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• (1700)

[English]

The Chair (Mr. David Tilson (Dufferin—Caledon, CPC)): Good afternoon, ladies and gentlemen. I will call the meeting to order.

This is the legislative committee on Bill C-2, meeting number 19. The orders of the day, pursuant to the order of reference of Thursday, April 27, 2006, are Bill C-2, an act providing for conflict of interest rules, restrictions on election financing, and measures respecting administrative transparency, oversight, and accountability.

Before we proceed, we have a point of order from Monsieur Petit.

[Translation]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you, Mr. Chairman.

I would like to comment on what I said at our meeting on Thursday, June 1, when we were discussing the tabling of the report drafted by our law clerk and parliamentary counsel, Mr. Walsh. I apologize if what I said offended anybody. I would like to assure members of the committee and the chair that I have the utmost respect for the Speaker, the House, and all parliamentary institutions.

Thank you.

[English]

The Chair: Thank you.

We have with us today representatives from the Law Clerk's office. We have the Law Clerk and Parliamentary Counsel, R.R. Walsh, and the Deputy Law Clerk and Parliamentary Counsel, Richard Denis.

Gentlemen, we have the document that's been prepared by you. There was a motion that you come to the committee so that members of the committee could ask you some questions. You spoke to me before the meeting and indicated that if there were any comments, you would like to get right into questions, and perhaps there might be a concluding statement at the end.

So we will do that, Mr. Walsh.

Madam Clerk, I need your assistance. Do we have the seven-minute rule here? Yes, we do.

Mr. Owen, go ahead, please.

Hon. Stephen Owen (Vancouver Quadra, Lib.): Thank you, Chair and Clerks.

Thank you for being before us today and providing this very useful advice on our deliberations. I have two questions. The first is for Mr. Walsh.

With regard to the constitutional difficulties you've identified with respect to the privileges of members of Parliament in particular, is it your opinion that it is within the powers of this committee to amend this bill so that it can cure any of these constitutional difficulties that you raise? That's my first general question. In some points it's quite clear that it can be. I'm interested in, and will be considering, if we follow that advice, whether that will impair the more general objectives or specific objectives of the bill to the extent that it's not worth it. I'm interested in knowing to what extent this is curable.

Second, I'm interested in knowing whether, as a normal course or in this situation, when there are issues of legislative drafting that do touch upon the business and the privileges of Parliament, and particularly the House of Commons, it is appropriate and common, or appropriate but uncommon, that you are consulted by the counsel at the Department of Justice who is drafting legislation. Did this happen in the case of bill C-2?

• (1705)

The Chair: Thank you.

Mr. Walsh, go ahead, please.

Mr. Rob Walsh (Law Clerk and Parliamentary Counsel, House of Commons): Thank you, Mr. Chair.

I'll answer the first of the two questions: are the problems described in this report curable by way of amendment? For the most part, yes, they are, in the sense that making the text of the bill reflect an intention to subordinate the powers, immunities, and privileges of the House to the provisions of the Conflict of Interest Act can be done by way of amendment.

A good part of the report, however, also touches on the consequences that may flow from that by virtue of legal processes that attach to the provisions of the Conflict of Interest Act and the possibility, by virtue of those processes, of the courts becoming involved in the business of members and the business of the House.

In terms of legislative process, amendments to the bill could be made of a kind that, with one exception, enable this to be a proper piece of legislation that goes through. But it would entail either perfecting the bill, so as to make the Conflict of Interest Act prevail over privilege, or the reverse, making amendments to make sure it does not prevail over privilege.

The one exception, of course, is section 49 of the Constitution Act, 1867. It would require a constitutional amendment, in my view, to get around the terms of that provision.

On the second point, regarding consultations with the Department of Justice, no, there were no consultations that I'm aware of between my office and the Department of Justice. And it is not commonly the case that there would be any consultations between the lawyers in the Department of Justice and our office prior to a government bill being introduced in the House.

Hon. Stephen Owen: Okay, thank you, colleagues.

The Chair: Mr. Murphy.

Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.): I want to thank you, Mr. Chairman.

The Chair: Excuse me, Mr. Murphy, if I could interject, we will have rounds of seven minutes, and then if there's time, we will have five-minute rounds. But you may proceed.

Mr. Brian Murphy: Did that count as my time? I'm just kidding.

Thank you, Mr. Chairman.

I want to, if I may, Mr. Walsh, cut to what I think is the crux of this matter, which is that you have written that Parliament has its own set or sets of privileges and its own customs, which have evolved over time, and legislating away parliamentary privilege or autonomy, to use a word you haven't used, is done sparingly. Obviously, it was done when the country was created, and it was amended in 1868, and you say on page 10 of your brief that, "Since that time there have been no legislated provisions, that we are aware of, that have affected the privileges of the House". I'm going to take it that you're absolutely correct on that, because it's not a hobby of mine to read 19th-century and early 20th-century parliamentary privilege history.

My question is this. We have the Minister of Justice, who today in the House did not refer to that part of your brief, but to the part immediately before that, which is where you write that you feel that "some of the proposals of Bill C-2 are contrary to the Constitution", and then, "but it is not unconstitutional to enact legislation that limits the constitutional privileges of the House". Somewhere else you write that at least Parliament should have their heads up when they do this, when they legislate away privileges.

I guess this is the crux of it. The Minister of Justice and, I can only assume, the government side feel it is within Parliament's power, by a majority vote, to legislate away privileges. But you say that it hasn't been done, basically, since 1868.

Am I summarizing the crux of your opinion correctly with respect to privileges?

Mr. Rob Walsh: Mr. Chairman, just as the member was speaking, I was looking for where on page 10 I had said that, and I couldn't find it on page 10, but I think I'm finding it on page 8.

What I think I said in the report—and, again, I haven't found the exact wording—was that the privileges of the House of Commons and its members and committees, as established by the Parliament of Canada Act, have not in that act ever been curtailed or restricted by amendments to that act. However, in my view, it arguably is the case that there are provisions out there in various statutes that have, as it were, crept in, perhaps unnoticed, perhaps not, and they constitute an

impairment of the powers, immunities, and privileges of the House and its members, much as the provisions in Bill C-2 do, as we indicate.

With regard to the other point you raise about the Minister of Justice, again, I was looking for that text and didn't make a note of your complete question, but I seem to recall that you had a question about a statement made by the Minister of Justice in the House.

• (1710)

Mr. Brian Murphy: Maybe the page numbers are off. I don't know. Under the heading "Closing", it is the first and only sentence in that paragraph. It's a one-sentence paragraph.

Mr. Rob Walsh: I'm sorry. That's not the text I was referring to on page 8. It is on page 9.

It is true, as I said in answer to the previous question, that legislation can be passed that has the effect of limiting or diminishing the privileges of the House or its members. As a counsel to this parliamentary institution, I'm urging clarity, so that it is very clear that it is clearly intended that the Conflict of Interest Act is meant to have priority over what may be countervailing powers, immunities, and privileges.

Mr. Brian Murphy: It's just that paragraph after—

The Chair: You're going to have to wait for the second round, Mr. Murphy. We were well over.

Before we proceed with Monsieur Sauvageau, as it is now ten after five, I would like to remind members that the deadline for submitting amendments is here; it is upon us. If there are any amendments to be submitted by members, could you submit them to the clerk so that we can include them in the package? If not, we will assume that all such amendments have been received.

Do you have a question on what I just said, Mr. Walsh, or something else?

Mr. Rob Walsh: In response to what you said, Mr. Chairman, without taking the time of any member, I brought lawyers from my office here this evening so that they can speak to members of this committee immediately after the meeting and perhaps take instruction. I understand that in many cases amendments may be needed tomorrow, as Wednesday you start clause-by-clause study of the bill and of clause 2, which is the Conflict of Interest Act. I asked my lawyers to be here this evening; they will get on to drafting tomorrow, and we're very confident we can make available to all members the motions they may want or need to have filed with the clerk tomorrow.

The Chair: I appreciate that offer. The problem is that we had set deadlines in a previous motion. I'm at the will of the committee.

Mr. Poilievre has a point of order.

