perkins: It's so we can get on to Bill C-27.

The Chair: For sure, but this was not public until today.

Mr. Ryan Turnbull: Chair, the motion still includes a witness who's already agreed to come, so I think that's problematic. I can't summons and vote on a motion....

I say we adjourn debate on this today and revisit it later in the week when we have more information, so I'll move to adjourn debate on this.

The Chair: This is a dilatory motion, so I'll ask the clerk for a roll call.

(Motion negatived: nays 6; yeas 5)

The Chair: This will bring us back to the motion at hand.

Are there any other comments on the motion?

Mr. Turnbull.

Mr. Ryan Turnbull: This motion needs to be amended before I can vote on it. I really don't feel comfortable voting to summon Andrew Noseworthy if he has already agreed to come.

Who is going to amend this motion to remove him? I'm not going to allow a vote to—

Mr. Rick Perkins: Amend it.

Mr. Ryan Turnbull: Yes, I guess I can amend it myself.

I'll move to amend this by striking (b).

Mr. Rick Perkins: I think I didn't read his name. I said that he doesn't need to appear when I read it.

The Chair: Yes, when you read it, that's true, Mr. Perkins, but the text that's before us still includes it. I understand that Mr. Turnbull is moving a subamendment to remove Andrew Noseworthy.

● (1125)

Mr. Ryan Turnbull: It would actually be an amendment.

Just strike (b).

The Chair: Is it the will of the committee to adopt the amendment?

(Amendment agreed to)

The Chair: Do I have any other speakers on the motion as amended by Mr. Turnbull?

Seeing that there are none, I'll put it to a vote.

(Motion as amended agreed to: yeas 6; nays 5)

[*Translation*]

The Chair: Thank you, colleagues.

That brings us back to the agenda.

(On clause 2)

The Chair: We were discussing Bill C-27, specifically CPC-9. Mr. Perkins had the floor.

As I mentioned, no one else seems to want to debate amendment CPC-9. If anyone wants to add their name to the list to speak, they can just let me know.

Mr. Perkins, the floor is yours.

[*English*]

Mr. Rick Perkins: Did I move CPC-9? Who moved CPC-9?

The Chair: Mr. Williams did.

Mr. Rick Perkins: Since Mr. Williams moved it, in terms of the testimony from officials at the last meeting when we were discussing this, I'd like to propose a subamendment to it, if I could. I think it reflects maybe not all of the concerns, but at least one of the concerns of officials.

I would like to propose a subamendment with regard to CPC-9.

In one of the English versions of the amendment, I would propose it read, “by deleting lines 6 to 15 on page 51”. That's what it would read. Just as an explanation, that's instead of what it currently says, which is “by deleting lines 1 to 15 on page 51”.

I believe that officials raised a valid concern regarding CPC-9 in the last meeting, related to the deletion of the private right to action. This was an error on our part during the drafting process when trying to delete the cross-references to the tribunal and removing the preconditions necessary to conduct a private right to action.

Conservatives support the private right to action. This proposed subamendment will ensure that private rights to action can continue under the CPPA, while also strengthening the process by removing the mandatory preconditions.

I know I just sort of dropped this on you. In circulating it, perhaps officials can take a look.

Essentially what we're doing is saying that the leading lines are 6 to 15. Lines 1 to 5 are the ones that deal with the issue—

The Chair: Mr. Perkins, hold on just one second. We have a point of order.

Mr. Ryan Turnbull: I'm really sorry to interrupt you.

I really need a copy of this before we continue.

Mr. Rick Perkins: He's sending it to the clerk.

Mr. Ryan Turnbull: I would really like to be able to read it, because I couldn't follow the deletions of the lines you've just mentioned.

In relation to a fairly long piece and an important piece of this bill, I really would like to have a copy in both official languages. Maybe we could just take a moment to suspend and get that, so that everybody has a copy and we can follow along.

Thank you.

The Chair: That makes sense to me. We'll wait for the subamendment to be distributed.

The meeting is suspended.

● (1125)

_____(Pause)_____

● (1140)

The Chair: Colleagues, I believe the subamendment by Mr. Perkins has been circulated in both official languages, so members and officials have had the chance to take a look at it. Thank you for that.

Mr. Perkins, I'll yield the floor back to you.

Mr. Rick Perkins: It has been correctly pointed out—thank you to the clerks—that I missed one word, which is in line 5. The word “if”, which starts off those following sentences, should also be deleted.

The Chair: That is duly noted.

Mr. Perkins, you still have the floor, if you have something—

Mr. Rick Perkins: The idea here was to put back into the amendment.... I understand that the government doesn't support the overall amendment, and I get that, but the idea here was that we had never intended to get rid of the concept of the private right of action. Perhaps on that particular aspect, I could get some comments from the officials.

[*Translation*]

Mr. Mark Schaan (Senior Assistant Deputy Minister, Strategy and Innovation Policy Sector, Department of Industry): I'd like to thank the member for his question.

[*English*]

As it relates to the current subamendment, what is being reintroduced is a portion of the “Private Right of Action” section—the first five lines, which is essentially proposed subsection 107(1). In both the French and the English, you'll note there are prerequisites for the purposes of the private right of action.

Proposed subsection 107(1) ends in English with "if" and in French with "*selon le cas*", and there are a couple of conditions related to when a private right of action would apply.

What has essentially been designed as the scheme for private rights of action is not an unfettered private right of action. Individuals aren't simply allowed to go forward whenever they feel like they've been aggrieved on a personal information issue.

The court of first instance is the Privacy Commissioner, hence the current prerequisite reads:

> (a) the Commissioner has made a finding under paragraph 93(1)(a) that the organization has contravened this Act and
>
> (i) the finding is not appealed—

I understand there is some consideration as to whether there should be appeals or simply judicial reviews.

> —and the time limit for making an appeal [or a judicial review] under subsection 101(2) has expired, or

The tribunal is not actually introduced until proposed subparagraph (ii):

> (ii) the Tribunal has dismissed an appeal of the finding under subsection 103(1); or
>
> (b) the Tribunal has made a finding....

What has been reintroduced is only a very partial scheme of the private right of action, which actually introduces an unfettered private right of action. There is no first-instance finding of the Privacy Commissioner, but, in fact, anybody who believes an organization has contravened the act "has a cause of action against the organization for damages for loss" and can simply pursue that.

We have had instances and concerns related to private rights of action in previous pieces of legislation where there is essentially unfettered access. The fear, of course, is that this creates what some people have suggested is a class-action factory. Suddenly, anybody is empowered to create legal actions when they believe their privacy has been contravened, as opposed to allowing the first-instance finding, which is the case of the Office of the Privacy Commissioner, to weigh in and, in cases in which there is a finding, to say, "Now you can actually pursue civil damages under the act."

