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Chair

Mr. Scott Reid

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● (1540)

[*English*]

The Chair (Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC)): Order, please.

I'll start by greeting our witnesses, Rob Walsh, the law clerk, and Melanie Mortensen.

I might just mention I had a chat with Mr. Walsh beforehand and we had a brief discussion about how he could make his presentation. He will outline how he'd like to go about it, and maybe members could just listen and see if his suggestion seems appropriate. It probably will, and we can just carry on.

Mr. Walsh, please.

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

Ms. Melanie Mortensen, a lawyer in my office, has been working with me on this file, so I asked, with your indulgence, to be accompanied before the committee today by Ms. Mortensen.

I notice you announced the purpose of this meeting as being to do with disclosure forms, but I had the impression, from what we received from the clerk of the committee, that our mandate was a bit larger than simply disclosure forms. It's an e-mail that I received on May 4 that talked about Bill C-2, the Federal Accountability Act, and the draft letter that's been proposed to go to the government House leader, and there are other general comments and perhaps some specific comments about the code.

Now, we are prepared to go forward on that basis. I would talk about Bill C-2 and the problems that remain, in our view, with Bill C-2. Then on the code, we have the benefit of the report of the Library of Parliament researchers. I don't know whether this is a report that's been distributed to members of the subcommittee yet, but in any event, it's a convenient tool because it sets out all the sections of the code. We went through it and we have some issues, and Ms. Mortensen will take the subcommittee through that piece by piece. I will talk about trusts in there, and I'll have some comments about the draft letter to the government House leader, as well.

I have asked the clerk to distribute copies of the relevant sections of Bill C-2 to members of the committee. I hope you have them there—there are the French and English versions. There are only the four sections I want to talk about, and they all interrelate, but I should take you through them one at a time, to begin with.

What you have there is subsection 6(1) and 6(2). The marginal note in subsection 6(1) in English is “Decision-making”; in French it's *Prise de décision*. In subsection 6(2), “Abstention from voting”; *abstention de voter*. It's subsection 6(2) that is of concern here. I'll come back to that.

The next section is section 21, which requires public office holders to recuse from debates or votes.

The next one of interest is section 30, which gives the Ethics Commissioner powers to make a compliance order against a public office holder, and includes recusal.

Then subsection 64(2) is the subsection dealing with whether certain activities would or would not be acceptable where they're done on behalf of constituents.

Now, just to set the context, these provisions were addressed by my office when I appeared before this committee in respect of Bill C-2. Again, the submissions made—

[*Translation*]

Ms. Pauline Picard (Drummond, BQ): Excuse me, Mr. Walsh.

The interpreters cannot follow you because they do not have the translated text. They have no documents at all. They have no idea of what we are talking about. This makes their work more difficult.

The Chair: Thank you, Ms. Picard.

[*English*]

Mr. Rob Walsh: Do you want me to continue, Mr. Chair?

The Chair: If you don't mind waiting just a moment, we're keeping our eye on the translation booth, and.... Okay, we have the high sign.

Please continue, Mr. Walsh.

Mr. Rob Walsh: The theme of our presentation to the committee back in late May 2006 was that there are privileges that apply to the House of Commons and its members that ought to be kept in mind when legislation is going through Parliament, and there were provisions in the bill that we thought were incursions into those privileges.

I don't propose to remake that presentation now by any means, but the gist of it was that on behalf of the House and in my role as law clerk I brought to the committee's attention where we thought those incursions occurred, including subsection 6(2) and sections 21, 30, and 64. I'll take you now to those sections in particular.

I think the committee actually did amend section 6 so as to remove subsection 6(2), but then it was put back into the bill by a motion at report stage in the House. Subsection 6(2) applies to a minister of the Crown, minister of state, and parliamentary secretary, but of course it applies to them as members of the House.

The fundamental and difficult problem here, Mr. Chair, is this confusion of the role of a member of Parliament and the role of a minister or parliamentary secretary. Obviously we all know that some members of Parliament have both roles. Other members of Parliament don't; they have only one role, that of a member. With one exception, there is no minister who is not a member.

It's important, in our view, that these two roles be treated and dealt with differently, in the sense that there are different places for them to be dealt with. Since it is the privilege of the House to have exclusive control of the internal affairs of the House, including discipline of its members, rules regulating the conduct of members should, in our view, speaking as legal counsel to the House, be dealt with by the House in its code as appended to the Standing Orders. Indeed, that's why that code is appended to the Standing Orders. It's for that very reason. It's in recognition of the fact that this is not a matter for the courts to get involved in, which they could do if it were a statute; it's a matter for the House to regulate in its good judgment.

So it is that we thought it inappropriate here in this act for ministers to be constrained in respect of their parliamentary function. I need say no more. I think that point is pretty evident from looking at subsection 6(2).

If you then look at section 21, again a public officer holder is required to not participate in debates or to vote. Public office holders, of course, include the minister or parliamentary secretary. In our view, that's an incursion into his or her parliamentary role. Although it doesn't mention the House of Commons, we assume debate or vote means to say a debate or vote in the House of Commons or in a committee, as opposed to a debate or vote in cabinet, let's say.

Section 30 then gives to the Ethics Commissioner the power to make an order against a public officer holder—again we're talking about a minister or parliamentary secretary—to comply with any measure, including recusal. So if it were the case that under section 21 or subsection 6(2) a minister or parliamentary secretary did not or would not recuse when the act would appear to say that he should, the Ethics Commissioner can make an order that he do so.

This power being in a statute, there is always the possibility of going to court to get the court involved in the legitimacy of the vote by the member or the parliamentary secretary on the occasion when he should have recused.

As you know, in the last Parliament we had one vote that was very close, to say the least, if not two. I may sound a bit alarmist in saying this, but in a way I foresee a situation in which a vote carries by one vote, or fails to carry by one, and off someone goes to court to challenge the fact that three ministers voted who shouldn't have voted. Now we have a court action going on and invalidating that vote. Of course, by the time the court hears the matter, other matters have taken place in the House, perhaps dependent upon that earlier vote; does that then invalidate all the subsequent things?

My own view is that the courts just would not want to go there with a 10-foot pole. They would probably say this is a matter of internal House business, and the courts would wisely stay out. However, the fact that it's in the statute gives standing to someone to go to the courts and put the courts to the test, if you like, regarding a statutory provision that arguably is meant to be enforced.

This is the essence of our concern about this type of provision with respect to the parliamentary capacity being found in a statute.

● (1545)

Section 64 means to protect these privileges. The trouble for us is that the “subject to” clause was brought in. We had suggested, if my memory serves, that these sections not be made subject to the other provisions. If they were not subject to subsection 6(2), section 21, and section 30, and they affirmed the privileges and affirmed that members of the House and the Senate can carry on their duties as they normally would, we would, as it were, accept that and face the battle we might have to face, say, later, in a different context, about the priority of section 64 over the provisions subsection 6(2), section 21, and section 30.

We would rather that we didn't have to face that challenge, if you like, or that ambiguity, and that section 64 not be made subject to, as it is there, and that subsection 6(2) and sections 21 and 30 not be made applicable, or that they be clearly made inapplicable to public office holders, ministers, and parliamentary secretaries when carrying out their duties in the House.

That is not to say that you wouldn't have that provision. You could well have that provision, but you'd put it in the code, attached to the Standing Orders. And the House might make the rule that no member who is a minister or a parliamentary secretary shall vote on a matter in which he or she has a conflict of interest. And that would be the place for it.

I might also suggest that one of the advantages of this sort of two-tracking is that the view of the day may change with regard to ministers on the one hand and members of Parliament on the other. If both are covered, as they are now, in the legislation, you could not take ministers as members out of this legislation without amending it. Or it could be that the House wants to, at some future point, not include ministers in this restriction, but the House couldn't do it. It would have to go to legislation.

If it's in the code, the House could deal with the matter as it sees fit relative to all its members, all 308 members, and in particular with reference to members who are ministers or parliamentary secretaries, as it sees fit. But when it's in the act, of course, it has to be dealt with as a legislative amendment.

So there is that process issue. But there is also, in our view, the more substantive issue of putting into legislation what is tantamount to a limitation on or an incursion into the privilege of the House that all its members, on behalf of their constituents, are free to participate in debates and to vote. You could go one step further and argue that it's an incursion into the democratic system of government we have where, in various constituencies, a member is elected to go to Parliament and represent his or her constituents. By virtue of a private interest that may exist—I am not saying that isn't worthy of consideration; I'm just saying that by virtue of a private interest that the member has or acquires—under this legislation, he or she cannot then participate in debate representing his or her constituents or vote on behalf of the constituents for that reason. So those constituents are deprived of representation in Parliament for so long as that conflict is there.

Obviously there's a balancing issue here for the members of Parliament, in this case legislators. The point really is, from our point of view, that it should be in the code and it shouldn't be in the act, so the House has control of its members.

There isn't much more that I need to say or want to say about that. I would move on to the question of trusts for a moment, but that is what I wanted to say about those four provisions.

Clause 99 of this bill puts, I think, five new sections in the Parliament of Canada Act pertaining to trusts. This is the subject of this draft letter I've seen. I assume that it is just a draft. Has the letter actually gone to Minister Van Loan, or is it simply a draft at this stage?

● (1550)

The Chair: At this point it is still a draft.