Mr. Pierre Poilievre (Nepean—Carleton, CPC): I don't see a problem with taking Mr. Walsh up on his offer, because we have put in place a new provision, I believe, that allows for amendments to be accepted on 24 hours' notice at any point throughout clause-by-clause study.

The Chair: I don't see a problem either, but I'd rather the committee tell me that. Thank you.

You have a point of order, Ms. Jennings.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Well, then, I will tell the chair that: that in fact is the motion, and even prior to Mr. Poilievre's hand going up, I've been trying to make that point to you. Mr. Poilievre is quite correct, and if you survey the members of this committee and speak to the clerk, I think you'll find that the motion does allow for amendments to continue to come forward, under those conditions.

The Chair: Thank you.

Monsieur Sauvageau.

[*Translation*]

Mr. Benoît Sauvageau (Repentigny, BQ): Mr. Walsh, Mr. Denis, thank you for being here today.

Were you consulted by Treasury Board or any other entity during the six weeks in which Bill C-2 was drafted?

Mr. Rob Walsh: No, nobody consulted us.

Mr. Benoît Sauvageau: Nobody consulted you even though the bill related to matters of parliamentary privilege.

I will not name any names, but I will ask you a question. Firstly, I would like to thank you for this edifying document on the Federal Accountability Act. Did a member of this committee instruct you to prepare this report?

Mr. Rob Walsh: No, I had no contact with members of the committee while preparing my report. I made a conscious decision not to speak with members of the committee whilst drafting it. The only time that I spoke with a member of this committee about the report was after having given it to the chairman in the evening of Wednesday, May 31.

● (1715)

Mr. Benoît Sauvageau: And it was not to me that you spoke.

Did somebody instruct you to write the report, or did you do so of your own accord?

Mr. Rob Walsh: I did so of my own accord.

Mr. Benoît Sauvageau: I would like to follow on from what Mr. Murphy was saying.

In the conclusion, which can be found on page 11 of the French text, you state the following:

Notwithstanding our view that some of the proposals of Bill C-2 are contrary to the Constitution as they fail to respect the constitutional position of the House, it is not unconstitutional to enact legislation that limits the constitutional privileges of the House.

When the Minister of Justice rose in the House this afternoon, waving around your report, and saying that it confirmed that he was

in the right, it made me think of what happened in 1981, when it was decided to repatriate the Constitution. It was said that to do so was not illegal, but... Perhaps you could refresh my memory?

Mr. Rob Walsh: I did not hear the answer that the minister gave in the House today. The repatriation of the Constitution in 1981 was an entirely different kettle of fish.

Mr. Benoît Sauvageau: It was said that it was not illegal, but that it was immoral.

Mr. Rob Walsh: Immoral? I do not think that it is a matter of immorality.

Mr. Benoît Sauvageau: It is to a degree. While it would not be unconstitutional to amend the constitutionally guaranteed privileges of the House, it would be a major change.

Mr. Rob Walsh: Perhaps, but Parliament has the right to change its privileges if it sees fit to do so.

Mr. Benoît Sauvageau: If Parliament sees fit to do so.

Mr. Rob Walsh: Exactly.

Mr. Benoît Sauvageau: If Parliament did want to, how would it go about it?

Mr. Rob Walsh: By means of the amendments included in Bill C-2, by stating that, notwithstanding the constitutional privileges of Parliament, in clause 6 or in clause 21...

Mr. Benoît Sauvageau: Even if it would amend the Bill of Rights, which dates back to 1889?

Mr. Rob Walsh: The problem is that it requires a constitutional amendment. We cannot use the standard legislative avenues. Changing how the 1889 act is applied would involve amending the Constitution.

● (1720)

Mr. Benoît Sauvageau: In the introduction of your report it is stated that:

The executive branch should never have legal control of the legislative branch (the House or the Senate). Otherwise, there would be no effective difference between a Parliament with a majority government and one with a minority government and the constitutional function of the House of holding the government to account would be a nullity. The House's legal autonomy is sustained through the application of long-standing principles of parliamentary law which are generally described by the term "parliamentary privilege" and form part of the constitutional law of Canada.

Further on, you state:

Some provisions in Bill C-2 seem to run contrary to the constitutional position of the House. These are provisions that [...]

You then go on to list the provisions in question. You state that Bill C-2 has an effect on the balance between parliamentary privilege and parliamentary tradition.

Mr. Rob Walsh: Of course. It affects the balance between the legislative, executive and judicial branches. The constitutional context in which our parliamentary system evolves grants rights to Parliament, to governments, and to the judiciary. This results in a form of balance. Would this balance be changed by amending these privileges? Perhaps. It is therefore important to be cognizant of what one is doing.

Mr. Benoît Sauvageau: Let us say, for argument sake, that somebody were to consider themselves to be a superior being and that they thought the bill to be perfect—I hope nobody thinks that I am talking about them—and did not want to hear talk of any of your suggested amendments. Were such a person to exist and hold such views, what would be the potential consequences?

Mr. Rob Walsh: In its current format, if a member, a minister or a parliamentary secretary were to challenge the act and to decide to seek legal advice, the matter could end up before the courts, which would generate uncertainty. In fact, the House could grind to a halt while waiting for the court to hand down a decision.

That is the problem that I see as a lawyer. Given that there is a conflict between the constitutionally guaranteed parliamentary privileges and the provisions contained in this bill, which are statutory provisions, somebody could initiate legal proceedings on the grounds that the act is contrary to the right of parliamentarians. Uncertainty would reign while you awaited the decision. It would be particularly problematic in the case of a tie vote or where the Chair had to vote in order to pass a motion. Furthermore, if somebody thought that a minister or a parliamentary secretary was in a situation of conflict of interest, he or she could take the matter to court arguing that the vote ought to be nullified.

Clause 9 states that the courts cannot interfere in affairs of the House of Commons; however, were the Ethics Commissioner involved, the court could be asked to review his actions. That would create a situation of uncertainty. Would parliamentarians have to wait months, or even years, for a decision to determine whether a vote is to be upheld? As a lawyer, I do not like uncertainty. I want to see provisions that provide certainty as to the process to be followed.

[English]

The Chair: Thank you.

Mr. Martin.

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

Thank you to the House law clerks for coming forward with this report at this time dealing with these constitutional issues at this stage, so that we can deal with them at this early stage rather than waiting for problems to possibly emerge at a later date.

I was hoping your presentation today might deal with a verbal overview of what problems you've identified, and even perhaps recommendations on how we might fix them, but we jumped right into questioning. I'll try to use the time as best I can.

One of the key things you've pointed out is that the officers of Parliament or Parliament's agents, whether in the newly created offices the bill contemplates or even as existing officers of Parliament, do in fact perform executive functions. This is a thing you're trying to illustrate in your report.

Have we known about this all along? Has this been something that's grown and evolved with the expanding roles of some of the officers of Parliament, and did it simply become a "straw that broke the camel's back" sort of issue when we compounded the problem by introducing new officers?

I'm curious as to why the status quo, with our current slate of officers of Parliament, whether the Information Commissioner or the Auditor General, etc., has now become a constitutional issue that must be addressed immediately.

Mr. Rob Walsh: Mr. Chairman, the executive nature of the duties of the officers of Parliament, while noted in our report, isn't something that means to say that therefore they're operating under the direction of the government of the day. I don't mean to cause members to think that because we describe these officers as having functions and duties of the nature of executive action we therefore think they are not to be trusted with the duties the statutes have given them.

• (1725)

Mr. Pat Martin: You go as far as to say they are a part of the executive branch.

Mr. Rob Walsh: Correct. In the broad sense, they're not judicial and they're not legislative. So they're in the executive branch. But that doesn't mean they don't enjoy the independence that may be sufficient to the satisfaction of members of Parliament and that there's no wrongful interference by the government. So it's a judgment call on the part of this committee in the case of C-2 as to whether there is anything here that concerns you.

But if I could, Mr. Chairman, just briefly respond to Mr. Martin relative to the overall picture, there are two principal themes here. One is the constitutional position of the House, and the second is the fact that there is a lot of legal uncertainty, in my view, that develops by virtue of the legal duties placed on members and legal powers given to the Ethics Commissioner, which, when put into action, can give rise to legal processes of a kind that leave everybody in a roomful of lawyers. Then you end up with a problem where you don't know what you've decided when you decided it, because you're now into a legal process that has to work itself out.