I understand the thought process here, which is that stripping out the PRA was never the intent, but what has been reintroduced is not the PRA as it was understood in the first scheme of the act; it is actually an unfettered PRA.

● (1145)

Mr. Rick Perkins: Thank you. That's clear.

We have another amendment, CPC-70, that's way down on the list. Basically, what you're saying is that this was intentional. It wasn't an unintentional miss on our part. This was an intentional thing.

If an individual does not want to wait, say, for two years to go through the Privacy Commissioner, the effect of this is, as I understand it, that if they can pay the cost they can go directly to the court themselves to get a finding without going to the Privacy Commissioner. That would be the effect of this. Is that correct?

Mr. Mark Schaan: Right now there are no bars at all, so there's no gating at all for individuals who wish to pursue direct court action against—

Mr. Rick Perkins: That's with this amendment—

Mr. Mark Schaan: That's with this amendment.

Mr. Rick Perkins: —whereas in the current CPPA, there is.

Mr. Mark Schaan: In the first instance, in the current understanding of the PRA, as it was introduced in the statute—or as in this draft—there is a bar, which is that the commissioner has heard your complaint and ruled that it is actually a violation. Therefore, you're then allowed to proceed on the civil basis for penalties.

That was done for a number of reasons. The first is that the Privacy Commissioner is the first-instance arbiter of privacy considerations, and the second is the potential for the courts to be clogged by a massive number of actions that may or may not be founded.

Mr. Rick Perkins: Perhaps, but we don't know that, and we don't know that it would be a massive number that would circumvent the Privacy Commissioner. However, it does give the individual the option of going straight to the court without having to pursue that after waiting for a lengthy Privacy Commissioner—

Mr. Mark Schaan: Essentially what it does is create a dual track. You have one track where individuals essentially don't have to wait for a trusted entity to actually have made findings related to privacy violations, and instead those who can—

Mr. Rick Perkins: That's correct.

Mr. Mark Schaan: —and are privileged enough to be able to mount a case would be able to do so. We have seen instances in other legislation where there are private rights of action without necessary conditions, and that does potentially incentivize behaviour and encourage people to see what they can get through and then to share in any benefits that come from that.

I don't believe that our concerns about the possibility for volume are necessarily unfounded.

I think Mr. Chhabra wants to add to my point.

Mr. Samir Chhabra (Director General, Strategy and Innovation Policy Sector, Department of Industry): Thanks very much.

I wanted to point out that I think it would also result in the creation of, as Mr. Schaan pointed out, two tracks, but also the possibility of scenarios in which the Privacy Commissioner's views or interpretation of the act would be different from what a court might find in a similar circumstance. You're now creating a situation where there are multiple arbiters of the act and its interpretation and application, which creates a huge amount of uncertainty for Canadians, for businesses, etc. It's a very different formulation from what's been proposed to date.

Mr. Rick Perkins: Thank you.

[*Translation*]

The Chair: Thank you very much.

Next on my list I have Mr. Turnbull and Mr. Vis.

I would remind you that we are now discussing the subamendment moved by Mr. Perkins.

[*English*]

Mr. Ryan Turnbull: Thank you, Chair.

I appreciated the comments made in response to Mr. Perkins.

Can we back up for a second? I'm trying to understand how this subamendment relates to what was originally proposed in CPC-9, which obviously really removes the tribunal from the entire bill, which we were debating. This is attempting to amend the section on "Private Right of Action", which is on page 51.

● (1150)

Mr. Brian Masse: I have a point of order, Mr. Chair.

I'm sorry, Mr. Turnbull, but I can't hear you. Something's going wrong with the audio, and I do appreciate your intervention.

The Chair: We'll look at it with the technical support here. Let me know, Mr. Masse, if the problem persists. Is it still that you can't hear?

Mr. Brian Masse: I'm just getting an echo sound with almost no volume at all, which is new.

The Chair: There is an issue with the English channel, but I see that's it's been resolved.

Thank you, Mr. Masse.

Mr. Turnbull, you may resume.

Mr. Ryan Turnbull: Thank you very much. I'm glad to know that Mr. Masse is attentive to my interventions, and I appreciate that.

I was trying to understand, again, the subamendment in relation to CPC-9. This amendment removes the tribunal from the bill, which I understand is pretty central, because the bill was contemplated based on the tribunal being part of the overall legislative framework.

This new subamendment looks like it deletes all of proposed paragraphs (a) and (b) and removes the "if" from page 51 of the English copy, which is 107(1), the private right of action.

What is really the effect of that? That's what I'm trying to understand. Obviously we didn't have any notice of this, so I think it needs to be clarified a little for all of us to make sure we're on the same page.

Thanks.

[*Translation*]

Mr. Mark Schaan: I'd like to thank the member for his question.

[*English*]

As noted, the original CPC-9 essentially removes references to the entirety of the tribunal in every instance of its appearance in the act, thereby removing the current separation between investigative and complaint findings of the Privacy Commissioner and the offence findings in terms of the penalties. In so doing, it also stripped out the entirety of this section related to private rights of action. Private rights of action obviously are a separate consideration as it relates to the overall scheme of the act.

The Office of the Privacy Commissioner is an extraordinarily important part of our overall protection of the fundamental right to privacy. It allows for individuals to make complaints to the Privacy Commissioner. It also allows for the Privacy Commissioner to investigate those complaints and to make determinations in terms of the applicability of the act. The Office of the Privacy Commissioner can then make recommendations in the current proposal of the act to a tribunal for the purposes of administering monetary penalties. It could also issue orders, potentially as a remedy for that privacy issue or, as is potentially imagined in some of the amendments that may follow, to reach consent agreement with the parties as to the appropriate rectification of the privacy finding.

What was imagined in the original scheme as one additional kind of tool in the tool kit is as follows: The Privacy Commissioner investigates, determines the applicability of the act, comes to the conclusion that there is actually a finding of fault or that there's a violation of the act, decides to issue an order and decides to come to a consent agreement. Or, they could decide to come the conclusion that there is a finding of a violation, potentially with the recommendation for an administrative monetary penalty.

What was allowed for in that particular instance was for an individual to say, "I'm taking my finding, and I'm going to pursue damages in my own right."