Mr. Rob Walsh: It's a draft. Okay.

It is proposed in this letter that the inconsistency or anomaly that's identified, and properly so, where an exemption or an exception is given to ministers but not to members of Parliament, could be corrected by simply making reference to its provision in the code in subsection 41.3(3) of what will become a provision in the Parliament of Canada Act.

Again, our concern is that this is something that should be dealt with in the code. And it could be dealt with in the code, in which case the members would enjoy the same exemption as ministers, but there again, as I said earlier, it may be at some future point that the House decides it doesn't want its members to have this exemption, or the government decides it doesn't want its ministers to have this exemption but the House wants its members to have exemption. It isn't, in my view, to be assumed that both regimes will always want to have the same for both categories of individuals. Again, we're talking about those individuals who happen to wear two hats as opposed to being distinctly in two separate domains.

Our view basically is that it is a problem. And fair enough, if the committee is of the view that it should be addressed so that the same regime applies to both, I would suggest that the better way to do it is that it be done by way of an amendment to the code so as to make that a requirement upon all members of Parliament, or an exception debatable rather, to all members of Parliament, including ministers.

The other concern we have with regard to clause 99 relates to the powers that are there to the Ethics Commissioner in respect of trusts, but those are not powers that he exercises or enjoys as part of his mandate under the new section, I think currently it's section 86 in the Parliament of Canada Act, and it'll become, I think, section 72.05, when it's incorporated into the Parliament of Canada Act. I've got it backwards, do I? It'll become section 86.

The danger there is that if you give the Ethics Commissioner these powers you are running the risk that he won't be protected by parliamentary privilege in carrying out these duties in respect of trusts applicable to members of Parliament, nor will he be constrained in some respects by parliamentary privilege.

You get to the question of judicial review. As it is now, there's no provision for judicial review of the Ethics Commissioner's actions, so if the Ethics Commissioner is going to have this authority in respect to members of Parliament now.... We're not concerned about the authority he may be given under the act relative to public office holders—that is, ministers and parliamentary secretaries—but if he's to have this authority with regard to members and be protected in that function, parliamentary privilege, and through that members of Parliament themselves who enjoy the protections of parliamentary privilege, it might be something that should be dealt with in section 72.05 or 86, whichever it was, in the mandate of the Ethics Commissioner in the act rather than in a stand-alone provision, as they are now intended to be in Bill C-2.

These are not straightforward matters, Mr. Chairman, and it may be that the committee will want to have an opportunity to look at this further. We can certainly come back with a more thorough treatment in writing, if that's of aid to the committee. But we were asked just a week ago to appear here, and so we have not had an opportunity to prepare this whole matter in writing, which would perhaps be of more convenience to the committee.

That's basically what I wanted to say about Bill C-2. I do believe it's important. I do believe that privileges of members of Parliament and of the House are important, and I urge the committee to dwell on that for a while and think about it, and think about the longer-run interests of the institution. Remember that members of Parliament are in one domain and public office holders are in another, and you don't want situations where the powers, for example, of the Ethics Commissioner under the public office holder's code could be used on a matter pertaining to a member because the member is a public office holder.

Or say the member isn't a public office holder but he's involved in the same scenario where public office holders are involved—we had one of those—and exercising those powers in respect to public office holders, which are greater than the powers he has regarding members. The Ethics Commissioner then makes confidential reports to the Prime Minister in respect of what may be the parliamentary business of a member and, if I want to take the low road here, an opposition member's activities find their way in a confidential report to the Prime Minister because the Ethics Commissioner is looking at public office holders.

● (1555)

I'm thinking of the incident a year or so ago where a representative of the Prime Minister of the day, a minister, was in meetings with a private member regarding the possibility of the private member crossing the floor. I think the Ethics Commissioner decided he didn't have jurisdiction to look into that. But you have there a mix of public office holders and members of Parliament. The issue is, is this governed by the public office holders' code, or is it governed by the members' code? Is it parliamentary business, or is it governmental business?

You have this mélange on the facts, and you have one Ethics Commissioner, two categories of individuals that I believe should be kept distinct. The question is, which code applies? Does a different code apply to this player and another code apply to this player in the same set of facts, and so on? You can see the complexities that could arise for the Ethics Commissioner, as well as for the individuals involved, the less there is of this distinction maintained between the code that applies to members and the code that applies to public office holders—that is, ministers and parliamentary secretaries.

Now, if it's your wish, Mr. Chairman, I could ask Ms. Mortensen to go through the code provisions that I think warrant some attention, based on this report that sets out the code, and possible amendments and reports on some discussions this committee has had. We can address those items ad seriatim, if you would like at this time, or if you prefer, we can pause and have questions on Bill C-2 before we go to the code. It is whatever you prefer.

The Chair: Let's find out what the committee prefers. I did see two hands, Mr. Owen's and Mr. Goodyear's. Obviously their questions, by necessity, would have related to what you've said so far, so why don't we allow them to ask those questions? Then if it looks like the discussion makes sense to keep going, we can keep it going. If not, we can wrap it up and continue with the rest of your presentation.

Mr. Owen, please.

● (1600)

Hon. Stephen Owen (Vancouver Quadra, Lib.): Thank you, both of you, for being here. During our discussions of Bill C-2 and otherwise, your advice was very precise and very helpful, even if it was not always followed.

Now, the two regimes and the complexity you describe are inherent in our particular exercise of parliamentary democracy. At this stage—but not always—in our parliamentary history, a minister is also a member of Parliament. I think at one stage in our history if people were to join the cabinet they had to resign their seat. Perhaps some of this complexity was meant to be overcome by that practice.

The complexity goes far beyond what we're talking about in having separate codes. I often refer to ministers as "administers", because they straddle that line between the political or partisan and the administrative. One has a partisan aspect to it, whether you're putting forward your platform in an election or putting forward legislation and debating it or appropriating funds or whatever. Once you've done all that, you cross a line and you have a duty of fairness. That's the administrative side. Ministers are bound by that. As public office holders, they and the others are bound to treat everyone equally, not in a partisan way.

The confusion about the distinct roles on either side is increased by the fact that people play the same role. It's often not obvious to people when they're playing one role or the other.

But in this situation—and I understand the theoretical problem you're posing—I'm having difficulty playing it out in a practical way. If a public office holder, as a member of Parliament, is going to have a conflict of interest, they will have had it, as well, as a public office holder, and they would have been recused of the decision-making around that. But when they step into Parliament, already having recused themselves, or having been recused of the role, as a public office holder, are they already immunized from the conflict of interest because they've recused themselves there? If not, are they part of that general duty of a parliamentarian that speaks to legislation in general? Certainly in British Columbia's conflict of interest code, with people who have private interests, it is seen to be more of a general responsibility than a specific one.

There was the case in B.C., which was a leading case in the conflict of interest jurisprudence, about spouses of members of the legislature, many of whom were teachers, when the legislature was dealing with, for instance, a back to work order or a salary increase or something very specific. They would have a personal interest as a member of a general class of "spouse of a teacher".

I'm wondering whether, as a practical matter, the theoretical problem you correctly pose will be screened out in most, if not all, cases. I'm trying to think of a case where it wouldn't, but—

Mr. Rob Walsh: Mr. Chair, to go from the theoretical to the practical is not easy in this domain. I dare say that ought not diminish the importance of the theoretical here. These principles have served the system well, over centuries.

I don't know that I can answer your question, Mr. Owen, in terms of "as if by operation". Lawyers would say that by operation of law or of circumstance, having recused himself as a minister, he would be cleansed, as it were, once he stepped into the chamber and addressed whatever issue might be before the House, because it's so general and he's a member of a general class in his role as a member of Parliament. In other words, in his role as a member of Parliament, he is addressing a very general issue and he's not addressing an issue that in all likelihood has any direct particular benefit to him or her as an individual.

That's a question of the facts, and it's also a question of perception. In my view, a lot of what's driving this is the perception of conflicts in terms of confidence in public officials, so they want to be pure as the driven snow to be sure there is no perception of conflicts. For many in this room who might not think there is a real conflict that ought to be given serious attention, some members of the public might think it is something that warrants serious attention.

I think the idea was that if you have a conflict that involves a private interest on a matter before the House, you should recuse yourself. But you're right, members of Parliament sitting in this committee or elsewhere might take the view that this is not an interest of a kind that warrants any recusal, but the minister might take a different view, for other valid reasons, given the different contexts the minister is in.

I guess what I'm saying is that I don't know whether you can assume that doing it for one context will necessarily be sufficient or adequate in the other context, or vice versa.

I don't know if I answered your question.

● (1605)

Hon. Stephen Owen: We're getting a little circular—without diminishing returns, one hopes, although circles can be helpful—in the sense that if you then say, well, back in the..... The concerns of a public office holder just by their nature, being on the administrative side and subject to judicial review and such, are much more likely, if not exclusively likely, to put someone in a conflict in the exercise of that function, whereas the general parliamentary function is of a very different type. It's not only—

Mr. Rob Walsh: It's really the difference between executive and legislative.

Hon. Stephen Owen: Yes.

Mr. Rob Walsh: The public office holder is in an executive capacity. The member of Parliament is in a legislative capacity, a different function.

Hon. Stephen Owen: I'm wondering if the same level of concern about the commissioner...or I'm trying to think of a situation where a commissioner would order a member of Parliament—qua MP, not qua minister—to recuse himself.