Traditionally, the House does its business as it sees fit and the courts stay out of it. You want to minimize the intrusion of any outside officers into that business or you run the risk of being dragged into court proceedings pertaining to the propriety of the actions taken under the authorizing statute.

Mr. Pat Martin: I won't pretend I understand all that. I swear, a carpenter is at a disadvantage in this setting.

Mr. Rob Walsh: Mr. Martin, if you didn't build a house right and there was an ability to take you to court and have you demonstrate that you built a house wrong, I don't think as a carpenter you would like that. I'm not sure if you are a carpenter, Mr. Martin, but if you're a builder and you don't build right, and you can be taken to court to demonstrate how you did build right, you'd lose a lot of money spending time in court and not building.

In the same manner, if parliamentarians or the Ethics Commissioner have to spend a lot of time in court to explain why they did what they did and it was all kosher, then you're not doing your day job. That's all I'm saying. And you have the uncertainty of what it is we decided when we had that vote. We don't know any more because we have a challenge to some of the people who voted on one side. We don't know whether their vote was valid. What did we decide, and what does that mean to the consequences of that vote?

Subsequent actions were taken based on something being adopted in the House, but we don't know whether that vote is valid because the process is in the court. So we've got to wait until that's sorted out. And then we find out whether that minister's or that parliamentary secretary's vote stands or doesn't stand.

I don't know. It's just the uncertainty that comes to me as a lawyer, saying, come on, let's clean this up. This is a recipe for a lot of confusion and uncertainty, which shouldn't bother me as a lawyer because it's a job for life, but at the same time, it's not good parliamentary practice.

Mr. Pat Martin: You also pointed out the appointment processes.... They're not appointed by either house; they're appointed by Governor in Council. You identified that as an issue, so the appointment—

Mr. Rob Walsh: Legally, the appointment is made by Governor in Council, but its statute requires as a condition before that that the House approve the appointment. But it doesn't happen legally until the order in council is made. That's part one of the indices of being in an executive-type position. But that's not to suggest the government is going to have inordinate or inappropriate control of the appointee. There's a difference between legal and parliamentary.

Mr. Pat Martin: Okay. That may be something that will come to me in the second round. Thank you.

The Chair: Thank you, Mr. Martin.

Mr. Rob Moore.

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Mr. Chair, and thank you for being here. We certainly appreciate the advice you've provided, Mr. Law Clerk.

We've heard some of the conversation over the last little while from the committee, and some members have been a bit alarmist. You've heard that there is some sort of constitutional crisis or that this is somehow immoral. I just want to put it a bit into perspective.

When the Minister of Justice and Attorney General of Canada deals with any piece of justice legislation, for example, there will always be witnesses who appear saying that this provision or that may or may not be constitutional, that there may or may not be a challenge at some point in the future, that there may be some hypothetical court case. We take that advice, and as parliamentarians it's our job to enact legislation. That's something we're used to. Anyone who has ever sat on any committee dealing with any subject matter knows there is always the possibility that some piece of that legislation could end up in court.

Also, there's been a great deal made about your particular office and your not being consulted, but I guess from the evidence I've heard from you today, it wouldn't be the normal practice with any piece of legislation that a department would call you up to say it was thinking about a piece of legislation and to ask what you thought about it.

Nonetheless, we hear members say "immoral" as though there's some constitutional crisis. From the evidence I've seen you provide, I don't think that's the case. For one thing—this has already been quoted a number of times—you say:

Notwithstanding our view that some of the proposals of Bill C-2 are contrary to the Constitution as they fail to respect the constitutional position of the House, it

is not unconstitutional to enact legislation that limits the constitutional privileges of the House.

Also, today you've mentioned that of any potential flaws you see, most are curable. To get to the specifics, in the interests of working to have a bill that's a good piece of legislation and a House that stands, how many amendments would you be talking about? What specifically would you like to see changed, and what are we talking about, as far as time goes, to make those few amendments?

• (1730)

Mr. Rob Walsh: I believe, Mr. Chairman, that my office can have available to any member who asks for them amendments reflecting the concerns raised in this report and have them available for the member tomorrow. I haven't counted how many there would be.

It could be 40, the deputy law clerk tells me.

We didn't, by the way, mean by this report to suggest that we were facing a constitutional crisis here. I don't think you'll find—

Mr. Rob Moore: I wouldn't suggest you have said that. Some people have taken a report and run with it and have suggested there is a constitutional crisis. My point is it doesn't seem to be what you've suggested.

In some of the examples I've seen, from what you've pointed out, you would prefer clarity. In other words, where we may not amend specifically the Parliament of Canada Act to achieve a certain end, you would prefer to see that particular act amended, and so on. But some of this is a preference in drafting or a preference in approach, not necessarily some sort of fatal flaw.

Mr. Rob Walsh: Well, it's more than that.

There are procedural rules about how you draft bills, so I can't draft as I would like to, cutting from whole cloth. You have to draft based on the bill you have in front of you, so you have to go where the procedural rules allow you to go. That doesn't always have us going to our preferred spot. But there are ways of doing it so as to enable it to happen.

But, Mr. Chairman, I wish to point out, since I think it is implied in the member's question, that I'm not crying fire here—or wolf, or whatever the expression is—but I feel duty bound on behalf of my client, which is the House of Commons, its committees, and the members of Parliament, to apprise them of what I see happening that they may not otherwise be aware of. This is what we've done by this report.

It's certainly up to the committee to choose whether it will do anything at all, or how much it will do, or whether it will do everything we're suggesting. That's entirely a matter within the committee's discretion. But I felt professionally and legally obliged to bring to your attention those matters that concern me as the legal adviser to the House and its committees and to members of Parliament.

The Chair: Mr. Poilievre.

Mr. Pierre Poilievre: I'm pleased also to hear that, as I originally expected, and in your words, there is no constitutional crisis here and that all of the problems you've pointed out can be resolved through amendment, and that you can produce those amendments within 24 hours, you're saying—

Mr. Rob Walsh: But not all. Section 49 is a problem.

Mr. Pierre Poilievre: Except for section 49.

What remedy do you propose for section 49?

Mr. Rob Walsh: I think you have to make a constitutional amendment, and that's not something you can do overnight, relative to the timelines of this bill. I think the only solution is to remove the provision pertaining to secret ballots.

Mr. Pierre Poilievre: That in itself is an amendment that could be.... Again, what I said originally was accurate: every problem you have with this bill could be amended in clause-by-clause consideration.

On the 40 amendments, are they all substantive or are some of them resulting from other parts of your amendment package? How many substantive changes to the bill are you talking about?

• (1735)

Mr. Rob Walsh: They're all substantive, I might say, but some of them might be consequential to other—

Mr. Pierre Poilievre: Yes, but how many are consequential and how many are original?

Mr. Richard Denis (Deputy Law Clerk and Parliamentary Counsel, House of Commons): Mr. Chair, for example, if we look at deleting the provisions dealing with the secret ballot, we'd be looking at close to 10 amendments, but they're all dealing with the same thing.

Mr. Pierre Poilievre: It's all dealing with the same thing, so how many are original, roughly? You don't have to be totally precise.

Mr. Richard Denis: Maybe 15 topics.

Mr. Pierre Poilievre: Fifteen amendments.

For the benefit of those who have not been through clause-by-clause, 15 amendments can be done in a good part of an hour and a half.

I'm very pleased with your testimony today because it really does show that we're not dealing with a big crisis. You have roughly 15 changes, all of which could be done in a total of about an hour and a half. I think that's good news for Canadians because it means we can get them accountability and get them an accountability act by the summer.

Thank you.

The Chair: Ms. Jennings.

Hon. Marlene Jennings: Thank you very much.

Notwithstanding the eagerness of our colleagues on the other side of the House, on the government side, to simply sweep aside parliamentary privilege and the constitutional autonomy of Parliament that has existed for over a century, going into two centuries.... You are in fact the parliamentary counsel and the law clerk. You have clearly made the point in your brief that some aspects of Bill C-2 would in fact impede on parliamentary privilege and the constitutional position of the House and its members. You then state that if the House wishes its parliamentary privilege and constitutional position to be subject to Bill C-2 as it now stands, it needs a clarification, and you can show us or provide us with an amendment.