Suppose the Privacy Commissioner has found that there's been a violation. Maybe he didn't recommend AMPs, and maybe he went through some other mechanism. Maybe he issued an order, and maybe he made recommendations because it wasn't found that the bar for AMPs was necessarily met in this particular instance. The individual then would still be able to take that finding and come to the courts to say, "My privacy has been violated. The Privacy Commissioner has not necessarily recommended the full outcome that I feel I'm in possession of. Therefore, I'm going to pursue this action for further damages."

The reintroduction of the primary right of action in this particular instance gives back that power slightly. Instead of becoming, "Pass GO once you've crossed the board, and then collect $200," it's essentially saying, "You don't have to pass GO anymore." If you feel like your privacy has been violated, if you feel like there's been a contravention of the act, go to the courts and see whether you get the $200.

The challenge that it introduces is as we noted. This was part of a multi-factor tool kit to say, here are the various ways in which fundamental rights of privacy are going to be protected. The Privacy Commissioner is going to be able to make determinations and investigate, and then recommend, among a series of things, an order, a finding, a recommendation of an AMP. Then, if you're unhappy or still feel that there are additional considerations, you can then pursue a private right of action. This actually says "Private Right of Action", which, as Mr. Chhabra noted, introduces two wrinkles.

One wrinkle is we don't know how many individuals are going to be motivated or able to bring their own private right of action in a case without a finding. Because there is no barrier to entry other than the fact that you need to have a court take it on, essentially, there could actually be a considerable volume of individuals who bypass the Privacy Commissioner and go straight to the courts.

The second wrinkle is that we've now asked the court to play the same function as the Office of the Privacy Commissioner. They are resourced and created in the system to be the finders of fact and the interpreter of the act for violations of privacy. We have an investigations-based system whereby essentially people make complaints to the Privacy Commissioner. They interpret the act on the basis of the investigation that they consider, and then they make a finding and a recommendation.

● (1155)

What this essentially says is that you can go down that path or you can go directly to the court, and now the court is placed in the position of performing the same role the Privacy Commissioner would, but the interpretability of the act is actually, therefore, bifurcated. We now have two bodies that are in a position to say well, when I read this act and I see this particular violation, I see it this way and I see this as a violation, but the first interpretation of the act is now spread between two bodies, which does introduce the possibility of conflict and does introduce the possibility of uncertainty.

From our perspective, I think there are three considerations with respect to the subamendment. First is the notion that we now have a private right of action without any barriers. Second is that we have two potential sources of interpretation. Third is that this fits into a broader scheme, in which it potentially fits into a broader amendment that removes the tribunal in its entirety, which, therefore, once again consolidates a number of the powers into one body as relates to the investigation and complaints function and then the actual determination of penalties.

Mr. Ryan Turnbull: That was a very thorough explanation, which certainly helped me understand the impact of this and what's being proposed here. It doesn't sound as though it has a whole lot of positive consequences, based on your initial assessment, or that it would allow, based on what you are saying, individuals who want to pursue the private right of action to do so.

Wouldn't this have quite a lot of impacts on the court system? Would it not clog up the courts? How would individuals determine whether they had a good case if they hadn't gone down a track and through a process in which, in a way, an investigation had already happened?

It seems to me that the cases might be weaker or might be inclined to be weaker and that individuals might stake claims to compensation for harms that might not be as justifiable under law.

That's just a thought, but maybe you could build on that if I'm right or correct me if I'm wrong.

Mr. Mark Schaan: I would say a few things.

One of the most important elements of this statute that have been retained from its predecessor, PIPEDA, is that it remains a principles-based and risk-based statute, which means that it's intended to be technologically neutral and applicable in a vast array of situations. It is not granular insofar as to prescribe in every single instance what a company shall and shall not do. It's principles-based, which means that its interpretation is actually extraordinarily important and that it grows with time.

One of the challenges of taking a principles-based statute and applying a private right of action without a finding of fact first, without the body charged by Parliament with its interpretation finding a first instance of violation, is that you're actually allowing for a wide variety of readings as to what is at stake here.

I can imagine instances in which a private right of action is introduced, instances in which the legal test or the interpretation is extraordinarily rigid and is understood in every instance to say, well, it's just as easy for me to figure out whether or not there's been a violation here as it is for somebody else to do so, but that's not actually what's at question here. This is a principles-based and risk-based statute with respect to which extraordinary deference is given to the Privacy Commissioner in their first-instance findings of violations.

This is something that actually ties back into one of our concerns about the removal of the tribunal, and that is that the tribunal is actually not vested with relitigation of findings of fact. We didn't try to introduce a second body that gets to determine what is or is not a violation of our privacy laws. It gets to make a determination of the appropriateness of an administrative monetary penalty. Actually, one of the concerns we had or one of the considerations we had when creating the tribunal was actually introduced in this particular subamendment in a new way, by essentially giving another body—that is, the courts—the ability to make first-instance determinations that privacy has been violated.

● (1200)

Mr. Ryan Turnbull: Thank you for that.

One of the other things that occurred to me when I heard you explain that was that individuals may not be able to easily determine whether a violation of their privacy rights has happened. When you think about operating in a digital age, as we are today, you may suspect it, but I think it would put a lot of onus on an individual, and how would they have the capacity necessarily? As you said, the first-instance finding, in the model that was contemplated for this bill, would happen through the OPC, so allowing for an alternative track, I guess, for someone to pursue a private right of action, seems to me to put a lot of onus on them to have to investigate or know how to determine whether a violation has actually occurred.

Is that part of the challenge you see that would kind of weaken the overall approach if this were to pass?

Mr. Mark Schaan: Certainly previous statutes and this one empower the OPC to be an investigatory body. It's given resources to determine whether or not a violation of privacy has been committed by a commercial actor. Essentially, by allowing a private right of action without the Privacy Commissioner having found a violation, you are essentially asking the courts to do that. Courts are good at many, many things, but what we've tried to do in the scheme of this entire set-up is to preserve for the courts that which is truly necessary, so we give the Privacy Commissioner all of the due deference regarding interpretation of the act and findings of violation, as well as all of the investigatory powers and the ability to make orders; we preserve for the tribunal the administrative monetary penalty setting, and then we preserve for the courts only those parts in which there's literally a failure of the law, where people have misunderstood the law in its entirety, not where there's a finding of fact but actually on an appeal basis.

What this essentially does is to say that you can go down that track; you can go to the OPC, but you can also go to the court, and if you go to the court without having gone to the OPC, the court is now going to be charged with the test of determining whether or not this is a finding of violation.