Mr. Rob Walsh: The commissioner may be asked to investigate a matter. He may come to the view that there is a conflict under the code. Then he may issue an order to recuse on all matters having relation to that interest.

I don't know how broad the Ethics Commissioner's definition might be of what is a relationship or relevant, or how narrow it might be. I can't predict what the commissioner of the day may feel about what's sufficient to require a recusal. My point is that it's odious to parliamentary tradition and principles for an appointed official to be telling you as an elected member of Parliament that you can or cannot vote, you can or cannot participate in debate. That to me is something that only the House should be allowed to do.

Now, the House could delegate a decision to the Ethics Commissioner on its behalf—i.e., please advise on this—and then the House might take that report, concur or not concur, and so on. But to give up power of order to an appointed official with regard to that, this is what we're saying is contrary—

Hon. Stephen Owen: And I take your point. I've argued for years that officers of Parliament should not have the power of order...that in fact weaken their power; there should be the power of reason that they would express then to, in this case, the House, which would make its own decision.

The Chair: Mr. Owen, we didn't set time limits here. I just assumed it would be the same as in the parent committee, as in seven minutes. You're now over that.

Hon. Stephen Owen: Excuse me, but when two members of the famous class of '71 get together, we go on forever.

The Chair: I think there is a special rule about that.

Mr. Gary Goodyear (Cambridge, CPC): I wasn't born in 1971, Mr. Chair. Could you explain it to me?

The Chair: I could, but that would eat into your seven minutes, Mr. Goodyear. Perhaps we'll just let you use those yourself.

Mr. Gary Goodyear: Thank you.

On what you ended off with, Mr. Walsh, this happens to be some of the problem, the lack of a clear and defined definition about what constitutes recusal.

With respect to the presentation you left with us, subsection 41.3 (4) begins, “No order made under this section”, and it goes on to say that it's after the member “ceases to be a member of the House of Commons”.

I'm curious about there being a defined timeline in Bill C-2, where the code seems to imply that it does follow the member after defeat. In fact, if I'm not mistaken, there's a retroactivity of seven years in the code.

Do you have any comments on whether or not the code itself should—

● (1610)

Mr. Rob Walsh: Are you at subsection 41.3(4)?

Mr. Gary Goodyear: Correct. I think it is directly related to trusts.

Now, that's not quite directly what I'm asking. I'm just noting that there's reference made in Bill C-2 that certain standards with respect to trusts, I would imagine, cease to have an effect after the day the member ceases to be a member.

Once retired, defeated, or whatever , it seems this doesn't apply to the member, whereas the code that we're dealing with, the conflict of interest code, does not apply during writs.

So I suppose I have questions for your opinion: Should it apply during writs? Should it follow after the defeat of a member? Should it have effect on a member after his or her defeat?

Mr. Rob Walsh: Just now as you're speaking, Mr. Goodyear, I've asked Ms. Mortensen to give me a copy of the code. Is there a provision in the code that you have in mind that indicates—

Mr. Gary Goodyear: Well, in the draft procedural guidelines in front of me, am I correct, Margaret, that there are...?

Ms. Margaret Young (Committee Researcher): No.

Mr. Gary Goodyear: I'm not correct. So the code ceases to be in effect after the member is no longer a member of the House.

Ms. Margaret Young: The reason for that is, if I could start a bit back—

Mr. Gary Goodyear: Please.

Ms. Margaret Young: You're quite correct in referring to the draft procedural guidelines, saying that they are seven years retroactive. That is the piece of work from the Ethics Commissioner.

We are mystified as to where he got that figure. When you think about it, once a member ceases to be a member, he does not come under the jurisdiction of the Standing Orders and therefore of the code. Keep in mind further that the Ethics Commissioner only investigates and reports to the House the decision as whether to impose a sanction...whatever to do. Once a member is no longer a member of the House, the House has no jurisdiction over that person.

So we are baffled as to where that seven-year figure came from.

Mr. Gary Goodyear: We're going to deal with that at some point, but not right now.

Can I ask Mr. Walsh one more question, if I have time left?

The security and confidential safeguard guidelines by the Office of the Ethics Commissioner seem to be pretty good. I'm not concerned with that, but what I'm concerned about is whether or not the staff at the Ethics Commissioner's office is trained well enough to know the difference between the two different codes—the one for public holders and the other for members.

I think the code spells out pretty well that any information in the Ethics Commissioner's office, etc., is covered by parliamentary privilege. But my concern is whether or not the staff is trained well enough to understand what that means.

I suppose the question is direct: are you comfortable that members' privileges are in reality protected to the level and the degree that they should be in the code?

Mr. Rob Walsh: First, Mr. Chairman, the fact that the provision is in the code is good enough for me regarding privilege, because that's where it should be.

No, I'm not satisfied with respect to those provisions of Bill C-2, which I mentioned, because I'm saying that the privileges of members of the House are diminished by those various sections, and most pertain to recusal and to those members of Parliament who are ministers or parliamentary secretaries.

In that respect, in my view, the privileges of the members of the House, and in the House collectively, are not adequately respected in terms of the House having control of this matter. Once you put it in the statute, it's beyond the House's control to manage consistent with its privileges of having exclusive authority over its members and the discipline of its members.

Now, on the question of the staff of the Ethics Commissioner's office, I hesitate to make a comment of the kind your question invites, insofar as I have not been over here. I have not met or worked with the staff over there.

I am concerned, however, that when you have one Ethics Commissioner dealing with two groups of distinct individuals, or two distinct functions certainly, and where there's some mixing of the source of the authority—the code attached to the Standing Orders on the one hand, and the statute and the Prime Minister's code in the statute on the other hand—it could ultimately be a problem. In the last two years, we've seen the Ethics Commissioner have trouble remembering—or he seems to be having trouble remembering—which code he's acting under.

This is compounded by the fact that he may have a fact pattern involving a mix of persons under both codes. So there is a problem operationally at some level in the discharge of the Ethic Commissioner's functions. From time to time, we saw that there wasn't adequate cognizance of the distinction between the member's position and the minister's position.

That much I would say, but I certainly wouldn't want to comment on the competence of the people in the office.

● (1615)

The Chair: Was that it?

Mr. Gary Goodyear: A final comment is that it sounds as though the code is adequate enough on this level. We can't fix what isn't broke; it just has to be followed, which ultimately is the reason we're here.

I'm good. Thank you.

Mr. Rob Walsh: Mr. Chair, there are some problems with the code. We haven't come to that yet.

Mr. Gary Goodyear: On this particular section, I meant, section 34.

[*Translation*]

The Chair: Ms. Picard, you have seven minutes, like the other members.

Ms. Pauline Picard: Thank you, Mr. Chairman. Good afternoon, Mr. Walsh.

I am interested in the whole issue of trusts. You made a really brilliant study of Bill C-2. I was sitting on the committee when you spoke about it.

You also raised a few important legal issues regarding the bill. One of the problems arose while we were reviewing the forms. I am referring to part 4 of your document, entitled “Members and Trusts”. The document says, and I quote:

> Bill C-2's regime on trusts would create a number of difficulties related to the constitutional autonomy of the House of Commons and its members. Given that the questions arising in respect of members' trusts would be determined under a statutory regime, actions taken under the act in respect of members' trusts may be subject to judicial review.

Could you give us a detailed explanation of the issue that you raised in your text, and give us some solutions to help us in our work on the Conflict of Interest Code and the declaration forms used by the members?

Mr. Rob Walsh: Do we have the document? Are you referring to the report presented to the committee a year ago? I think it is in part 4.

Ms. Pauline Picard: Yes. May 31.

Mr. Rob Walsh: If I remember correctly, it has to do with the fact that subsections 41.1 to 41.5 of the act would allow courts to settle problems encountered by members with regard to their trusts. In our opinion, it is not good to give the courts any power to intervene in matters related to trusts.

I am sorry, Madam, but I do not have the text in hand.

Ms. Pauline Picard: We can get by without it.

I am referring to sections 17, 18 and 19 of our code.

Mr. Rob Walsh: Which part are you interested in?

Ms. Pauline Picard: I am interested in part 4 of your document, entitled “Members and Trusts”.

Mr. Rob Walsh: I have part 4 right here.

Ms. Pauline Picard: I quoted an excerpt from your document.

Mr. Rob Walsh: Yes, but is there some part of part 4 that you are specifically interested in?

Ms. Pauline Picard: In our review of the code, we are currently studying sections 17, 18 and 19, that deal with trusts. Now we have some questions about what you said.

Do we apply Bill C-2, or the code? You said that Bill C-2 could “create a number of difficulties related to the constitutional autonomy of the House of Commons and its members”. And then, “given that questions arising in respect of members' trusts would be determined under a statutory regime, actions taken under the act in respect of members' trusts may be subject to judicial review”.

Should we amend our code? We would like you to explain what you said in your text about the code.

Mr. Rob Walsh: A moment ago, I suggested that the four or five sections that deal with members and not with ministers should be included in the code, and not in the act.

As I said, including the sections in the act creates a problem. It enables courts to deal with issues concerning members of Parliament. In my opinion, basically, everything that has to do with confidential matters involving MPs should be included in the code appended to the Standing Orders of the House of Commons.

● (1620)

Ms. Pauline Picard: All right.