On the other hand, if the House and its members decide they do not wish to throw close to 200 years of tradition out the window, there's a different amendment that can be put into place. My question to you, as the legal adviser to Parliament, specifically to the House of Commons, is what advice do you give to the members of this committee as to which option we should choose?

When I go to a lawyer and I pay a lawyer, I expect the lawyer to put out all of the various options, with the pros and the negatives. Then I expect my lawyer, whom I'm paying, to come up with a recommendation. You have option one: here are the pros, here are the cons; option two: pros and cons; option three: pros and cons. I recommend you go with option two.

Do you recommend to the members of this committee that we throw parliamentary privilege and the constitutional position of the House and its members out the window, subject to the Conflict of Interest Act, as it is now stipulated, or do you recommend that we maintain parliamentary privilege and the constitutional position of the House and its members as it now stands, in which case it would require a different amendment?

Mr. Rob Walsh: Mr. Chairman, as the lawyer for the House of Commons, members of Parliament, and committees, naturally my view would be in favour of the interests of that institution. The short answer to the member's question is that I don't think you should play around with your privileges, and you should sustain them.

Over the weekend, I had occasion to read a definition, if I can share it with the committee, of "ecology". It said in this definition that it's a branch of biological science that studies organisms' relations to one another and to their surroundings. Planet Earth is a type of community of life characterized by interdependence and delicate balance; a deeper understanding of this has been accelerated by environmental deterioration.

I was struck by the parallel. That statement, with a few artful substitutions of words, gives a description, in my view, of what this committee is facing. I will read it to you with the changes.

Parliamentary powers, privileges, and immunities is a branch of political science and law that studies the constitutional relations of the three branches of government—executive, legislative, and judicial—to one another and to their surroundings. The House of Commons is part of a constitutional community of life, characterized by interdependence and delicate balance. A deeper understanding of this has been accelerated by environmental deterioration.

What we have here, Mr. Chairman, in my view, is the danger that over time and going into the future the parliamentary environment may deteriorate. They say a fish doesn't see the water it swims in. Members of Parliament come to a committee like this one. They're looking at conflict of interest. They're looking at members' trust. They're looking at a director of public prosecutions. They're looking at the substantive matters relative to public policy. They're not thinking about their privileges; they're not thinking about the institution. That's why I had to get off my hands and come to the committee as I have done.

I don't know if this is an answer to the member's question, but I'm talking about your working environment; I'm talking about the air that you breathe. You can neglect it and carry on and adopt provisions without regard to privilege, and some day one or two or several of you might find that you haven't got the privilege that you thought you had in some circumstances.

In the last Parliament, we had, under the current ethics regime, as some of you will remember, some very serious difficulties between a couple of members and the regime as it was applied against them. We had in one case a minister who, in my view, suffered a political assassination when charges were made and she lost her cabinet position, and later the allegation made against her was proven to be bogus. We had another member whose family suffered as a result of the process.

This is serious business when you're talking about legal proceedings that can be brought against a member of Parliament on some allegation about a possible conflict. It's important, I feel, on your behalf as your lawyer, to say to you, think twice about what you're doing here. You're here, in my view, to serve—and God forgive me, because now I'm talking like I'm lecturing and it's not my place to be doing that—in the constitutional environment that's been provided to you, in the interests of the people of Canada, and they want you here freely to do it.

I noticed the other day, that section 463 of the Canada Elections Act says that if a certain form isn't filed, a certain document, the member can't sit or vote. The constitutional panoply of electing someone to come to this House to represent his electors, to speak and address the major issues of the day—that's all subordinated by filing a certain document? Somehow, filing a certain document—a regulatory requirement—can't be enforced except by denying that member his participation in the democratic institution he was elected to and for which he represents his people? To me there's a confusion of priorities there.

I'm speaking with the bias of parliamentary counsel. I'm not speaking against this bill. I'm speaking about issues relating to your working environment; I'm speaking about the air that you breathe, the water that you swim in, and I'm asking that you have your eyes open as you swim through it. If you want to compromise your privileges, you're perfectly entitled to do so.

● (1740)

The Chair: Okay, you'll have to wait for another round if you want to continue.

Mr. Poilievre, go ahead, please.

Mr. Pierre Poilievre: I'll share another definition with you that I'm sure some members of the opposition would like as the definition of some committees: a committee is a group of individuals who, by themselves, can do nothing, but together agree that nothing can be done. I think there are some members of this committee who would like to see this bill delayed as long as possible, so they're trying to invent some sort of hysteria about 15 amendments that you propose, which would take about an hour and a half to review and vote on through the regular course of a clause-by-clause amendment.

The section of the Canada Elections Act that you were concerned about, that said that a form not filled out would keep a member from sitting in his seat—what statute was that?

Mr. Rob Walsh: It's in the Canada Elections Act.

Mr. Pierre Poilievre: It's currently in the Canada Elections Act. When was it put in? Was it Bill C-24?

Mr. Rob Walsh: No. We actually did some research on that. We found that it's been there since the 1920s. What's proposed in Bill C-2 is along the same lines.

Mr. Pierre Poilievre: How many members have not sat in their chairs as a result?

Mr. Rob Walsh: I don't know the answer to that.

Mr. Pierre Poilievre: Well, obviously, it's a big problem.

Mr. Rob Walsh: I'm told that it was one member.

Mr. Pierre Poilievre: One member. What year was that?

Mr. Rob Walsh: The year the member was not sitting, I'm told, was 2006.

Mr. Pierre Poilievre: It was in 2006, and we haven't even heard about it.

Mr. Rob Walsh: Well, these things aren't necessarily made public, I suppose.

Mr. Pierre Poilievre: Every member in 2006 voted in the House of Commons, so it's obviously not been that big a problem.

● (1745)

Mr. Rob Walsh: I don't know the facts of that case.

Mr. Pierre Poilievre: It hasn't manifested itself in the House of Commons or any of the caucuses. No one here even seems to know who that member is.

I'm only saying that if this enormous problem you've pointed to has existed for 80 years, on a section in a bill that requires a politician to fill out a bloody form, but in 80 years you have one example that seems to not even have manifested itself in any serious way, it's maybe not such a big problem after all.

Mr. Rob Walsh: Mr. Chairman, I need to remind the member that in the last Parliament we had two or three votes that were won by one vote or were tied and the Speaker had to break the tie. A member's presence could arguably make a difference.

The Chair: I remember it well.

Mr. Pierre Poilievre: Never once did that provision in the Canada Elections Act ever impede any of those votes or any other vote.

Mr. Rob Walsh: I don't know.

Mr. Pierre Poilievre: You pointed to an amazing problem in theory, but it doesn't seem to have manifested itself in practice in any real way.

Mr. Rob Walsh: Mr. Chairman, I'm sorry. Could I respond to that?

That was the kind of response that was given in the early days of environmentalists. It was an uphill struggle to bring awareness to the fact that the unseen impact of various activities is real.

I'm not an environmentalist, and I'm not here to preach environmental causes, but I have what I call my paint-can theory of the environment. I wanted to throw out some paint cans this weekend. I took them out of the basement and put them in the garbage. My wife said that I couldn't do that and I had to take them to a special place.

Mr. Pierre Poilievre: I have to say I'm afraid that in some of the analogies you're using, it sounds like you have a whole group of solutions that are looking for problems.

We're of course willing to look at all 15 of your amendments. I'm sure that we'll give an hour and a half to those amendments, which is what they generally take.

Hon. Marlene Jennings: I have a point of order, Chair.

The Chair: On a point of order, Ms. Jennings.

Hon. Marlene Jennings: Yes. I believe that any witness who comes before our committee or any committee of the House has the right to courtesy. I believe that not only the tone but even the substance of the comments by the member, Mr. Poilievre, are insulting to our witnesses.

The Chair: You're right. It's a grey area and Mr. Poilievre will have to be careful, but I think he is questioning this section on not filing returns under the Canada Elections Act.