That means you're essentially giving it an investigatory role, which is not what's envisioned in this scheme; nor is it necessarily what the court is set up or resourced to do. Moreover, it actually creates the possibility for duelling investigatory findings potentially, because notwithstanding the fact that one would like consistent outcomes every single time, the reality is that, particularly when we have an office of subject matter expertise in the Privacy Commissioner, we have a body that's actually set up to know how the act is supposed to apply.

● (1205)

Mr. Ryan Turnbull: One of the arguments the Conservatives made when they introduced the original amendment CPC-9 was that it would somehow erode the powers given to the OPC.

I was arguing last time—and I think you were providing some helpful testimony—that with how the bill was contemplated, that wasn't the case, but I think this subamendment certainly has that effect. Perhaps you would agree that this effectively almost allows people to opt out of utilizing the Office of the Privacy Commissioner and that its investigative role becomes somewhat...I wouldn't say obsolete, but it certainly seems as though people could just choose a different track and bypass the Privacy Commissioner.

Mr. Mark Schaan: What the subamendment contemplates is the possibility for two distinct bodies, one being a body that is a subject matter expert created for the sole purpose of making findings as they relate to violations of privacy and enshrined in law as the interpretive body for the statute, because by its investigatory power and its findings power it has the ability to determine what is or is not offside of the law.

Instead, we would now have a new body with wide responsibilities, so not necessarily the subject matter expertise that potentially comes with having this as your sole job, and this new body would have the same capacity now to make findings of violation and therefore interpretation of the statute in competition with or at least in parallel with the Privacy Commissioner. This essentially does at minimum bifurcate the interpretation of the act. It gives the interpretation of the act to two bodies, because essentially if a court is allowed to make a first-instance finding of a violation and to make rulings on what is and/or is not a violation in the first instance, it is now essentially equal to the Privacy Commissioner in coming to that determination.

Mr. Ryan Turnbull: You have one track where you have an individual and contemplate a tribunal that has expertise interpreting the statute, and then, on another track, you have the courts, which may not necessarily have the expertise to interpret it, and those two interpretations may come into conflict from time to time. We might even expect them or anticipate them to do so.

I don't know if there's historical context for this, but I imagine, if you were designing a process, you would probably not create two tracks that are going to cause conflicts in how the statute is interpreted. I mean, that wouldn't be ideal. Am I right? You probably wouldn't do it that way. I can understand why it wasn't contemplated that way, but this subamendment has that effect. That's what you're pointing to. What are the ramifications of those interpretative conflicts as we move through? Who would decide on what effectively becomes the interpretation if those interpretations come into direct conflict with one another?

Mr. Mark Schaan: One can imagine a time period in which the two findings would live simultaneously in conflict. You could have essentially a first-instance ruling. Like stare decisis, it's a path-dependent kind of approach to how one approaches particular types of activities in violations of the privacy law, which is then the prevailing standard upon which further violations are heard. You could in parallel have a ruling of a low court that comes to the conclusion that there's been a violation of privacy that's not in keeping with either the current practice of the Privacy Commissioner or potentially how the Privacy Commissioner may ultimately come to that conclusion. Until such time as there is an appeal or a future finding by the Privacy Commissioner, you live in a world of uncertainty.

What might happen is that the Privacy Commissioner gets a similar violation down the road and comes to the same conclusion he or she had previously and says, “Just for the record, I'm making it known to lower courts that this is how I continue to view the interpretation of the act and its applicability.” Or you could have someone appeal the lower court determination, and the Privacy Commissioner may or may not seek to try to influence the outcome of the appeal. The potential risk that's at play here is that, for a time period, you could have a period of certainty until such time as the Privacy Commissioner can recommit their views on a particular subject. Then you may very well have conflicting judgements. You could have a lower court that's made a determination that is at odds with the current interpretation as understood by the Privacy Commissioner.

● (1210)

Mr. Ryan Turnbull: Who determines what becomes this sort of precedent or body of law, because then you have direct conflicts in the interpretation? You have essentially the OPC in terms of its history of decisions. It sort of has a body of precedence in a way. Then the courts would as well, and they would be on separate tracks.

Mr. Mark Schaan: Yes.

Mr. Ryan Turnbull: Could you then choose, if you were to analyze the body of evidence in the courts and the OPC, which one you feel is more favourable to your particular case? Would that be something that someone would naturally want to do, pick the environment where they would be most likely to be successful or have the highest chances of success? That seems like a very strange unintended consequence of this.

Mr. Mark Schaan: There certainly is incentivized behaviour, potentially, for people to find a venue that they believe will be more sensitive to their cause, so you may very well have people avoiding the OPC and opting instead to go to the courts until such time as the law can be clarified. This would lead to more challenges until either the Federal Court of Appeal or the Supreme Court can make a determination in these particular instances, and then I think it's worth remembering that this goes back to living in the schema that's set out in CPPA.

In the government's view and version of the statute that's before members right now, the Privacy Commissioner receives complaints, makes investigations, makes determinations, uses the full tool kit available to the Privacy Commissioner and orders findings of violation and recommendations of administrative monetary penalties. Then, in the government version, if he or she goes the AMPs route, the tribunal rules on AMPs, and what is then only reviewable is not findings of fact. Again, the Privacy Commissioner's view would be determined as per the Privacy Commissioner's original findings. There are other amendments that are coming later, potentially, about making it judicially reviewable only if there's a determination.

Then you'd have one track potentially on the private right of action side that has this possibility for regular review and renewal on the part of the courts, because you get different courts reviewing it, and then, on the Privacy Commissioner side, findings of fact on their violation that will not be reviewed, because it's determined that he or she is actually the sole determinant of findings of fact and violation as it relates to the interpretation of the act.

You'd have two very jarring systems, because one has a ton of variability and one has privileged an actor to say, “You're the first-instance finding and we have belief in your capacity, and we'll only continue to appeal insofar as you potentially have made an error in law or potentially that we want to review the determination of the tribunal.”

That's the last thing I'll say. There are other powers associated with that investigatory function that are quite important—the compulsion of information, for instance. They're a resource body for the purposes of investigating people's complaints about privacy. The court has the evidence that is provided to it, so the plaintiff and the defendant, in this particular case, will be the sole determinants of the information that the court can make a determination on, as opposed to in the case of the OPC, where they fill the record with what they need to be able to come to a determination on the fundamental violation or not.

● (1215)

Mr. Ryan Turnbull: That seems like a really big difference. In cases with the OPC involved, they're taking on that investigative function, so they're gathering all the evidence to make a determination, whereas in this separate track, where you're going directly to the courts, who would be responsible? Each one of the plaintiffs then would be responsible for hiring their own investigators. Is that right? Who is investigating? We're not talking about criminal law here, are we? Who's actually doing the investigation? It's not the police force, so who is it?