Mr. Rob Walsh: It would give to the House of Commons ultimate authority with regard to such issues. That is the idea.

Ms. Pauline Picard: Could you write down for us some more details about what you just said regarding the legislation and the fact that the behaviour of MPs should be under the control of the House of Commons and not subject to legislation that could hand such matters over to courts? Do I understand this correctly?

Mr. Rob Walsh: This is the first and most basic principle.

Ms. Pauline Picard: All right.

Mr. Rob Walsh: The remaining issues are in the hands of the Ethics Commissioner who enforces both codes: the act and the Conflict of Interest Code for Members of the House of Commons. Thus, the Ethics Commissioner has a mixture of obligations and legal powers. It is difficult to make sure that both these things are kept separate, and that the rights and privileges of MPs are respected.

Ms. Pauline Picard: As it stands, things are not sufficiently clear. The act infringes on the code, and the code sometimes infringes on the act.

Mr. Rob Walsh: That is where the problem lies.

Ms. Pauline Picard: That is the problem. Thank you.

[*English*]

The Chair: We've just done a round of questions. Every member has now had the chance to ask Mr. Walsh something. We can continue on with that, or we can give him the opportunity to return to his presentation and move on to a different topic. Would that course be preferable, or does anyone want to pursue the questions?

Okay, let's continue on.

Mr. Walsh, there was one thing I didn't hear you say in response to Madame Picard. She did actually ask about making a written presentation. That was something I had hoped for as well. If you could follow through on the offer you made earlier about putting your thoughts in writing, I think that would be helpful for all of us.

Mr. Rob Walsh: Certainly, Mr. Chair, we can do that. If time had been available, we would have done it for today. But we can do that, certainly.

The Chair: Fine, thank you.

Why don't you carry on, then, with the rest of your presentation?

Mr. Rob Walsh: At this point, do the members have the draft of the Library of Parliament document? It may not be circulated. Is that it?

The Chair: It has been circulated.

All right. So everybody has this one.

Mr. Rob Walsh: Ms. Mortensen will proceed through that, but in terms of questions and what not, it may be that when we're on a certain article it might be the best time for members to ask their questions rather than waiting until the end. It's up to you, of course.

The Chair: If that's your advice, Mr. Walsh, we're likely to take it. I'll just encourage members to not be shrinking violets, that they make sure they are seen and heard by the chair.

That's less significant for you, Mr. Goodyear, than the rest of us.

All right, Mr. Walsh, please.

Mr. Rob Walsh: Ms. Mortensen is going to proceed with going through the code, based on the Library of Parliament researchers' report.

Ms. Melanie Mortensen (Parliamentary Counsel (Legal), House of Commons): Thank you, Mr. Walsh; and thank you, Mr. Chair and all of the members.

I haven't prepared anything formal, so I'm just going to proceed, identifying at each section where we wish to comment on anything that we saw in the code as it presently is or in the amendments that have been proposed, perhaps responding to the comments that are also identified on the side there.

We'll start with subsection 3(3), and if you don't mind, I'll just go through it quickly, because there are many.

Mr. Rob Walsh: Mr. Chair, I can assure you that we'll put this in writing, if the committee would like to have this presentation in writing.

The Chair: I think you can be sure we'd like that very much.

Carry on, Ms. Mortensen, please.

Ms. Melanie Mortensen: Before I begin, one of the things I should mention is that for some sections in which we have identified some vagueness or ambiguity—I think Mr. Walsh would agree—certainly we would be able to assist, if necessary, with any review by the legislative drafters, or with advice that they be given in that regard. The ambiguities that may be identified aren't meant to take up a lot of time, so I may just mention them and move on to more substantive issues.

The other overall issue is that we've looked at these comments and the sections and the amendments with regard to, as we had discussed earlier, the power of the House of Commons, and the power and the right to discipline members, and the role of the commissioner in advising the House, and how that functions. We've had the benefit of a few years now of seeing how it's worked and seeing how the code is interpreted. So it is with that benefit of experience that we've tried to examine how the code may be interpreted in a way that may go beyond what was intended. It's with that view that I'm going to make these comments.

The first section I'll address is subsection 3(2). This is the subsection that identifies what is furthering a private interest of the member. We would suggest that it be made subject to subsection 3 (3), just to be a bit more clear, so that furthering of private interests is subject to the exceptions of subsection 3(3).

● (1625)

The Chair: Please carry on.

Ms. Melanie Mortensen: Okay.

Section 5 says:

> A member does not breach this Code if the Member's activity is one in which Members normally and properly engage in on behalf of constituents.

This section is quite general, it permits quite a bit of discretion—and that's appropriate—but when you look at section 8 on the next page, it indicates:

> When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those of a member of the Member's family, or to improperly further another person's private interests

These two sections together may be a bit confusing, so if there is an opportunity to more clearly designate what the parliamentary functions are and what are those constituency functions are, and to identify clearly where there are constituency functions that may in fact be parliamentary functions....

The Chair: Is it as simple as saying....

Oh, sorry. Actually, Mr. Goodyear was ahead of me.

Mr. Gary Goodyear: I don't believe I was, Mr. Chairman. I'm sorry.

The Chair: Could it be as simple, then, as making section 8 subject to section 5? Would that or the reverse be logical?

Mr. Rob Walsh: Mr. Chairman, the problem here, in my view—and members of Parliament sitting around this table who are experienced and acting on behalf of their constituents would know better than I would—is that I don't know if there's any easy way of distinguishing between what a member might do in a certain set of circumstances on behalf of a constituent and whether that is not furthering someone else's private interests. A person's dealings with the Government of Canada in the member's ombudsman role, where he's seeking to help a constituent deal with a private interest of the constituent, is arguably a problem, given section 8, but he's only doing what every member of Parliament does on behalf of his constituents. So that's the nature of the clarity problem here.

Private interests as such aren't defined well. They're defined in terms of furthering of private interests as the offence, but are we really talking about commercial interests? Are we talking about pecuniary interests as opposed to immigration problems or passport problems? That's the problem, Mr. Chairman.

The Chair: Right. I'll go to Mr. Goodyear in a second, but I do notice that in section 8 when we're dealing with someone other than a family member, the word “improperly” is added in. So that may have some significance.

Mr. Rob Walsh: Sorry?

The Chair: Section 8 says, “a Member shall not act in any way to further his...private interests or those of a member of the Member's family, or to improperly...”. That does, to some degree, give a bit of insulation, I would think, with regard to constituents.

Mr. Rob Walsh: Some members might argue that if they have a large industrial interest in their riding, they should further the interests of that industrial interest in their role as members of Parliament, in seeking consideration of that constituent's interest with the government. So “improperly” certainly is.... We need some indication of what the word “improperly” means in every context. That's part of the problem.

● (1630)

The Chair: I see a whole bunch of hands up, but Mr. Goodyear was first. Then I'm not sure if it was Madame Picard or Mr. Owen.

Okay, let's start with Mr. Goodyear, anyway.

Mr. Gary Goodyear: I guess the way I'm interpreting this—and it's left open to interpretation by somebody else, and I'm not the Ethics Commissioner—is that I certainly would fight very hard for individual interests and corporate interests and whatever other interests are in my riding. That's my job. I certainly hope somebody else would see that as perfectly proper, whether it's for the veal industry or the auto industry. I certainly hope this would be deemed to be normal.

So personally, I don't have a problem with either section. That is all I wanted to say. I'm happy, as you pointed out, Mr. Chair, with the word “improperly”, but I can appreciate what Mr. Walsh is saying, that it could be up to interpretation. I don't have a solution.

I just wanted to make that comment.

The Chair: Mr. Owen, please.

Hon. Stephen Owen: I think the distinction may be in the actions of the member of Parliament on behalf of a constituent. If the MP is affecting that person's interest in a legislative sense, then that's in a general sense and it's not a problem; that's the partisan role, and we should be playing that role.

On the administrative side, the executive side, an MP, I believe, has the right and duty to influence the administrative or executive side within the rules. That presupposes that the executive is actually running a proper administration, where you have objective criteria, transparency, and accountability, and such.

So the distinction would be, for instance, in whether an MP is furthering the private interest of a person in an immigration matter by going to the IRB or to the minister and saying, look, I want this person to jump the queue or I want to bend the rules. On the other hand, furthering someone's interest in being treated fairly or according to fair rules, or being treated fairly by seeking to have the rules changed to become fair, I think that's just fine. I don't think that should get us into any trouble, and I think that is our role.

The Chair: All right.

Would you like to carry on, then?

Ms. Melanie Mortensen: Thank you, Mr. Chairman.

I think what we've identified here in this conversation is something that may seem reasonably straightforward but can always be improved. If this is what the members see and would like to have in the code, so that there is this distinction between their constituency role and their parliamentary role, and there is indeed something improper, and if it can be more clearly spelled out—if that's what the members wish to do, and this committee wishes to indicate that for the House's approval—then that's something that will permit a commissioner more guidance as to what is indeed appropriate.

On the earlier question about the staff, I have no comment at all about how the staff has proceeded in the past, but it is a staff that has had a certain experience with respect to public officer holders, prior to the role with respect to the members of Parliament, and there's a difference in terms of what the duties and functions are as part of that role. I think this code does reflect that, but there could always be a little bit more clarity, if the members wish to have more guidance within the code, for the commissioner who interprets it. So that's why we pointed this out.