I think it's a fair exchange between them. I'm sure that if Mr. Walsh finds it insulting, he's been around here long enough and he'll tell him.

But be careful, Mr. Poilievre.

Mr. Pierre Poilievre: I will be very cautious.

I will also remind Mr. Walsh that I have great respect for both him and his office. This is just a good clash of ideas.

I think what we're really talking about here are the constitutional rights of politicians. I've never had that issue come up on the doorstep of my constituency. That's not to say it's not important.

I would conclude by saying this.

Mr. Walsh, I'm glad that you brought these issues forward. If there are 15 or so amendments that we can look at and vote on over the course of roughly an hour and a half, on the route to passing the Accountability Act, then I think it might be worthwhile.

Thank you.

The Chair: Thank you, sir.

Madam Guay.

[*Translation*]

Ms. Monique Guay (Rivière-du-Nord, BQ): Thank you, Mr. Chairman.

I am staggered by what I am hearing. I find it thoroughly unacceptable to try to downplay the importance of somebody's work.

Mr. Walsh, I have a great deal of respect for your work. I think that you are trying to warn us to proceed cautiously because the bill comprises provisions that could undermine our rights as parliamentarians. That is something that's extremely important to me. I have

been a parliamentarian for more than 13 years, and if there is one thing that is important to me in the House of Commons, it is to preserve the rights that I have as a parliamentarian. It is a lot harder to rebuild a reputation than to destroy one.

If this bill contains elements that could damage the reputation of parliamentarians because it has been badly drafted, and if it could result in a lawsuit free-for-all, I think we should go back to the drawing board. The Conservative Party is trying to downplay the importance of the amendments that you are suggesting. I believe we should go through them with a fine-tooth comb. We should study them thoroughly...

Some Hon. Members: Oh, oh!

Ms. Monique Guay: I am sorry, but I have the floor. You can speak when it is your turn. That is what it means to be responsible and to have some respect!

Mr. Chairman...

[*English*]

The Chair: Continue, Madame Guay.

[*Translation*]

Ms. Monique Guay: Thank you. Mr. Chairman, I listen when others speak.

I would like you to present us with your amendments. In fact, the document you gave us contains several amendments. I think it is extremely important to study them one by one.

Mr. Walsh, we spent 41 hours studying a bill of this scope, whereas we normally should have spent at least 200 hours doing so. But we have to be realistic. My party never opposed this bill, but we want it to be well done. You have told us in so many words that we should be careful since we are on the point of affecting other legislation in a way which would curtail the rights of parliamentarians. This causes us great concern. Can you give us other examples where our rights as parliamentarians could be affected, and can you explain them to us?

• (1750)

Mr. Rob Walsh: Are you referring to Bill C-2?

Ms. Monique Guay: Yes.

Mr. Rob Walsh: I think that we found everything which could affect the privileges of parliamentarians. Going through the bill clause-by-clause would require an enormous amount of time.

Ms. Monique Guay: You mentioned 15 amendments. These amendments will affect other provisions contained in the bill.

Mr. Rob Walsh: Mr. Chairman, I must point out that this idea that there are 15 amendments is just a little off-base. In fact, it is the number of subjects which is at issue. There are 15 subjects involved. However, you cannot present a motion concerning a subject; you have to proceed clause-by-clause and study the entire bill.

Perhaps Richard can provide us with a little more detail.

Ms. Monique Guay: In that case, do you think you could study the bill clause-by-clause with us to make sure that we do a good job? That way, you could warn us that, for instance, we need to amend such and such an article, in such and such a bill, because otherwise the rights of parliamentarians, which are protected by the Constitution, would be affected.

Mr. Rob Walsh: Our legal advisors are at your service, Ms. Guay, as they are at the service of any committee member wishing to draft an amendment. All you have to do is ask our legal advisors to prepare them. We do not present amendments; it is the members who do so.

Ms. Monique Guay: The chair and the committee would have to agree to receive these amendments if we are to study them and include them in the bill. The committee decided to proceed with the clause-by-clause study beginning Wednesday afternoon. Will that really solve the problem? Will this bill turn out to be a good piece of legislation which could be enforceable and which would appease your concerns based on the current wording?

Mr. Rob Walsh: Mr. Chairman, we are willing to prepare amendments for Ms. Guay and for any other member of the committee. Just tell us what you want and we will prepare the amendments.

Ms. Monique Guay: For our part, we are willing to support you, Mr. Walsh and Mr. Denis.

Is there anything else you would like to say?

Mr. Richard Denis: I would simply like to add a small detail. In the course of preparing the report, when we discovered problems or points which we felt should be raised, we also thought of possible solutions and corrective measures. As we state in our report, and this holds more true for this bill than for most other situations, we are in a position to propose solutions. Of course, any final decision is up to the committee. When a problem is pinpointed, we also propose solutions. We already have a good idea of what these might be. And that is why we can respond fairly rapidly.

[*English*]

The Chair: Thank you.

Mr. Lukiwski.

Mr. Tom Lukiwski (Regina—Lumsden—Lake Centre, CPC): Thank you very much, Mr. Walsh, for being here.

I want to make sure we're all singing from the same song sheet here. I'm not sure if anyone has actually made an official request to take you up on your offer to have you and your legal team present to us the proposed amendments you would suggest that would strengthen and clarify this bill; if not, I would make that request. I'm not sure if we've actually put it on the table.

When you say you would be willing to assist political parties or members to present amendments, I'm asking you the very same thing. Could you and your team prepare a package of amendments that would, in your opinion, clarify this bill and make it constitutionally doable?

Mr. Rob Walsh: Mr. Chairman, I'd certainly be pleased to do that. However, please understand that we only draft in response to instructions received from members of the committee, so there has to be that event: the member has to request them. You can forward

requests for amendments, but then we need to seek instructions from the member as to what he or she wishes to do.

There are two avenues one might go with this bill. Some members might say, let's make privilege prevail over the Conflict of Interest Act. Another member might say, let's not, and let's go the reverse. Or they might say, for this, yes, we should keep our privileges, but for that over there, no.

We're ready to go in any direction the members request; we are ready to provide amendments to members of this committee, according to what they want to have from us, including all private members, and private members on the government side, too. Obviously we don't prepare amendments for the government; they have their own, and the parliamentary secretary, presumably, will bring those forward. But for the members on the governing side, as well as the members on the opposition side, we need their individual instructions. That's why I asked my lawyers to be here to take their instructions in the break, or at the end of the evening, and we can get to work on them right away.

• (1755)

Mr. Tom Lukiwski: Thank you for clarifying that point. We'll work from that premise.

Thank you.

The Chair: Mr. Martin is next.

Mr. Pat Martin: Thank you, Mr. Chair.

This is all very helpful and very interesting, but it's very complex too. My understanding is that it's really quite simple to fix the deal about the secret ballot vote. It's a matter of going through one by one, and where you find the reference to the conflict commissioner, you fix that clause; where you find the commissioner of lobbying, you fix that clause, simply by eliminating reference to secret ballot vote. That seems simple and straightforward.

I don't know what we would replace that process with, but the point is that the officers of Parliament should be selected by, or appointed by, Parliament—you've made that point—but also shouldn't be governed by statute. Is that a point you were making, that we as Parliament are governed by standing orders of Parliament, but officers of Parliament shouldn't be governed by the statutes that govern governments?

Mr. Rob Walsh: Mr. Chairman, the statutes would govern public office-holders and the provisions of the House of Commons would govern members of Parliament. It might be that the same official would have responsibilities for inquiring into alleged conflicts with respect to either members or to public officer-holders, meaning ministers or a parliamentary secretary.

The problem, in my view, is that we have a situation in which there is an attempt by legislation to deal with ministers and parliamentary secretaries when they are acting as members voting and participating in debates. It's oil and water; you've crossed over, using statute, into the domain of the House. You crossed over and made provisions prohibiting members from voting or participating in debates if they would be in conflict were they to do so. The minister doesn't rise as a minister in the House; he rises as a member and votes as a member. The problem here is that putting it in statute means he can't vote in the House, because, as I said earlier, you've got this confusion that can emerge as to what the standing of the minister's vote is when he voted as a member and there's some allegation of a conflict.