Mr. Mark Schaan: The defence and the prosecution would both mount their respective cases and place information on the record of the courts to make their determination. The court is bound to make a determination on the basis of both case law and the information that's been placed before it by both the defendant and the plaintiff. It would be up to the two parties to ensure that the court is furnished with sufficient information.

Unlike the Privacy Commissioner, who has a compulsion power that allows them to fulfill the record with what they need, the court would be limited to that which is actually before it, which means that because there is no investigation, it would be a slower process, because essentially the parties are having to furnish the court with all of the recommended information, and one of them does not necessarily have compulsion powers to be able to force that evidence to be put before the court.

Mr. Ryan Turnbull: It would be significantly slower but also more costly for the individuals who are seeking compensation for a violation of their privacy rights. Would it not be a lot more expensive for them, not having a first fact-finding from the OPC to base their case upon?

Mr. Mark Schaan: The scheme we imagined, as it relates to the private right of action, is this: The first finding of violation essentially allows people to proceed to court with a finding. It allows the court, essentially, to make the determination as to whether or not additional remedy is required or justified. It's supposed to be a short-circuiting in part, because there's already been a found violation by the entrusted, resourced entity the legislation holds responsible for making first-instance determinations of privacy violations. It's not the case in a private right of action scenario without that requirement.

Mr. Ryan Turnbull: One thing that also occurs to me is this: From an access to justice perspective, if the OPC were not involved and performing its investigative role in cases where you're bypassing the OPC and pursuing a private right of action through the courts, you're essentially having to spend more money and, I would think, wait longer. We're talking about individual people whose privacy rights have been violated. At least, they feel this has happened. They're seeking compensation for the harms done to them, and we're saying, “You can go through the court system—which may be more favourable—if you feel like it, but it's going to be more time-intensive and costly, and you may not get the decision you're looking for, obviously.”

Doesn't that also create another asymmetry? Some people might be motivated to go to the OPC in one respect, if they're lower-income or don't have the resources. If they have the resources, they might find themselves paying costly fees going through the court system. Would that not be the case?

Mr. Mark Schaan: I think that's an accurate concern about this approach.

The second consideration is the prospect of monetary penalties at the outset of this. You might see particular behaviours in the marketplace start to form. “Have you been a victim of privacy violation? Call 1-800-privacy-violation.” Then you split the reward on a contingency basis. Suddenly there's a bunch of people brought into a class action or other types of action within the court system on a premise that there might be gold at the end of the rainbow.

In the OPC process, we've actually empowered people to find violations on a finding of fact. There is a learned body entrusted with protecting their privacy and making determinations.

● (1220)

Mr. Ryan Turnbull: I don't understand why the Conservatives proposed this. I get that the intentions were good...in some world. I don't know. This just seems like it has a lot of adverse unintended consequences. I'm not a fan of doing things on the fly. I believe the government and the team have put a lot of time, energy and effort into contemplating a robust legal framework that I think fits together and tries to streamline the process to be as effective and efficient as possible and to probably not have significant delays in terms of justice being served.

I note that Mr. Williams used the phrase “justice delayed is justice denied” over and over again. It seems like this particular subamendment would delay justice considerably, thus, I think, violating the intention of some of what the Conservatives have said multiple times. I'm not sure where this is coming from, but it seems like a half-baked idea that is not going to serve the interests of anybody at all and will actually create mass confusion.

I certainly am not supportive of this subamendment based on the testimony, Chair. I know there are other people on the list, so I'll yield the floor for the moment. I'll put myself back on the list, because we can't have this subamendment go forward. I won't let it.

The Chair: Thank you, Mr. Turnbull.

Mr. Masse.

Mr. Brian Masse: Thank you.

To the officials, is it true that whether we have a tribunal or no tribunal or this process that's presented or maybe an alternate, that any case could eventually end up or will end up in the courts if the parties want that to be the case?

Mr. Mark Schaan: I think I need to unpack your question slightly.

As it relates to the matter before us regarding this private right of action, what this contemplates is whether individuals will have the capacity to bring their own efforts before the courts as it relates to privacy violations. The scheme that was initially provided for in the bill imagines that individuals do have that capacity, but only after the commissioner has made a determination of a violation of privacy, unless that violation is under appeal, the tribunal has dismissed an appeal or the tribunal has already come to a determination. If you've closed your case, as it were, before the track that includes the OPC and the tribunal, then the private right of action is no longer there, but if it's an open-ended one, then you can pursue it.

As it relates to the subamendment right now, we are imagining that individuals will be before the courts at the same time as potentially someone might be appealing an OPC ruling.

As it relates to the—

Mr. Brian Masse: No, I understand that, but the question was about how even under the tribunal process we could still end up at the courts. I understand you're saying there would be steps that would take place before that, but the courts are still the ultimate backstop for any model we have in front of us. That's what I'm looking to.... I understand there could be different stages, but there's nothing stopping anyone from suing at the end of the day if they don't like the model we have in legislation with the tribunal or, alternatively, with another model that might be presented.

● (1225)

Mr. Mark Schaan: I'll say three things maybe, and I'll turn to Mr. Chhabra and Ms. Angus for two of them.

One, to your last point, is that it isn't actually possible to necessarily find yourself before the courts in the current model of the bill, because in order to find yourself before the courts, you need a finding of violation by the Privacy Commissioner. That's a ticket to entry, so it does reduce the number of court instances in which this is potentially the case.

In the case of the current model, though, as you note, what happens when people don't like the determination that happens.... Maybe I'll turn to Mr. Chhabra and Ms. Angus to identify again what role we've given the courts as it relates to what they can and can't opine on. I think it's important, because at the core of this is who has interpretation and investigatory responsibilities under the act. In the scheme that's currently provided for under Bill C-27, the role of the courts in their actual consideration of OPC findings is actually relatively limited in certain cases.

I'll turn to Ms. Angus to walk through that.

Ms. Runa Angus (Senior Director, Strategy and Innovation Policy Sector, Department of Industry): Thank you very much.

I'll just talk a bit about.... Here, on this amendment, we're talking about a PRA, a private right of action, which is about damages. It's somebody who has lost something because of a privacy violation, and they go to court to make themselves whole again. This is not about correcting the privacy violation. It's about making themselves whole again and getting damages for the loss that they suffered.