Mr. Gary Goodyear: I don't want to stall on this topic, Mr. Chairman, but I don't feel we've solved this issue. We either decide that we're happy with the wording, or perhaps we can get some suggested wording from the witness to tighten this up a little bit. We can debate at the next meeting whether to adopt it or not.

The Chair: I have been operating under the assumption that we would listen to what Ms. Mortensen and Mr. Walsh had to say on these things, ask them questions and take notes, and then return to them at the next meeting. But that, of course, is just a suggestion. My fear is that if we go a different route, we'll arrive at the end of the meeting and they won't have gone through their list, because we'll have been engaged in drafting.

Ms. Melanie Mortensen: Thank you, Mr. Chairman.

The Chair: I'm sorry, I apologize.

Mr. Godin, yes.

[*Translation*]

Mr. Yvon Godin (Acadie—Bathurst, NDP): Excuse me, but I am trying to follow this. The code for MPs clearly states that they must not favour their own family members. I missed that part. I am sorry, but I had to leave the room to deal with another matter. This also applies to any other person... I do not understand, because when you solve someone's problem, you do them a favour. Is this the ambiguous part?

Personally, I write a dozen letters to ministers on behalf of people in my riding on a daily basis. If I solve a problem, I am exercizing my influence in favour of someone from my riding. It would be different if someone paid me for doing them a favour. However, when a citizen comes to my office and tells me that he needs a visa or some other thing and I appeal to the minister, because this is what an MP must do, and if I am successful, it means that I have done a favour for this person. I am just giving this as an example. This is how it could be interpreted. For example, someone could come to my office to ask me to sign the passport application that he will send to Ottawa. If I do my job as an MP and if this advances some individual's interest...

● (1635)

Mr. Rob Walsh: I do not think that this applies to the case that you describe. But this is an extreme example.

Mr. Yvon Godin: We have to live with extremes.

Mr. Rob Walsh: Yes, you are right, but we really need to set reasonable limits. In my opinion, there are many other situations involving interests...

Mr. Yvon Godin: For instance, someone who owes the government $50,000 in taxes comes to my office, a citizen whom I do not know at all. He tells me that he is unable to pay $50,000 and asks me to speak to the Minister of Finance and try to convince him to waive the penalties, interests, etc. to help him pay his debt. This involves a substantial sum of money.

Mr. Rob Walsh: Another example that is more...

Mr. Yvon Godin: I would like to hear some more examples that would help me to understand what this means. I am thinking of direct conflict of interest. I am not talking about helping someone in return for some reward, I am just talking about doing my job as an MP. To me, this seems ambiguous.

Mr. Rob Walsh: The regulations regarding conflicts of interest contain the term “pecuniary”. This was one of the criteria for deciding whether there was an unacceptable conflict of interest. The term “pecuniary interest” was used. Here, we have no such term for defining.... We could say “commercial”.

Let us come back to the example of Mirabel. Many families lived in that region when the federal government decided to expropriate farms in order to build an airport. Later on, I believe that the farmers asked for more substantial compensation for their land, etc. Let's suppose that you were an MP from the Montreal region and that you had intervened on behalf of a farmer to get him a more substantial compensation.

Mr. Yvon Godin: And I was also one of the farmers. Is this what you mean?

Mr. Rob Walsh: No. Let us suppose that you did it in your capacity as a MP. Nonetheless, it involves the private interests of the farmer, the value of his farm, and he was challenging the federal government. Mr. Owen spoke of a clear and objective system of administrative criteria. Ministers often have discretionary powers, and for good reason. It gives them some way to resolve issues that involve thousands of dollars, or even larger amounts.

Where do we draw the line between the valid intervention of an MP on behalf of a citizen and an intervention made for advancing the private interests of someone from his riding who is a good supporter, a friend with whom he has personal or professional ties, etc.? But it was, nevertheless, a valid cause. The farmer wanted a more substantial compensation from the government. This is a good question. It is difficult to judge the member's intervention. Was it acceptable or not according to the code?

Mr. Yvon Godin: It is not clear.

Mr. Rob Walsh: That is the problem. Perhaps you have answers or opinions about this, but I do not have any.

[*English*]

The Chair: I think we may be approaching the end of the seven minutes, Mr. Godin.

I have Mr. Owen and Mr. Goodyear on the speaking list, and I actually have a question myself, but I'm wondering in the interests of time if the committee would regard it as reasonable if we maybe shortened up the amount of time for each of the back-and-forth exchanges. This is in order to ensure that our guests are able to get through their material by the time we come to the end of our allotted time here.

With that in mind, Mr. Owen.

● (1640)

Hon. Stephen Owen: I was going to—

The Chair: Is it okay if we say five minutes? I realize you may be taking less than that.

Hon. Stephen Owen: I'll try to make it very quick. I agree we should go ahead and hear the presentation, but there is the issue of the exercise of discretion. Statutory discretion, of course, is there and it's there for good reason, as Mr. Walsh has said. The act of governance has to bring coherence, and sometimes it means looking at different interests in different ways and mediating them.

But discretion as a matter of administrative fairness, so that it doesn't become arbitrary, should be following some objective guidelines in order that people are treated fairly, that different cases are distinguishable and similar cases are treated similarly. So the problem you describe and the confusion is because we don't always do that well in government, and we should. We should do it better in terms of transparency and fair process and objective criteria, so that we can distinguish between things that are different and things that are the same and make sure that everybody gets procedural fairness.

That's why you need a federal ombudsman or, in this case, I think a federal officer of Parliament to help us out with those, to help MPs with some of those, to ensure that the executive has those administrative processes properly thought out and codified.

Mr. Rob Walsh: Mr. Chairman, what Mr. Owen is saying is that it seems that two members could do the same thing, set up for the same objectives, as in my example of Mirabel, but in one case the minister made a decision that was unfair and in the other case he made a decision that was fair. Where he made a decision that was unfair, the member now has a problem because he advanced some interests improperly. Where the minister made a decision that was fair, the member doesn't have a problem because it resulted in a fair result.

The problem with all of this is that we're looking at what the member of Parliament did, what his intention might be, what his pursuit or objective is. He may have an unfairness objective; he may want his constituent to have a fair shake like anyone else, obviously driven by the perception, to begin with, that what he got before wasn't fair. So there's an attempt to get an appeal or get that revised. Without getting legalistic about process here, my concern is that I don't know that you could measure the character of what the member is doing by the end result.

Hon. Stephen Owen: I think that's right. But the member should conduct himself or herself in a way that is not asking for something improper, that would not be within a fairness regime, from a person exercising statutory discretion.

On the other hand, if the member wants to argue in Parliament for a change in government policy so that expropriation rules are changed, or this particular act that expropriated that property should be changed, that's a parliamentary function, and partisanship is completely fair. That's in a different context.

But I'm slowing things down, so let's—

The Chair: I see Mr. Goodyear, and I think I saw Madame Picard's hand go up.

Mr. Gary Goodyear: I'm struggling with this. I think as we talk about it further, it's becoming more and more necessary to define this a bit. In listening to Mr. Owen, for whom I have great respect, I think he's probably got a better handle on this than I would have.

I come from a health care background where all kinds of catastrophic things happen, despite the best intentions. Patients die on the operating table, despite everybody's effort to save them. So the outcome can be a bad thing, but the input was nothing but the best. I think in that case doctors are not charged with malpractice and so forth and so on because they're judged by their peers to have done the very best they can.

So I'm trying to relate how the same sort of standards would work with parliamentarians. I suppose in my case, I tend to be more of a constituent advocate versus a parliamentarian or a politician. People come into my office with provincial issues, workers' compensation, for example, because my background is health care. I can work my way through the system pretty quickly, but I shouldn't be dealing with it because it's provincial. But if I deal with it, it's done in three days. If I let anybody else deal with it, sometimes it doesn't get done. So I don't know whether that's improper or not. I'm getting really confused.

I would suggest we move on, because I think if anybody has the best handle on it, our witnesses have. If we could just move on, they could probably provide us with some suggested wording that we could discuss at the next meeting. But I can see if everybody is reasonable, it's going to be okay. I would even suggest we send it back to our peers, which is back to the House, but I can see how that's not going to work. In a majority Parliament or something, and partisan politics plays games with a thing....

But anyway, Mr. Chair, my suggestion would be to move on, ask for some suggested wording, and try to tackle it.

● (1645)

The Chair: Perhaps that'll be the thing, then. We're asking for quite a bit in writing, but perhaps they can make some suggestions along those lines as well.

Do you have something, Mr. Godin?

[*Translation*]

Mr. Yvon Godin: I agree with the suggestion. You have noticed that we feel that there is an issue. I find that Mirabel story much more disturbing. Did the MP do something wrong? What do we do in such a case?

If the MP lobbied a minister regarding a matter in which he is also personally involved, there would have been a problem, but this is not what we mean. If he is merely doing his job as an MP and has done nothing wrong, given the fact that he lives in Montreal, far away from Mirabel.... If this is how you interpret things, we have to change the language.

[*English*]

The Chair: As we ask Ms. Mortensen to resume, I'm going to point out that we got up to section 8 in a code that goes up to section 30 or something, does it not? I'm going to suggest we all let them make their comments as much as possible and restrain ourselves from asking questions unless we absolutely have to, or else I am worried that we're going to have to invite our guests back.