It's a question of separation of the two branches, as we say in our paper. The House, constitutionally and traditionally, has control of its members, and the Prime Minister has control of his ministers—and of course the civil service as well. In mixing them up, you're creating confusion—process confusion, role confusion, and legal confusion. I'm not suggesting politically—politically it's very simple—but in a legal constitutional sense, it's confusing and could become problematic by virtue of the processes that could flow from it as a member tried to defend his or her position.

The Chair: Mr. Murphy.

Mr. Brian Murphy: Let me get back to fixing it, but I want to say that I'm absolutely shocked that the Minister of Justice would get up in the House and quote your report as a means of shrugging it off, saying we can change this if it's unconstitutional, while at the same time refusing.... His parliamentary secretary is here today and could have said so, but didn't either. You, the government, could have proved that they have a constitutional opinion that disagrees with Mr. Walsh's. We haven't got that opinion, and I think the intention of the government, from the cavalier attitude of both the parliamentary secretary and the Minister of Justice in the House today, is to put this legislation over parliamentary privileges.

I take you to page 10—I think the numbers are off—and the third-last paragraph of your brief. Let's be clear. You would accept a request for an amendment put by a member, but I think you'd want some direction as to whether they want you to do A or B, and you put A or B in the third-last paragraph. You're saying that if we want the parliamentary privileges, which I take it haven't really been touched since 1868, to be subject to the conflict of interest code, you've set out the proposed amendment; if not, you've set out the other amendment.

I think it's imperative for this committee or for a member of the committee supporting the subjugation of parliamentary privileges to the new Conflict of Interest Act—which doesn't happen every day—to ask for that. It may be the debate of the committee. I think we have to have one or the other. The reference you made in your previous answer was that to have the secret ballot remain, however—if it is to remain—might require an amendment to the Constitution. That's a little more than an hour and a half clause-by-clause procedure, if I remember. Amending the Constitution—our attempts to do that are not met with great success in this country, but we're willing to do it here if we want to keep the secret ballot. Is that right?

●(1800)

Mr. Rob Walsh: Section 49 of the Constitution Act, 1867, requires that all questions be determined by a majority of voices. There might be some who think that's not terribly important.

Section 48 of the Constitution Act, 1867, requires that the House have a quorum of 20 before it starts its business. Every day in the morning, if any of you have been in there first thing—and I'm sure many of you have—the Speaker waits until he has a quorum. That's because the Constitution requires it. Also, there's a five-year limit for each House of Commons. Also, money bills can't be introduced in the Senate first; they have to be introduced in the House. That is respected, and you can be sure the House will insist that it be respected. And of course you have the royal recommendation. On Wednesday of last week the Speaker gave a ruling or a statement in the House on royal recommendations, and twice in his statement he referred to observing the Constitution. The next day, June 1, he revisited that subject at the invitation of a member who rose on a point of privilege and suggested that the matter could be taken to a committee and the committee could consider the matter and perhaps change the practices that the House currently has on private members' bills, subject to the Constitution.

I think it's quite evident that when you have something in the Constitution that directly applies to the House, it has to be taken seriously. As my paper indicates, the majority of voices is yea or nay. Someone said to me, what about electronic voting? With electronic voting, you still have to vote yea or nay, and then when you vote electronically, if you're sitting there, Mr. Murphy, in your chair, and you press a button and it goes up electronically to indicate what your vote is, that's fine, it's a way of recording your vote. Or you stand in the House and record your vote. But to go to a ballot, and no one knows how you voted.... The point isn't just that we like the sound of your voice on the yea or nay, but the point is, in my view, that the public is entitled to know how their representatives vote. Secret ballot votes go against that. I'm assuming here that this is the thinking behind section 49. It's a longstanding tradition that votes are done, yea or nay, and if you record, you rise in your place and you indicate how you voted. The second recording vote is not the vote. The vote took place earlier and then the members rise to confirm.

Mr. Brian Murphy: Thank you for that answer.

I want to split my time with Ms. Jennings.

The Chair: I'm sorry, you don't have much to split. You have another minute.

Mr. Brian Murphy: I just want to say that outdoors we can hear the voice of Sir John A. Macdonald in a Scottish reel opposing the taking away of the privileges of Parliament.

Hon. Marlene Jennings: Is there any time left on Mr. Murphy's round?

The Chair: No.

Mr. Sauvageau.

[*Translation*]

Mr. Benoît Sauvageau: Mr. Walsh, I won't be asking you any questions, but I will make a comment. You can respond, if you wish.

To begin, I would like to distance myself from what certain committee members said and apologize for the lack of respect they showed you and the Constitution.

It is understandable that a member, due to a lack of experience, would ask who ordered a document and then demand that the official appear before the committee because he is paid to do so, and so on. That might be understandable. However, when a parliamentary secretary as much as says: “Hey, buddy, send me your 15 amendments, we’ll take a look at them for an hour and then flush them down the toilet”, that is, in my opinion, inexcusable and unacceptable. I feel it shows an utter disregard for basic politeness. So I would like to distance myself from those remarks, because unfortunately I am a member of the committee even when such things are said.

Further, I never said that your document referred to a constitutional crisis. I simply said that your document referred to the Constitution. Unfortunately, though we are trying to conduct a rigorous study of Bill C-2—which was drafted in six weeks and which we are being asked to pass in three weeks—we are being accused of partisanship. As far as I know, you are not a member of any political party; you are the legal advisor for members of the House of Commons, and you are their protector. We have been accused, you—who raised the alarm—and I—while trying to do my job with rigour—of being guilty of partisanship and of being obstructive. In 13 years I have never witnessed anything like this and I find it unthinkable.

I would like to quote a passage from your document which is on page 5. It says:

Bill C-2 overlooks the necessary constitutional divide that gives exclusive authority to discipline members of the House of Commons to the House of Commons and authority to discipline public office holders (ministers and parliamentary secretaries) to the government.

This is merely one passage which underscores the fact that we must study your document closely and seriously, because it is highly relevant. We must also, in the same manner, consider Bill C-2. As well, as Mr. Murphy said a little earlier, it is possible that the intent is for the Constitution and constitutional rights acquired since 1867 not be respected anymore. If the government prefers one approach over another, it should do so openly. But that is not what is happening.

I would like to thank you for having written this document. I would like to thank you for having raised the alarm. I apologize for the irreverent and disrespectful things which have been directed at you. I certainly hope that your message will be heard. Unfortunately, it seems that the government still wishes to push this bill through for base political reasons, such as the fact that they want to make the Liberals pay for their previous low blows. I think that if we push the bill through too quickly, all members of Parliament, all officials and indeed all Canadians will pay the price for these petty political games.

That’s all I had to say. I would be pleased to hear you respond, but if you don’t do so, I’ll understand.

•(1805)

[English]

The Chair: Ms. Jennings.

Hon. Marlene Jennings: Mr. Walsh, I would ask that when you sit down with your drafters, you draft an amendment to Bill C-2 that will clearly indicate that it is not the preference of this committee to allow the proposed Conflict of Interest Act to override the traditional and longstanding constitutional position and parliamentary privileges of the House and its members. Thus a provision should be, through amendment, inserted into the proposed Conflict of Interest Act to show that very clearly.

I believe—and I’m speaking for myself—that this House and its members, through this committee, should reflect long and hard before subjugating our privileges and the traditional position of the House and its members to any statute.

I would hope that the government, now that it is aware of the consequences of Bill C-2 as it is now written, if it wishes to proceed in like manner, would mount a convincing argument and debate on the issue before taking that ultimate step. I would hope as well that each member of this committee, regardless of which political party they belong to, before casting their vote to reject or adopt an amendment to the Conflict of Interest Act...which would state clearly that it does not override the constitutional position and parliamentary privileges of the House and its members.

Thank you.

The Chair: Mr. Owen, I have your name down here. We’re still on your dime.

Mr. Tonks.

Mr. Alan Tonks (York South—Weston, Lib.): Mr. Walsh, does a committee have the flexibility to offer parliamentary privilege to the public when it appears before a committee?