In that case, as Mr. Schaan said, the track is that the OPC makes a finding of a violation, and then that plaintiff takes that finding of a violation to the court and says, “Look, there's been a violation. The OPC says so after an investigation, after an inquiry. I've lost X, Y, Z because of this privacy violation”—whether that's reputation or anything else—“and I would like to be made whole again through damages.” That is that track.

Then there is another track, which is the OPC making a finding that could possibly be appealed to the tribunal. That is the actual finding. The tribunal acts as an oversight mechanism for that finding. It's not a dual track, as it would be for a PRA, like Mr. Schaan discussed. It's really an oversight mechanism, not a dual track. That cannot be appealed to a court, as we discussed last time. That is actually a final decision on a particular factual finding. In that finding, the tribunal gives deference to the commissioner on findings of fact and findings of mixed law and fact. That cannot be appealed to a court. That can only be judicially reviewed, which is entirely different. It's not a substantive consideration of the merits. It's just a question of whether the tribunal acted reasonably or not.

Is the court a backstop? It's always a backstop, but how you get there—whether it's on a PRA or on a finding of a violation—is very different. It's a different standard of review, and the court plays a different role in each of those situations.

Mr. Brian Masse: Thank you. That's been helpful.

With regard to the amendment, can we not create a model whereby we amend the amendment so that the Privacy Commissioner completes their investigation first and then you can go to the courts? I'm not entirely enamoured by this tribunal.

I do appreciate the arguments of complicating things for the Privacy Commissioner with a two-stream process that's ongoing, but can we not create a piece of legislation that would have the Privacy Commissioner continue to be the first step before any court process?

Mr. Mark Schaan: Mr. Chair, as it currently reads in the bill itself, that would be achieved through the continuation of the inclusion of what was in the draft text. Right now, the Conservative subamendment stops at line 5, where there previously was an “if”. That “if” is gone. Essentially, what that “if” does is what you propose.

The “if” of proposed paragraph 107(1)(a) is:

> the Commissioner has made a finding under paragraph 93(1)(a) that the organization has contravened this Act and
>
> (i) the finding is not appealed and the time limit for making an appeal under subsection 101(2) has expired

It goes on to talk about a tribunal determination, but at minimum, paragraph 107(1)(a) and subparagraph 107(1)(a)(i) get at the notion that this has to have been reviewed by the Privacy Commissioner first to allow for a private right of action to proceed.

● (1230)

Mr. Brian Masse: Thank you for that.

Would including subparagraph 107(1)(a)(ii) be more specific in the sense of direction for that process? That's the model I like, but I would also like to know whether subparagraph 107(1)(a)(ii), which you didn't quite get to, would also be better and clearer for the Privacy Commission process.

Mr. Mark Schaan: Proposed subparagraph 107(1)(a)(ii) gets at the suggestion that a tribunal exists. It says “that the organization has contravened this Act and”:

> (ii) the Tribunal has dismissed an appeal of the finding under subsection 103(1)

The gates for getting a private right of action are in proposed subparagraph 107(1)(a)(i). The Privacy Commissioner has understood and found a violation. That finding is not under appeal, so you're not still in the process. You're not taking a shortcut and trying to get around the issue that the Privacy Commissioner is still considering this.

Then, if a tribunal exists, there's subparagraph 107(1)(a)(ii), that the tribunal hasn't already ruled on this and dismissed this, or paragraph 107(1)(b), that “the Tribunal has made a finding”, has actually come to a conclusion on this matter. Proposed subparagraph 107(1)(a)(ii) and paragraph 107(1)(b) contemplate the existence of a tribunal and its role in the private right of action.

Mr. Brian Masse: That's what I don't want. I really appreciate the thoroughness of your response.

I would, at the appropriate time, Chair, seek consensus. Perhaps we could finish the first part and then (a) and then part 1 of the bill. That's what I would propose finding some consensus on.

Thank you, Mr. Chair.

The Chair: Mr. Masse, I'm not sure I follow. Are you moving it?

Mr. Brian Masse: Yes, I'll move a motion. I didn't want to inadvertently cut off any speakers, because I'm not in the room, but if no one else wanted to, I would be prepared to move an amendment to the Conservative amendment that includes—

The Chair: Mr. Masse, to be procedurally a little more elegant, I think I would rather deal with the subamendment. Then maybe you can move.... Wait just one second.

Mr. Brian Masse: Thanks.

The Chair: That's what I had in mind, Mr. Masse. We'll deal with the subamendment of Mr. Perkins first, and then you will be able to move your subamendment in due course. If you want some time just to explain it so members know what's coming, I can defer to you.

Mr. Brian Masse: I'll be really quick. I just want to make sure I am doing this right. Once we passed Mr. Perkins' subamendment, I would have to then reinstate (a) and (i). What I'm seeking is that the tribunal would be the first course of action. That would precede any court cases. The Privacy Commissioner would be the first stop in the decision-making process, and then from there the court system would be engaged if someone sought that. I think that would be a better process than having the two-track process that's been identified.

Thank you.

The Chair: Thank you, Mr. Masse.

That was just as a point of information, to enable members to know what might be coming. In the meantime, Mr. Masse, if you want to move this subamendment once we're done dealing with the one currently before the committee, please prepare it in writing so that it can distributed to members.

[*Translation*]

Next on my list is Mr. Garon.

Mr. Jean-Denis Garon: Thank you very much, Mr. Chair.

I want to make sure I understood what you presented to us.

Let's take an example that would happen in Quebec, since that's the case I'm interested in. Let's say a person has been a victim of a violation of the act and decides to go to a civil court to sue for damages, reputational damage, or whatever. If the commissioner hasn't first conducted his investigation and made a decision, the delays will be extended and the costs will be increased for the person who decides to institute proceedings. Is that basically it?

● (1235)

Mr. Mark Schaan: [*Inaudible—Editor*]

Mr. Jean-Denis Garon: For educational purposes, let's say there is no tribunal. I repeat that this is for educational purposes, because I wouldn't want Mr. Turnbull to get angry. Based on what you're saying, if we keep the commissioner's analysis at first instance, that means that the commissioner conducts his investigation and submits a report and a recommendation. Afterwards, if the person is dissatisfied and wants to file a lawsuit, the person can turn to a civil court, such as the Court of Quebec.

Based on what you're telling us, if we were to remove paragraph 107(1)(a), including subparagraphs 107(1)(a)(i) and (ii), as well as paragraph 107(1)(b), which are proposed, a person could institute proceedings without having received the commissioner's report, but, as a result, they would have to bear the costs of the investigation, the discovery of the facts and so on. That in itself could be prejudicial to the person who has already been harmed. Did I understand correctly?

Mr. Mark Schaan: Yes, you understood correctly.