Mr. Walsh, yes.

Mr. Rob Walsh: I have a suggestion, Mr. Chairman, that might assist your concerns regarding the meeting. We will edit our presentation to where we deal with the more substantive ones and when we make our later written presentation to you, we'll put in the other ones that are not quite as complex or vexing.

Would that assist the committee in getting through?

The Chair: I think that might be very agreeable, yes.

With that in mind, please carry on, Ms. Mortensen.

Ms. Melanie Mortensen: Thank you, Mr. Chairman.

There is one more substantive issue at subsection 16(1), which is linked to section 18, and it may be that this was something that was intended.... I'm just going to point out what I'm talking about. Subsection 16(1) indicates: "A Member shall not knowingly be a party to a contract of the Government of Canada or any federal agency or body under which the Member receives a benefit." There's an amendment suggested. Then section 18 indicates something similar, but it indicates that the partnership in a private corporation that has a party to a contract.... So it's the same issue.

Where the amendment indicates that "unless the Commissioner is of the opinion that the contract is unlikely to affect the Member's obligations under this Code", we just wanted to draw the committee's attention to the fact that in the Parliament of Canada Act at sections 32 and 33, this is something that affects the eligibility of a member, and so it may be affording the House, through the commissioner, a bit more discretion than is available in the law. While it is of course up to the House to determine how laws apply when it comes to its proceedings, it may have been intended that sections 16 and 18 were to reflect what was in the Parliament of Canada Act and put those into the code, because when this was created some of the other sections in the conflict of interest part of the Parliament of Canada Act were repealed.

I wanted to point that out.

Mr. Rob Walsh: If I could just put that into other words, this proposal gives the commissioner the discretion to say, you have an interest in a contract with the Government of Canada, but it's okay. In our view, the act doesn't allow that, and I don't think the code can do something that the act doesn't allow.

I think you have to take a second look at doing that, because you appear to be saying that if the commissioner thinks it's okay, notwithstanding the act saying that such contracts prevent eligibility to be members or sit or vote, we're going to let the commissioner say it's okay. I don't know if you'd want to be doing that.

● (1650)

The Chair: All right. That's one that will be very helpful to get in writing. As you can imagine, it's a bit complex for us to piece together without having that.

Please carry on.

Ms. Melanie Mortensen: Thank you, Mr. Chair.

I'm going to move quite a bit ahead to subsection 27(2). This has to do with the conduct of inquiries and the proceedings on the conduct of inquiries.

We have seen how the reports have been issued, and issues that have been raised in the House as a result of interpretation of the code and how the inquiries proceed. We thought it might be helpful to provide a bit more clarity in the section.

Presently it says, "The request shall be in writing and shall identify the alleged non-compliance with this Code and set out the reasonable grounds for the belief that it has not been complied with." There's an avenue for this code to be taken quite broadly, where it might be open to a commissioner to review the Speaker, for instance. If the Speaker were to permit people to speak about something that occurred and was going on that might be part of an inquiry, that isn't necessarily what this inquiry is meant to do.

Of course, we hope a commissioner would view the code and compliance with the code as being the rules of conduct. But it might provide more assistance if, instead of saying "non-compliance under this code", it said something along the lines of "non-compliance with the rules of conduct" and the rules of conduct were set out under a subsection or heading in this code. Then it might say, "in interpreting the rules of conduct, the commissioner may look at the principles of the code for guidance", or something like that.

I think that would help show what the inquiries were meant to really address.

Mr. Rob Walsh: We as lawyers have a bias in favour of being strict about the ambit of legislative documents—rules-based documents. We don't err on the side of giving them a broad, easy, casual, loosey-goosey interpretation. Lawyers tend to say, "Where is it? If it ain't there, you haven't got it."

The Ethics Commissioner has to apply rules of conduct, not principles, although there are such things in the code. Principles inform the rules of conduct, but the principles don't stand alone as provisions, the violation of which gives rise to action by the Ethics Commissioner. We have found that the Ethics Commissioner has on occasion failed to make that distinction. Members themselves may seek an inquiry on what they see as an offence under a principle, but it's not necessarily an offence under the rule of conduct.

So we're really saying here that it's better to have a focus on rules of conduct and violations or non-compliance, informed by the principles. The principles do not stand alone as the basis for action by the Ethics Commissioner.

The Chair: All right. I see no questions at this point, so let's carry on please, Ms. Mortensen.

Ms. Melanie Mortensen: Thank you, Mr. Chairman.

I think that also would help in guiding members who do wish to bring allegations of non-compliance because it would suggest to them that they should point their attention to the sections of this code that are in the rules of conduct, and that helps to target what the inquiry is meant to actually address. I'm not thinking of anything in particular, but we're just looking forward and trying to say how this can be improved in order to allow the members to have a fairness in the conduct of inquiries and so on.

I will move along. At subsection 27(5), which is on page 26, there is an amendment suggested to permit a preliminary report, or a preliminary review of an inquiry to be set out explicitly within the code. This is just a suggestion. It may be that the committee would want to decide, and I believe from the notes that the committee hasn't actually made a decision as to whether they would want the report to be made at all. That may be why a preliminary review would be required, so that it could just be disposed of if it's frivolous or vexatious, or what have you, and it shouldn't be made public. But it may be that the reporting and making it public, when this was initially brought forward, is to indicate that when the House, through its mandate, has said to the commissioner, okay, we are delegating to you this duty, the House would then, in return, have the right to know what has occurred.

This isn't specified here, so I don't know if that side of it has been considered...rather it's just been considered whether there should just be the dismissal and then nobody hears about it, nobody knows about it. I think that the consequence of having a report is what is meant to guide members in their decisions of whether they would raise an allegation of non-compliance.

So that's just a consideration you may want to think about.

In conclusion, it may be that a report could be suggested even at the close of a preliminary inquiry. If that is the case, then if you move to the new amended subsection 27(5.1), it may be assisting this problem of the non-confirming publicly. If there is a report at the preliminary stage, then it solves that problem somewhat.

Okay?

● (1655)

The Chair: Yes.

Ms. Melanie Mortensen: I'll move along to subsection 27(7). There was a question here specifically regarding the French for "in private", *à huis clos*, whether the latter does not accurately convey the English. We consulted our legislative drafters, and they indicated that there is more of a tendency now in legislative drafting to use English terminology as opposed to Latin terminology, so "in private" is more preferred. However, in light of the fact that this is part of the Standing Orders and it's something that the House of Commons procedure tends to recognize—in camera—and respects as a certain way of proceeding, that would be perhaps preferable to guide the commissioner in the future.

Mr. Rob Walsh: Perhaps I could add, Mr. Chairman, that I don't think the language issue should be determined about whether one likes Latin or doesn't like Latin. As someone who had six years of the subject, I have good reason to not like it, but the expression "in camera" means, in my view, something different from "in private". I think this committee and the House should govern itself accordingly; at least, the anglophones amongst them should think about whether they understand the term "in private" to mean the same thing as *à huis clos* or in camera. I think there is a difference, and if you mean to say "in camera", I think you should say that. That's my view.

The Chair: Some people feel that the use of Latin is the *ne plus ultra* of legislative drafting, but I see you don't share that feeling.

Ms. Mortensen, please carry on.

Ms. Melanie Mortensen: Thank you, Mr. Chairman.

I am moving quite a bit ahead.

At subsection 28(13), this is once we have the report and the House is dealing with it. Subsection 28(13) indicates that "The House may report back to the Ethics Commissioner...". I'm sorry, before I move to subsection 28(13), I am going to raise one issue at subsection 28(10).

Subsection 28(10), regarding a motion to concur, states: "If no such motion has been moved...within 10 sittings days...a motion to concur...shall be deemed to have been moved". There's a question. It's up to the subcommittee, of course, to consider what it wishes to do, whether or not it should be deemed to be adopted. Another option may be to consider whether a longer time period would be preferable, rather than just deciding 10 days or nothing.

Mr. Rob Walsh: Mr. Chair, in my experience—in Melanie's and mine together—in the last several years with this regime, I think 10 days is a bit brief for members to consider their position when the report comes down. We're talking about the automatically deemed concurred in.

You might want to give as much as three months for the member to think about what he or she wants to do about this report, or what process he or she wants to initiate within the House. Three months, two months, or whatever, but in my view, 10 days is very harsh.

● (1700)

The Chair: I saw Mr. Goodyear's hand.

Mr. Gary Goodyear: I accept that. I'm not going to argue about 10, 30, or 90 days.

There was some discussion in the meeting, Mr. Walsh—and I'd like a brief comment from you on this—that the reports not be tabled in the House. Instead they should be tabled here at the committee and then forwarded to you first, because once they're tabled in the House, they're public, and the second they're public, of course, any errors or.... It's based on historical incompetence.

I'd appreciate a brief comment on whether or not you agree.

Mr. Rob Walsh: I would hesitate to deal with that, Mr. Chair, because the Ethics Commissioner is supposed to be operating at arm's length. Once the House or this committee get into the business of looking at draft reports, you invite the suggestion that you're into some kind of censoring or controlling role vis-à-vis the Ethics Commissioner's report.