•(1810)

Mr. Rob Walsh: Yes, when a member of the public sits in front of a committee, as I am here now, they enjoy all the protections of that committee meeting. It’s a proceeding of the House and they are fully protected. We had to very quickly move to protect that rule when the Gomery commission wanted to use evidence of a witness before the public accounts committee in those proceedings, and we were successful.

Mr. Alan Tonks: That leads to my second question. Is there anything in this bill on your concerns raised vis-à-vis parliamentary privilege as it relates to members of Parliament? Is there anything in the bill that would then affect the ability of the committee to offer protection to anyone appearing as a witness?

Mr. Rob Walsh: I’m not sure I fully appreciate your question. If you are asking whether proceedings of a committee would be adversely affected by provisions in the Conflict of Interest Act, it’s only to the extent that parliamentary secretaries might not be able to participate in the debate or vote at committee where they would be in conflict. Secondly, an individual member might be concerned about their position, depending on the matter before the committee, and because of a possible process that could go on out there affecting that member, the member might prefer to withdraw from the committee just to avoid it.

So it's that avoidance strategy that starts to develop amongst people who feel they might be at the wrong end of some process. The avoidance strategy is to just not attend, and find someone else to attend instead. So that fear can give rise to an intrusion, if you like, into the proceedings of the House or a committee.

Mr. Alan Tonks: And parliamentary secretaries, if they aren't privy councillors, wouldn't be protected—or they wouldn't have information that would be deemed to be “executive” information unless they were privy councillors.

Mr. Rob Walsh: I don't know what information a parliamentary secretary who is a privy councillor may have, as against that of a parliamentary secretary who's not a privy councillor. In either case, he or she is sitting on this committee and is participating as a member of Parliament.

Mr. Alan Tonks: Right.

Thank you.

[*Translation*]

The Chair: Mr. Sauvageau.

Mr. Benoît Sauvageau: I have two brief questions.

First, I want to make sure that everyone is clear on this. Members of the committee have the right to ask you to draft amendments. Do you realize that you were asked to do so? Do we have to make an official request?

Mr. Rob Walsh: No. Our lawyers are here and we will do what you ask. Just tell us exactly...

[*English*]

The Chair: Mr. Sauvageau, as we've stated several times, if members want to make an amendment, only members of the committee can make the amendment. So if you have particular amendments, you can accept Mr. Walsh's offer and ask him, and you would present the amendment, not Mr. Walsh.

[*Translation*]

Mr. Benoît Sauvageau: Now for my second question. I decided to ask it in committee, because our offices are not very close to each other.

Mr. Joe Wild, from the Department of Justice, who regularly appears before this committee, told us that he was going to provide us with legal advice. I would ask you to ask him to provide the committee with the Department of Justice's legal opinion on this bill—or rather, on this report—because when he appeared before the committee, he said that he had been involved with the bill since its beginnings.

I would like him, through you, to provide the committee with legal advice. Thank you very much.

[*English*]

The Chair: As I understand it, Mr. Walsh gives the committee advice; Mr. Wild gives the government advice.

[*Translation*]

Mr. Benoît Sauvageau: No.

[*English*]

The Chair: That's not true?

You're absolutely right. He gives Parliament advice, but as I understand it—and I'm sure you'll all correct me—if there's to be legal advice given to this committee, that legal advice is given by Mr. Walsh.

Mr. Rob Walsh: That's correct.

Let me put it this way. Mr. Wild or any other Department of Justice lawyer who might be here and present himself or herself to assist the committee in considering a government bill may be asked questions that call for a legal answer, and you might see that as giving legal advice. But the committee is not that lawyer's client, so he has no duty to advise that client in the client's interest. As Mr. Wild—I heard his testimony before this committee—I think indicated, he can try to explain some of the technical features of the bill to the members of the committee, but he doesn't see himself as having a legal advisory role to the committee.

• (1815)

The Chair: Yes, and I recall, Mr. Sauvageau, that Mr. Wild will be available during the amendment process.

Does that thoroughly confuse you?

[*Translation*]

Mr. Benoît Sauvageau: Yes, because when he appeared before the committee, he told us that he could give us legal advice. I am therefore making an official request for legal advice, through you, to somebody who offered to provide me with such a service. Before we proceed with clause-by-clause examination of the bill, I would ask Mr. Wild to provide us with legal advice on the report that was tabled, as he said he would. That is all. The ball is in my court, and I am accepting his offer.

[*English*]

The Chair: I don't want to get into debate here; I'm just trying to clarify it.

Legal advice is given by Mr. Walsh, and Mr. Wild could make a legal comment, but it's not “advice to this committee”.

[*Translation*]

Mr. Benoît Sauvageau: Very well. I would like to have his legal comments.

Thank you very much, I will have some further questions for you about the amendments.

[*English*]

The Chair: Mr. Murphy.

Mr. Brian Murphy: Just to move the ball forward a little bit, I'm hoping the government members here might want to get rid of the provisions with respect to secret ballot, which would get us out of this constitutional amendment aspect.

Secondly, I'm hoping they will choose to keep parliamentary privileges, which in your second suggestion means that this committee could propose an amendment to the proposed Conflict of Interest Act.

What I'm asking you as counsel to Parliament is how that would work. It exists at other levels of law, where certain boards, agencies, commissions, law societies, etc., give certain rights, but they're inferior to the rights of the Charter of Rights, for instance.

Am I correct in thinking that the proposed conflict of interest subordinate to members' privileges would still be in effect for public office-holders, but that the public office-holder, if he were so impugned or needed the reach, if you like, of the age-old parliamentary privileges, could invoke them?

Is that an understanding?

Mr. Rob Walsh: In answer to your question, Mr. Murphy, parliamentary privilege, and all that that is about, is constitutional in nature. The Conflict of Interest Act is a mere statute. If there are remedies available to a person, a minister, a parliamentary secretary, or a member with respect to provisions of the Conflict of Interest Act, and those remedies are found in parliamentary privilege, they will argue parliamentary privilege has a priority set of laws because it's constitutional in nature, whereas the Conflict of Interest Act is merely a statute.

Mr. Brian Murphy: The two can live together.

Mr. Rob Walsh: The two can live together, but there is a priority; there is a hierarchy, and the constitutional prevails over the statutory.

Mr. Brian Murphy: Thank you very much. That's all I have.

The Chair: Your closing statement, Mr. Walsh.

Mr. Rob Walsh: I'm concerned by some comments made earlier that since there haven't been many instances of a problem under section 463, there is therefore nothing to be concerned about. As far as that goes, that's true. Again, some may feel I'm overstating the case, but I would like members of this committee to consider what their reaction would be to this bill, and I'm going through a hypothetical just because I don't want to get into the debate about this bill. If the bill had a provision that no private member could introduce a private member's bill without first having confirmation from the parliamentary budget officer that the bill would not require the spending of any public funds, I can assure you that would stop dead in their tracks a certain number of private members' bills. It would give to an appointed officer the ability to stop a member of Parliament from getting a private member's bill onto the floor of the House for debate.

You might say it's one of the sacrosanct rights and privileges of a member of Parliament to propose to the House what he or she thinks is worthy of consideration by the House. Such a provision would give to an appointed official the ability to say "You're not going anywhere; that bill's not going to get into the House." I would think private members would be concerned about this.

On the other side, suppose amendments were made to this bill, in the interest of accountability, conflict of interest, and transparency, that require that 24 hours before the start of a cabinet meeting the agenda of the items that are going to be discussed at the cabinet meeting be posted on the Government of Canada's website, and that 24 hours after the cabinet meeting that agenda must be modified to indicate if there were any additional items taken up at that cabinet meeting. It also must be provided who attended the meeting, who didn't, so that there could be information provided to the Ethics Commissioner about a possible conflict. Understandably, I would fully support opposition to such suggestions relative to the constitutional convention of cabinet confidentiality. But you can see how you start to slide down the road when you start setting aside well-established principles respecting the autonomy and the

independence of the executive branch and the legislative branch. These may be relatively minor, although arguably they're more major than the one that you don't sit if you don't file a form with the electoral officer. These might not be so dramatic today, although in some cases I think they are, but they could get more dramatic later.