Mr. Jean-Denis Garon: Okay. It's rare for us to agree quickly like that. That's fine. We're off to a strong start.

I have a question: if we were to remove paragraph 107(1)(a), subparagraphs 107(1)(a)(i) and (ii) and the following, what would prevent someone from waiting for the commissioner's report and then using that document in court?

Do you understand what I'm getting at? I feel that, even if we accepted Mr. Masse's proposal, we would be taking away an option from someone. There's nothing to prevent a person from waiting for the commissioner's report and using it in court. However, if a person is in a hurry or if the harm is significant, they can decide to take the steps at their own expense and deal with the delays. It's still a choice.

Could someone still wait for the commissioner's report before filing a civil suit?

Mr. Mark Schaan: If I understand the question, you want to know if proposed paragraph 107(1)(a) and subparagraph 107(1)(a)(i) require that the commissioner to have concluded his investigation, otherwise the person has no opportunity to file a complaint in a civil court.

Mr. Jean-Denis Garon: That's correct.

If we remove proposed paragraph 107(1)(a) and subparagraph 107(1)(a)(i), what will prevent someone from waiting for the commissioner's report before launching a civil suit?

Mr. Mark Schaan: Can you clarify your question?

Mr. Jean-Denis Garon: In other words, even if the proposed legislation does not require the person whose rights have been infringed to wait for the commissioner's report and recommendation before launching a civil suit, that person could still decide to wait for the commissioner's report and use it in civil court. Is that correct?

Mr. Mark Schaan: If a person wants to go to civil court for a violation of their rights under this act, the provisions of this act require that the person wait, since it says that civil recourse is only possible after—

Mr. Jean-Denis Garon: I understand, but my question is—

The Chair: Mr. Garon, I apologize for interrupting such a fascinating conversation, but I need the unanimous consent of the committee to continue, because members are called to vote in the House.

Do I have the permission of the committee to continue until about 12:55 p.m.? Those who want to vote in person will then have time to get to the House.

[*English*]

Mr. Brad Vis (Mission—Matsqui—Fraser Canyon, CPC): Is it 10 to?

The Chair: It's five to.

Is it until 10 to that you would prefer, Mr. Vis?

Mr. Brad Vis: Yes.

The Chair: Okay, so if we go until around 10 to....

Some hon. members: Agreed.

The Chair: We have unanimous consent. That's perfect. Thank you.

Mr. Brad Vis: Was it a 30-minute bell? Okay. I apologize.

Mr. Rick Perkins: It's a 30-minute bell, so going until five to will give us 15 minutes.

Mr. Brad Vis: Okay, that's fair.

The Chair: Okay. Thank you.

[*Translation*]

Mr. Garon, you may continue.

Mr. Jean-Denis Garon: Mr. Schaan, I'm wondering about what you said, that removing proposed paragraph 107(1)(a) and subparagraph 107(1)(a)(i) would increase costs for someone who, for example in Quebec, would decide to file a civil suit rather than defer to the commissioner.

Even if proposed paragraph 107(1)(a) and subparagraph 107(1)(a)(i) were removed, the commissioner will still conduct his investigation and still submit a report. There is no connection between the two. The question we're asking is about how the commissioner's report will be used in a civil tribunal other than federal courts, for example.

Suppose my rights have been violated, and I decide to sue someone in the Court of Quebec. If the proposed paragraph 107(1)(a) and subparagraph 107(1)(a)(i) didn't exist, would I still have the option, on a voluntary basis, of waiting until the commissioner has conducted his investigation and filed his report before filing my lawsuit? Would that be an option for me?

● (1240)

Mr. Mark Schaan: Yes, in that case, the person would have the option of waiting for the commissioner's report, for example, to strengthen their case, but nothing would require them to wait.

Mr. Jean-Denis Garon: That's correct.

So, even if paragraph 107(1)(a) and subparagraph 107(1)(a)(i) are deleted from the proposed act, the worst thing that can happen is that the person waits and ultimately uses the commissioner's information. However, if someone decided, for their own reasons, not to wait for the commissioner's report and to launch a civil action by paying the costs incurred, they could do so.

Mr. Mark Schaan: Yes.

Mr. Jean-Denis Garon: So the costs and delays wouldn't necessarily be increased for the complainant. What we're doing is taking away a choice.

Mr. Mark Schaan: Yes. As you said, the person would have the option of waiting, relying on the resources of the commissioner and using his report to bring a civil action.

The person would also have the option of not waiting for the commissioner's report, but that option would cost them more. It's also possible that this option poses a challenge to the interpretation of the act. Once the case is before the court, it will be the court's role to interpret the law and determine whether or not the person has been violated, in the absence of a report from the commissioner stating that there has been a breach of privacy.

Mr. Jean-Denis Garon: In all cases, if the person is dissatisfied with the commissioner's report or, above all, with the penalty suggested by the commissioner, the fact remains that the person can then ask a court, such as a provincial court, to review the penalty.

So, if I understand correctly, in all cases, even if we keep paragraph 107(1)(a) and subparagraph 107(1)(a)(i) as proposed, a game of ping-pong could be played with the interpretation. I'm talking about the penalty here.

Mr. Mark Schaan: It's the interpretation of the penalty, yes. This is such an important thing. That may be one of the open-ended questions. That's also why we want to create this tribunal: It's an effort to separate the concept of sanction from the concept of violation of the act.

There are two options when it comes to considering the penalty. Under one of those options, the commissioner has found that an individual has a well-founded complaint of a violation of the act, wants a penalty to be imposed, but is dissatisfied with the penalty proposed by the commissioner. It's somewhat the same thing in the case of the tribunal. The penalty has to be reconsidered. It's not a question of reconsidering the interpretation that was made that there was a violation of the act. That role rests solely with the commissioner.

Mr. Jean-Denis Garon: I understand.

I asked you the question because, when Mr. Turnbull was asking you questions earlier today, it seemed clear in your mind that, if we deleted paragraph 107(1)(a) and subparagraph 107(1)(a)(i) that are proposed, the only possible outcome was an increase in costs for someone who wanted to take the law into their own hands. We agree that's not true.

Mr. Mark Schaan: There are the—

Mr. Jean-Denis Garon: If the costs go up, it's the individual's choice.

Mr. Mark Schaan: Yes. The examples are clear. There may be one of the options where the costs are going up or are higher.

Mr. Jean-Denis Garon: Thank you very much, Mr. Schaan.

Mr. Mark Schaan: No problem.

The Chair: Thank you very much.

Next on my list I have Mr. Williams.