Whether the report should be tabled here as opposed to being tabled in the House, I don't know that this offers anything, because once it's tabled in the House, the House would routinely refer it to this committee. The committee may well take up the report and have something to say about it, but you run into problems with the arm's length issue.

Mr. Gary Goodyear: By the way, that was...[*Inaudible—Editor*]...committee. So thank you.

The Chair: All right. Please carry on.

Ms. Melanie Mortensen: In the same vein as this question, subsection 28(13) indicates: "The House may refer any report back to the Ethics Commissioner for further consideration, with or without instruction."

We have two comments. First—and this has to do with the committee's role—it may be appropriate to formally recognize the committee's role with respect to the commissioner, by putting something along the lines of: "upon recommendation of the committee, the House may refer any report back". That language could be considered.

The other issue is whether the House would not be able to do this after it has been concurred in, or whether that option is still available to the House after it's been concurred in. It would seem appropriate that it not be available to the House to refer it back once it has been concurred in. If this is the case, it might be more clearly indicated here.

Mr. Rob Walsh: Actually, Mr. Chairman, we agreed that I would intervene on the next item, subsection 29(1). This is a troublesome area pertaining to the obligation of the Ethics Commissioner to refer a matter to the proper authorities where he believes there's been an offence under an act of Parliament. Of course, the worst-case scenario is that the act of Parliament is the Criminal Code and, by reason of information obtained by the Ethics Commissioner, he believes that there's been a criminal offence committed, perhaps by the member under inquiry or perhaps by some third parties, but in any event, he believes a Criminal Code offence has occurred and he's to refer "the matter". Well, what is "the matter"?

He sends an e-mail to say, "You may want to look into the idea that so-and-so may have been involved in fraudulent conduct against the senior citizens of northern Ontario" or he might want to say, "Here are all the documents I have pertaining to this matter; you might want to review these." It's the latter scenario that presents a problem, in my view. I don't have any problem with there being a heads up, you might say, by the Ethics Commissioner to these so-called proper authorities, although it might be nice to get more clear about what we're talking about. But it's the handing over of documentation that is evidence.

These documents or other information provided orally by the member to the Ethics Commissioner are provided under a legal obligation of the code to do so, and there's sort of a rule of evidentiary law that you can't take information you have from someone who has provided it under compulsion of law and then turn around and use it for some other purpose, or give it to some third party for whom it was not intended. If you allow that, of course, you're causing people to incriminate themselves unwittingly. So in fairness to the individual providing the information under a legal obligation, it's used for the purpose for which it's given and not for any other purpose.

I'm a little concerned that when we have this provision...and we've had discussions with the ethics office about this—indeed, quite extensive discussions—and with the third parties involved, as to what the various rights and claims and entitlements are when these third-party investigative authorities want to have access to certain documents.

Our view—and this is not the Ethics Commissioner talking; this is my office talking, but I shared this view with the Ethics Commissioner—is that while these documents and information are privileged, coming from members—I'm not talking about public officer holders now, we have to maintain these two roles and be distinct here—this information is received by the Ethics Commissioner pursuant to a parliamentary function. And in my view, it's privileged—whatever it may suggest by virtue of its content, it's privileged—and ought not to be made available to third parties without, at the very least, the approval of the Speaker or the House. I don't mean the member, I mean the Speaker or the House. It's the privileges of the House we're talking about here.

Now, the scenario is, what if the police came up with a warrant and they slapped the search warrant on the Ethics Commissioner? Well, we can get search warrants on the Hill; there's nothing unusual about that. But there's a process for this, and you go through the Speaker. The Speaker doesn't intervene to try selectively to provide documents to the police, but rather, the police, with the approval of the Speaker, go to where they want to conduct their search, with a lawyer from my office in attendance simply to observe that everything appropriate is carried on, that nothing inappropriate is carried on.

The Speaker's role here is not to decide whether he will or will not allow a search warrant to be effected, but rather to see that it takes place in a way that's not interfering with parliamentary proceedings and is not in any way disruptive of those proceedings or the parliamentary business. But in every other respect, the legal process is cooperated with and it takes place. I hasten to say this is not a common practice, by the way.

The same rule would apply with the Ethics Commissioner's offices located, as they are, off the Hill. They're still a part of the precincts, in my view, because that's where parliamentary business is carried on with respect to members, but they're not part of the precincts with respect to public office holders. Whether the Ethics Commissioner has a wall in his office somewhere keeping these things separate, I don't know, but in principle that's the case. I've taken the view with the Ethics Commissioner that he ought not to provide this information, these documents, to the third parties.

We came to an understanding that in the event he were served by proceedings of that kind, he would give me notice that he has that. Then I would do whatever I thought was appropriate on behalf of my client, the House of Commons—not the member in question, although indirectly on behalf of the member—that was appropriate to defend the privileges of the House. The Ethics Commissioner might have his own counsel and the police, indeed, might have their own counsel, and the matter might go on. We might allow the documents to go forward, be sealed, and kept under seal until the legal issue had been addressed and resolved, whatever.

But that was the understanding I had with the Ethics Commissioner's office, that he wouldn't do that without telling us that he had received this warrant, and then we would have an opportunity to intervene.

● (1705)

But that begs the question as to whether in fact he's entitled to do this at all. This is not a parliamentary procedural question, it's a legal question of what is privilege and what is the ambit of privilege. Ultimately, all legal questions are determined by the courts, and so at some point this may well end up in the courts for a determination.

But currently, in my view, he ought not hand it over. In this provision, as it reads, “refer the matter to the proper authorities”, I'm just not sure what that means. It's dangerously ambiguous. We can come back to you with some suggestions in that regard, but I think it warrants closer study.

The Chair: I suspect you're going to get a number of people on the committee concurring with you.

Mr. Goodyear raised his hand first, and then after him, Mr. Owen.

I'll just encourage members to be brief.

Mr. Gary Goodyear: Thank you. I'll be very brief.

Mr. Chairman, I've brought this up before. This is my concern, that there are clearly things in offices of members of Parliament that are quite privileged. I would think that we have to word this in a way to put the Speaker in between, in every circumstance. I just wanted to make that point.

When we come back to it, I'm in support of somehow figuring out how to protect the members' privilege, which ultimately is to protect our constituents.

The Chair: Thank you.

Hon. Stephen Owen: I agree. I think the route through the Speaker and effectively through your offices is a good way to go if there's a search warrant or such.

The wording here, I think, does need sharpening up or clarifying, because in referring the matter, you get into an area where an officer of Parliament receives information, for instance, that a crime has been committed. It raises the question, is it that person's public duty to report that matter to the authorities? That would not necessarily mean privileged evidence or information, and as Mr. Walsh says, that's protected by the charter, by rules of evidence. There are all sorts of protections there. Giving it to a Supreme Court judge and having it sealed until that is worked out is something that often happens, for instance, when search warrants are served on lawyers' offices, who are also operating under a privilege.

The key is to have a procedure that's tempered and follows the proper process. We might want to look at your advice on the wording around the matter, to be a little crisper, and maybe what we're really talking about is whether it's Criminal Code breaches or breaches of the law that raise a responsibility on anybody, any citizen, to inform the authorities.

● (1710)

The Chair: All right. I suspect that's one on which we'll be very anxious to see some written commentary, if your office would be good enough to provide it.

Did you have further items—we do have a number of sections left—or was that the end of your list?

Mr. Rob Walsh: I have one or two left.

The Chair: Mr. Owen.

Hon. Stephen Owen: I had one other thought on that.

One of the reasons you have a section like this for officers of Parliament is to give a clear signal to that officer of Parliament that they're not supposed to be wandering into criminal matters. That's not their jurisdiction. It's sort of a handing-off rather than their going further with their investigative powers that are getting into a criminal matter.

The Chair: Thank you.

Ms. Mortensen, please.

Ms. Melanie Mortensen: Thank you, Mr. Chairman.

I have only two sections left to address: subsections 30(1) and 30(2). This deals with the submission of proposed rules to the committee—well, not to this committee but to the relevant committee.

What this indicates is that basically the amendment is meant to clarify slightly the obligation of the commissioner in this regard. One of the observations that we thought might be appropriate is whether there ought to be some tempering of the commissioner's powers in this regard to ensure that it goes through this committee first, before there's any publication, or making public, at least, of the guidelines that would be proposed, in order to allow the procedure and House affairs committee to be able to determine, in its view, whether or not they are the best guidelines or how they want to consider them, and so on. In that way, it doesn't become a matter of public debate prior to the committee being seized of the matter.

The Chair: Is that not resolved by subsection 30(1) with the changes we've put down, that "The Commissioner shall submit any proposed procedural and interpretative guidelines and all forms relating to the Code to the Standing Committee on Procedure and House Affairs for approval"?

Ms. Melanie Mortensen: I don't think it is. With all respect to the drafters who changed it, of course, I think it is what was intended at proposed subsection 30(1). I know guidelines have been published. It doesn't seem to have stopped that.

The Chair: This stuff isn't in the code right now. It's a suggested provision. We'd add it. It's not yet in effect.

Ms. Melanie Mortensen: Yes, I know. But it says "shall submit any proposed rules for the administration", and so on. It would imply "for approval", but neither of these sections as drafted restricts the commissioner from doing it.

Further, if you go on to section 32, it indicates: "The Ethics Commissioner may undertake educational activities for Members and the general public regarding this Code and the role of the Ethics Commissioner."