The examples I've given you are examples of very serious suggestions, and I would hope the government would oppose any amendment of the kind I'm suggesting relative to the cabinet. I would hope no one would have the idea of limiting a member's right to introduce a private member's bills to what some appointed official says about it.

I would also like to point out as a point of information that—it came up in the House again today, and it may have come up on an earlier occasion too, that the Minister of Justice under the Department of Justice Act is bound to examine all legislation for its constitutionality before it comes to the House. I was surprised when I heard that, so I went to the act. Now it's not beyond me to take the wrong act down from the shelf, but I went to the act, and what's required is that the Minister of Justice satisfies himself or herself that a bill the government's going to propose is not inconsistent with the provisions and purposes of the Charter of Rights and Freedoms, which is only part of the Constitution of Canada. I'm unable to find in the act any obligation on the part of the minister that he must satisfy himself that the act meets all constitutional requirements.

The minister in this case may have done that, I don't know. That's not my business. I thought I would correct the point that was made that the bill wouldn't be here if there were constitutional problems in the mind of the minister. One might accept there aren't any charter problems in the mind of the minister, but under section 4.1 of the Department of Justice Act, it's limited to that.

I would like to close by saying, Mr. Chairman, that I had a lot of trouble determining what it is I should or should not do in the circumstances. I felt obliged that something had to be done because I had the feeling that if nothing was done there might be some unfortunate provisions go into statute law, the kinds of things that my office is spending time in court trying to get the House out from under. So I gave some thought to it. I was not invited to testify before this committee, so I did not think it appropriate that I should walk into the committee meeting and say, hey you, listen to this.

You may not be aware, but Standing Order 13 deals with the question of privileges of the House and where those privileges might be adversely affected by something presented to the House. It obliges the Speaker, whenever he is of the opinion that a motion offered is contrary to the rules, the privileges of Parliament, that he should apprise the House thereof. So I decided, in the spirit of Standing Order 13, that I'd do a report and deliver it to the Speaker, which is what I did. The Speaker then authorized me to bring the report to this committee, and that's when I arrived on May 31. I was dancing as fast as I could to keep ahead of the movement of this committee, as things were moving along fairly well, but fortunately I arrived before it did.

• (1820)

The authorization of the Speaker is not to be taken as any concurrence on his part as to the content of that report. I've had no comment from the Speaker regarding that report. He may agree with some of it; he may not agree with other parts. But I came here with the authorization of the Speaker in the spirit of Standing Order 13.

When I recognized that I might be doing this some weeks ago, I spoke with Mr. Gibson, your executive assistant, on your behalf, to advise him that I was doing this and that I did not know whether it would in fact result in a report coming to this committee; later, as it turned out, it did. I apologize to the committee, to the extent that it arrived and came as a bit of a rude surprise to some that a report was arriving unasked for, as it were. But I honestly felt that as the law clerk of the House of Commons, its committees, and members of Parliament, I was duty bound to do this as a lawyer—experienced now for over 30 years in the field. You don't sit on your hands when you see something happening that may be adverse to your client's interests; you have to intervene and tell the client what's coming down. I've done that.

I don't expect any particular action by the committee. The committee can decide for itself what it thinks is appropriate, and it would do so fully within its prerogatives as a committee of the House. But I felt that I had to deliver what I did deliver to the committee. I hope the committee members do find it useful, and I certainly did not want to impair or interfere in the processes of this committee, or in any way appear to overreach my responsibilities as law clerk. I hope that in the minds of members of this committee, you don't feel I have done so.

Thank you, Mr. Chair.

• (1825)

The Chair: Thank you, Mr. Walsh and Mr. Denis. There's none taken. If I could speak on behalf of the committee, I think the committee members appreciate the work you've done and we've appreciated your report.

We have one more item on the agenda tonight.

Mr. Walsh, as you know, if there are going to be any amendments, I have a feeling some of the members may wish to approach you and your staff. If I could trouble you and your staff to wait until after we finish with this next item of business, and perhaps after the adjournment, in case members wish to ask for counsel—or they may not.

Mr. Rob Walsh: Chairman, I've already instructed the lawyers to stay here until the end of this meeting and make themselves available to members. Richard, I think, is able to stay as well. Certainly we're of service.

Hon. Stephen Owen: Mr. Chair, just to add to your acknowledgement and gratitude to Mr. Walsh and Mr. Denis, I would give my acknowledgement of the superior quality of the class of 1972 from the University of British Columbia law school.

Some hon. members: Oh, oh!

The Chair: Mr. Denis and Mr. Walsh, thank you very much, and if you could stand by, we'd appreciate it.

Ms. Jennings has a notice of motion that has been served on us.

Once that's been distributed, Ms. Jennings, could you read the motion? We'll wait until we all have a copy of it, and then at the conclusion of your reading of it, you can speak to the motion.

[*Translation*]

Hon. Marlene Jennings: Thank you, Mr. Chairman.

[*English*]

I move that this committee, through its chair, request the Minister of Justice and Attorney General of Canada to appear before the committee on Tuesday, June 6, from 3:30 p.m. to 5:30 p.m.

Given the testimony of Mr. Walsh and the brief he has tabled on the issue of whether the Conflict of Interest Act should override parliamentary privilege and the constitutional position of the House, or be subjugated to the Conflict of Interest Act, and given that the Minister of Justice has a responsibility for certifying that any government legislation is in conformity with the Charter of Rights and Freedoms, I believe the minister should come before this committee and speak to us on this issue.

It's a very simple request, and I would expect that the minister would be more than happy to do so.

The Chair: Monsieur Sauvageau.

[*Translation*]

Mr. Benoît Sauvageau: The question is either for you, Mr. Chairman, or the clerk. You read a statement about committee votes at our last meeting. Unfortunately, I do not have the blues here with me, and I would like to know whether the chair votes to continue the debate when there is a tie vote.

[*English*]

The Chair: First of all, I guess we should wait to see what happens. I don't want to comment until I see what the vote is going to be.

Mr. Moore.

Mr. Rob Moore: I fail to see the added value of having the minister appear. Frankly, I think this is an attempt to further politicize what we're doing here. The minister has given his opinion. The advice he got from his own department, as everyone on that side knows, is that there is privilege attached to that.

The law clerk delivered a document to us. We looked at his opinion, we analyzed it, and now we've had him as a witness. There's an openness now, and there's an opportunity to look at the amendments the law clerk is proposing.

So I guess I would be voting against this motion because I see no compelling reason to ask the minister to come. There's no point in getting into some debate over the law clerk's advice. He's given his advice. If members want to ask for a specific amendment from the law clerk and his team of lawyers, then they can do that.

• (1830)

The Chair: Mr. Martin.

Mr. Pat Martin: I was interested in this motion when the notice was first served. But we've just learned from the law clerk that there is no duty or obligation on the part of the Minister of Justice to make sure that a piece of legislation is in compliance with the Constitution. There is a reference to making sure that it doesn't offend the Charter of Rights and Freedoms, but no one has made the case that this bill offends the charter in any way. I no longer see the purpose for bringing in the Minister of Justice, so I'll be voting against it.

The Chair: Mr. Murphy.

Mr. Brian Murphy: I agree with what has just been said. The thing that troubles me is that we are in a Parliament where you're entitled to ask a question of a minister. The minister said two things. I wanted to know the answer to the simple question of whether he felt it was constitutional. His first answer was, well, we can override

it anyway, and his second answer was that it is constitutional. I'd just like to know. Maybe the minister could help his members over there to propose which amendment they want to do. Do you want to take away the privileges of Parliament or not? Then we can deal with one of the two amendments.

I'd like some direction from the government. It's unclear to me. Given what the minister and the parliamentary secretary said here today, it would seem to me that they're leaning toward taking away parliamentary privileges. If Mr. Moore would assist in telling us which direction they're going in, maybe we can avoid Mr. Toews' appearance.

That's my two bits.

The Chair: Madam Guay.

[*Translation*]

Ms. Monique Guay: Mr. Chairman, I think that we have said all there is to be said on the matter. I would ask you to call the question.

[*English*]

The Chair: We will proceed. All those in favour?

There is a tie, so the chair votes against the motion.

(Motion negated)

The Chair: Thank you very much. This meeting is adjourned until Wednesday at 3:30.

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