[*English*]

Mr. Ryan Williams (Bay of Quinte, CPC): Thank you, Mr. Chair.

I appreciate the discussion today. I think it is a good discussion, but I'm essentially bringing the discussion back to the reason for these amendments, which is that we are again looking at whether we need a tribunal or whether we look at some other routes.

As has been indicated, there are other options besides the tribunal. There's the initial complaint requirement. One we haven't talked about is an escalation to the court requirement. These are all going to come into the same section when we get to it, but coming back to the changes we're trying to make in the initial amendment we're dealing with is whether the tribunal is needed at all.

I think we've heard arguments on both sides. Certainly, we can look at the option of a tribunal, and we've gone through what happens with the courts and how we go through that process, or we can give more power to the OPC, as they've asked for, and then look at this section and others to see what other amendments we can make to ensure the public has options.

I've heard from you, Mr. Schaan, arguments almost on both sides when you're arguing this, because the last time we were here, you were saying the problem with it and why we needed the tribunal was that the OPC was going to be overtaxed, overburdened, and the tribunal was a way to alleviate that. I think the private right to action actually also alleviates that in some ways, because there are going to be other ways for the public to go and find a dispute mechanism without having to go through this tribunal.

I think the tribunal has been brought in as an idea. We would be one of the first—and the only G7 nation—to bring in a tribunal. The rest of the nations are working just with more power for the privacy commissioners, and it seems that's still the argument that we're at.

Mr. Turnbull brought up a lot of arguments to say that this is going to clog up the system or we're going to have different decisions made by different courts, but if we had an escalation to the court requirement, or if, again, we looked at proposed paragraph 107(1)(a) and subpara (a)(i) of this section, certainly that would in some ways alleviate those concerns and make it a little simpler. To me, it still does not make sense as to why we couldn't make those changes that have been asked for by the Privacy Commissioner without creating the tribunal, which is just another bureaucratic layer.

Have we looked...? I guess the question is.... We haven't talked about it, but could it be escalation to the courts or could something be written stating that if the tribunal had taken too long with a certain decision, it automatically would go to the courts? Is that another remedy that would allow us to look at more power to the Privacy Commissioner without having a tribunal?

● (1245)

Mr. Mark Schaan: I think it's important to make sure we're segregating the arguments in their purest form to make sure we're understanding where there are considerations or concerns that are being raised.

There is a rationale about courts versus tribunal in terms of resources and capacity, because in the instance of the creation of the tribunal you are essentially creating a purpose-built body for the purposes of administrative monetary penalties for privacy violations. That's not about the OPC's resourcing, because it's actually about the tribunal as a stand-alone body able to understand and issue AMPs, as opposed to the courts. That's one argument that is—

Mr. Ryan Williams: What would the alternative to that be? The OPC could administer those. Is that correct?

Mr. Mark Schaan: There is a consideration around whether the OPC issues those AMPs. That introduces a different set of considerations.

One is that you're converting an ombuds that was created as an agent of Parliament and has a very particular function. An ombuds is not a determinate body. It's an advice-giving body. That's why it was created as an ombuds. It's because of the nature of an agent of Parliament. You are entrusting an agent of Parliament and moving them from an ombuds function to an enforcement function. You are in effect grouping an investigatory function, a findings function and a penalties function. By all considerations of natural justice in administrative law, there should be appropriate mechanisms in place to segregate those functions. We do that in a number of particular types of instances. There are ways in which we can contemplate how to separate those functions.

Essentially, you have two considerations there. One is that you've grouped them all, which we have concerns about because that's not, to our mind, a consideration of how you actually achieve natural justice or administer it in due process. Two, you've given it to an agent of Parliament that is presiding over private sector actors. Most agents of Parliament preside over government functions.

● (1250)

Mr. Ryan Williams: I'll interrupt you there.

The alternative is a tribunal, which would then, in some ways, still be an agent of Parliament, because some of those positions, as listed, would be appointed by either the minister or Parliament.

Mr. Mark Schaan: Except that—without "nerding out" and getting too down in the weeds—there is a distinction to be made between agents of Parliament and GIC appointees.

GIC appointees act under the minister and under the authorities set out by statute. This means there's a line of accountability in the Westminster system, from the duly elected government down to the appointee, as opposed to agents of Parliament appointed by some summary of Parliament but not actually accountable under the statutory obligations set out in a particular piece of law.

There is a material difference between those two things in terms of how one understands natural justice to have occurred.

Mr. Ryan Williams: We've had these discussions before.

Looking at other G7 nations or western jurisdictions, are they not putting the AMPs into the privacy commissioner function? Are they not doing what you're saying is not...?

Mr. Mark Schaan: There are a number of models out there. The particularities of our situation—in which you're converting an ombuds function into an enforcement function and then putting them with the AMPs—is quite distinct.

I'll let Mr. Chhabra weigh in.

Mr. Samir Chhabra: Thanks very much.

I think, as we discussed last week at this committee, it's important to recognize that when we do analysis on these kinds of issues, we do it in full view of the totality of the systems we're looking at. It's not just about picking out any one specific element and saying, "That's the same over there. Why can't we do it the same way?" As Mr. Schaan just mentioned, we're talking about a particular constitutional construction here in Canada, where we have an officer of Parliament in the first instance. Nowhere else do we find it structured that way. Right away, we have a distinction that needs to be made about what could fit well within that construct.

Second, as we discussed last week, there are a number of jurisdictions internationally that separate the function of the investigation work, the adjudication work and the decision-making around penalties. I think I mentioned last week that Australia separates it. The commissioner in Australia may seek civil penalties from a court body. Ireland also separates that function. In New Zealand, the privacy regulator cannot issue administrative monetary penalties, but cost and damages may be awarded by a human rights review tribunal. In Quebec, for example, the CAI is essentially a tribunal function built into the privacy regulator. There are many instances.

In fact, as we discussed last week, it's generally understood that, in order for folks to have a fair and impartial hearing, and to have the process stand up under scrutiny and not be subject to a very significant risk of challenge on the basis of a reasonable apprehension of bias, you need to separate those functions. Vesting a single individual or office with the responsibilities of ombuds, investigatory function and adjudication function would significantly open it up to challenge.

The Chair: Mr. Williams, I apologize, but we'll have to leave it at that in order for members to head back to the House for the votes.

I want to thank our witnesses.

[*Translation*]

Mr. Schaan, Mr. Chhabra and Ms. Angus, thank you for taking part in this exercise again.

We'll see you on Wednesday for another fascinating meeting.

Thank you, everyone.

The meeting is adjourned.