Earlier on in the code, you know there's the section that indicates that the commissioner can basically render generic or render non-personal any opinion for the benefit of members. Those also may be published. There are a lot of ways the commissioner has the power to issue interpretive guidelines, rules, or what have you. In my view, the way this is drafted for approval doesn't necessarily stop him from making it public. It depends on what the committee's role is in terms of guiding the commissioner.

Mr. Rob Walsh: If I could add to this, I would remind the committee that he operates under the general direction of the Standing Committee on Procedure and House Affairs. How do you want to look at his guidelines? After he's put them on his website and they have all kinds of publicity, do you then want to come along and say you don't like them, or do you want to have a chance to talk to him about his proposed guidelines before they get that kind of public attention?

It's essentially what we're saying. He gives the committee an opportunity to have input before they're out there in the world. Everyone's satisfied, but the committee isn't.

The Chair: I take your point. I had a bit of a battle with the former commissioner on this very point.

Mr. Gary Goodyear: Mr. Chair, it's only a tightening of the wording. It makes it clear that he can't publish anything until we basically authorize that it's approved, and we authorize him through a separate vote or something that it can now be published.

The Chair: Mr. Owen.

Hon. Stephen Owen: I have an observation on the type of oversight role for a committee to play. This is exactly the way it should be distinguished from getting into fact finding and reviewing and approving his substantive reports. This is the very type of procedural oversight we should have.

● (1715)

Mr. Rob Walsh: You want to have it in a context that's fair, where you're able to have input without being in the position where you look like you're trying to sabotage or interfere with it.

Those are the items we think are of particular interest.

The Chair: We'll hear one more comment.

Ms. Melanie Mortensen: This is a clarification, and it's also for your attention.

With respect to the matter that Mr. Walsh addressed on section 29, if you look at proposed section 31:

> The Commissioner shall retain all documents relating to a Member for a period of 12 months after he or she ceases to be a Member, after which the documents shall be destroyed unless there is an inquiry in progress under this Code concerning them or a charge has been laid against the Member under an Act of Parliament and the documents may relate to that matter.

It isn't necessarily clear, because of this section, that documents aren't indeed meant to be handed over if there is a referral of the matter. It may be that because the commissioner has the obligation to suspend the inquiry, for instance, but then may resume it if the investigation by the police is dropped, he can then continue with his inquiry. In that event, he still has the documents, even if over 12 months have passed.

It's not clear which of these is intended from this. The lack of clarity makes it difficult to interpret section 29.

Mr. Rob Walsh: Mr. Chairman, I think that's all we have about the code.

I have one last thing. We briefly talked earlier about Mr. Van Loan's letter. In terms of the e-mail of May 4, we've covered the three bullets indicated there.

If I may reiterate, the underlying principle here is that members are in one regime and public office holders, including ministers and parliamentary secretaries, should be in another regime. The challenge is to see that they're both dealt with effectively, consistent with the fundamental principles of our parliamentary system of government, which is that the executive is one regime and the legislative is another.

As Mr. Owen was saying earlier, he is from that distinguished class of '71.

Hon. Stephen Owen: It's '72, not '71.

Mr. Rob Walsh: That's right. You aged by a year there.

That regime Mr. Owen described relative to the objective administrative decisions and the conflicts of interest is very much affected by the fact that it's an executive power that's being exercised. You're spending money. You're issuing contracts. You're doing all kinds of things that are administrative in nature, but they are very tangible in many contexts.

A member of Parliament in the legislative function is into a broader debate about a matter of public interest. He or she is voting as one of 308 on a matter of broad application to the public. In my view, it's very much the exception that the member would have some conflict for that reason. It could happen, but it's like saying farmers can't vote on agriculture or lawyers can't vote on justice bills, and so on it goes—members who are fishers can't vote on fisheries legislation.

You have to work hard, in my view, to get the matter before the House narrowed down to the point where you really have something a member should recuse from. But who's better to judge that than the members themselves, in keeping with their control of their own proceedings?

The Chair: Members of the committee, we have a number of items to deal with before we leave. It's not too bad; we have about 10 minutes to deal with these things.

I've got several things to run through. Mr. Walsh, you indicated you'd be able to get material back to us. We appreciate the fact that we called you on quite short notice; we are, however, working towards a bit of a deadline. The House does not always sit to the very end of June, much as we all would like it to do so, so with that in mind, could I inquire as to when you anticipate you'd be able to get a written submission to us? We could then plan around that.

Mr. Rob Walsh: I'd love to answer your question with another question. What is your timeframe for getting back to the House?

The Chair: Perhaps Jamie, our head researcher here, can talk a little bit about our anticipated schedule.

Mr. James Robertson (Committee Researcher): I can, or not. The original plan had been to try to consider a draft report at the meeting next Thursday. A number of issues have arisen today, and the subcommittee will want to look at the proposals and comments from Mr. Walsh's office. Perhaps if we had another meeting next week to try to consider all the outstanding issues, we could then have a draft report for the week after the break, which would mean that with any luck, the report could go to procedure and House affairs by the first week of June.

That would mean that, as you say, depending on when the House rises for its summer recess, there would be a chance for procedure and House affairs to make its report to the House and get the House to concur in that report before the summer recess.

● (1720)

The Chair: Effectively, it would be very helpful to us if we had that report by a week today in order to distribute it. We tend to meet on Thursday afternoons. Does that seem realistic from your point of view?

We have a further restriction. In order to distribute it, the clerk has to have it in both official languages. If not, it has to get in earlier, so that it can be translated. You know about these things.

Mr. Rob Walsh: We usually provide them in both languages, and that is part of the burden of meeting a deadline. I heard Mr. Robertson very clearly, I think. That pause of a week creates a problem for all of us in terms of the eventual adjournment.

May 29 is the first Tuesday after that break. Would that be sufficient for the timelines you were describing?

Mr. James Robertson: The difficulty is that the subcommittee has to finish its preliminary determinations before the draft report can be prepared. We were thinking of having the draft report prepared over that one-week period, so that when the House returned after that one-week recess, they would be able to finalize what they want to put before procedure and House affairs.

Mr. Rob Walsh: Mr. Chairman, it's a struggle between the Library of Parliament and my office as to who gets the week off to do their homework. We'll get it for you for next Thursday. We'll do what we can, both as to the Bill C-2 issues I raised and also in terms of the code. It may to some extent be in point form, just to enable it to be a useful tool for you, but we'll have it to the clerk of the committee for...the meeting of a week from today? Do you want to discuss it at the meeting a week from now?

The Chair: I think that would be our intention.

Mr. Rob Walsh: Okay. By the end of the day on Wednesday, hopefully, the clerk will have it.

The Chair: I realize that you're putting yourselves out there, and we do appreciate that.

Mr. James Robertson: Perhaps I could intervene. If the subcommittee could have the benefit of your main proposals and concerns by that meeting, they could at least make preliminary views of them. If there was specific follow-up language that needed to be done, we could work together with you on that during the one-week period.

Mr. Rob Walsh: That's correct.

Mr. James Robertson: Rather than hold up your written documentation, we could ensure that we at least got a decision of the subcommittee so we could move forward to the next stage.

The Chair: Good. I think we've dealt with one item here.

The next thing I wanted to actually inquire—

Mr. Rob Walsh: Excuse me, Mr. Chairman.

The Chair: It was with regard to you, actually.

We had a discussion at the front here, as you were going through it, with relation to the concerns you had regarding the letter to Minister Van Loan. I'm actually sufficiently confused again.

Perhaps, Margaret, you could summarize some of the things you'd like to make sure come forward in the letter.

Ms. Margaret Young: Mr. Walsh, in your remarks—you can correct me if I misinterpreted—I understood you to say that it was the code that should be amended, rather than the new Bill C-2 provisions in the Parliament of Canada Act.

I confess that I didn't really understand that, because the point of the letter, we thought, was clear: there is an exception for public office holders in Bill C-2, but no comparable exception for ordinary members who have these trusts under the code. It seems to me that as long as the legislative provision remains, as enacted by Bill C-2, nothing the code can do can change that. In fact, if Bill C-2 is not changed, ordinary members, under the code, will not be permitted to have the trusts.

So I wondered if you could, in your written material, either confirm that I am correct or explain where I've gone wrong, and in particular, in aid of where the letter might need to be redrafted, what you see is the problem.

● (1725)

Mr. Rob Walsh: There is a way of amending the proposed amendment here to make reference to the equivalent in the code so it's consistent with keeping it in both places. The legislation could say: “or the requirements for blind trusts, as may be set out in the Conflict of Interest Code for Members of the House of Commons”. So the legislation itself could give reference to the code as the basis of any exception or exemption.

My point is that it's the wrong place to have it, the way it's done now. I will address that in the material.

The Chair: I believe this really does complete the business before us.

Allow me, then, to take this opportunity to thank our witnesses for coming here, for being patient with our questions, and for staying late, as well, on a beautiful day when we could be off enjoying ourselves.

Both Rob Walsh and Melanie Mortensen, it's been a real pleasure having you here. Thank you.

Mr. Rob Walsh: Thank you, Mr. Chairman.

The Chair: The rest of us, I gather, are going to be back here, unless there are objections, on Thursday next week, at same time and probably in the same place. But you'll be hearing from the clerk about that.

Thanks very much.

We are adjourned.

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