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Tuesday, May 13, 2008

Chair

Mr. Paul Szabo

Standing Committee on Access to Information, Privacy and Ethics

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● (1535)

[*English*]

The Chair (Mr. Paul Szabo (Mississauga South, Lib.)): Good afternoon, colleagues.

Our order of the day is the reform of the Privacy Act, and we have two witnesses.

The members have been made aware of a motion, and some discussions have been held. I believe it is the wish of the committee that we deal with the motion first.

Mr. Hiebert.

Mr. Russ Hiebert (South Surrey—White Rock—Cloverdale, CPC): There is agreement.

The Chair: I understand Mr. Martin would like to move his motion. Mr. Martin, please read the motion.

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

I will read the motion first. Then I would like to explain the rationale of it. Is that understood?

The Chair: Let's read the motion.

Mr. Pat Martin: I submitted this on May 8, so I believe it is in order in respect of timeliness.

I move that the Standing House Committee on Access to Information, Privacy and Ethics report to the House that the Standing Orders of the House of Commons be amended so that in section 3(3) of Appendix 1, Conflict of Interest Code for Members of the House of Commons, the word “or” is dropped after the word “public” in subsection (b), and in its place the following words be added:

> (c) if the private interest consists of being named as a defendant in a lawsuit regarding matters then before Parliament or a Committee of Parliament; or

and to re-letter the remainder of the subsection accordingly.

The Chair: At this point, I want to make a ruling on the motion of Mr. Martin. The committee will know that on March 3 I rose in the House on a point of order related to the mandate of committees. The Speaker made a substantive ruling on March 14—that famous ruling regarding anarchy in committees. The substance of my point of order had to do with committees adopting work beyond the scope of their committee mandate as outlined in the Standing Orders.

I want to point out to members that under the Standing Orders of the House of Commons, 108(3)(a), the mandate of the Standing Committee on Procedure and House Affairs is laid out. Standing Order 108(3)(a)(iii) authorizes

> the review of and report on the Standing Orders, procedure and practice in the House and its committees;

Standing Order 108(3)(a)(viii) authorizes

> the review of and report on all matters relating to the Conflict of Interest Code for Members of the House of Commons.

The Conflict of Interest Code for Members of the House of Commons is included in the appendix to the Standing Orders.

I have in the past stated that the chair must reflect the Standing Orders and that the chair should defend and uphold the Standing Orders as they are. In the Speaker's ruling, he repeated that the committee is the master of its own work order and agenda, but that there are possible consequences, and that among these is the ruling out of order, by the Speaker, of any report of the committee on a matter not within its mandate.

Accordingly, to be consistent with my past rulings and representations, I must rule Mr. Martin's motion out of order.

Mr. Martin.

Mr. Pat Martin: I'd like to challenge the ruling of the chair for the following reasons.

The Chair: I want to remind all members that a challenge to the chair is in order, but that it is not debatable. A vote must be taken immediately. At this point, then, I am going to take a vote on sustaining the decision of the chair.

I call the question to sustain the ruling of the chair.

(Ruling of the Chair overturned)

● (1540)

The Chair: The chair has been overruled, and the motion is now in order in front of the committee.

Mr. Martin.

Mr. Pat Martin: Thank you, Mr. Chairman. I'm glad to have the opportunity to explain my motivation for putting this motion forward on May 8.

I believe that an unintended consequence of the Standing Orders conflict of interest codes has been recognized and reported to us by the Conflict of Interest and Ethics Commissioner. It is that an unacceptable libel chill has been created among members of Parliament, and if we don't nip this in the bud there will be so many lawsuits flying around here you'll think you're in a snowstorm, believe me. Good people are going to be silenced by strategic lawsuits against public participation, or SLAPP suits. The oldest corporate trick in the book is to silence dissidents or protestors with a SLAPP suit that threatens them with a lawsuit and prevents them from doing their jobs.

I raise this today with the utmost urgency and full knowledge that you would rule this out of order because it is properly before the procedure and House affairs committee. But that committee has been logjammed by a filibuster that has gone on for months and months by the Conservative Party. They've made the procedure and House affairs committee unable to do their job and protect the parliamentary privilege of members of Parliament by making the necessary changes to the standing order.

On this motion I've put forward today, I know the language is kind of legalese, but let me simply say all it does is make it abundantly clear that a member of Parliament is not in a conflict of interest just because they find themselves as a defendant in a libel suit on a matter pertaining to their work in Parliament or in committee.

There would still be exceptions, if a member of Parliament is embroiled in a lawsuit on a piece of real estate or shares he owns in a company, when they would and should be barred from taking part or asking questions. But if it's a matter of the ordinary business of a member of Parliament in the context of their work, you should not be able to be silenced by some vexatious and frivolous SLAPP suit that's clearly designed to shut you up.

I was shocked to learn—and members here would be shocked to learn—that you don't even have to be served papers before you're silenced. All the other party has to do is file the statement of claim, and from that moment on you are barred from making any comment on that subject matter in the House of Commons or at a committee. This is what happened to our colleague Mr. Thibault. No had even served him with notice that a civil suit had been launched against him when, according to Madam Dawson, he was in that situation where he was unable to speak.

So let me simply say we cannot let this continue. I believe it is clear that the motion urges the committee to recommend reporting to Parliament—I hope in the strongest possible terms—that the conflict of interest code as it pertains to members of Parliament has to be amended immediately. I hope we can make a report to that effect to the House of Commons as early as tomorrow. I hope you, Mr. Chairman, can stand up in the House of Commons and explain what an impossible situation we find ourselves in here. Believe me, if it can happen to Mr. Thibault, it can happen to you or you.

For instance, if I were to criticize one of the big drug companies and accuse them of gouging because they were extending their drug patent laws, and one of them slapped a frivolous lawsuit at me saying that I had been speaking untruths about their company, that would prohibit me from asking any questions about that industry sector in the House of Commons until the suit was settled. That could be 18 months down the road, or at the end of this Parliament. That would put me in the terrible situation of possibly losing my home trying to defend myself in a frivolous lawsuit, because not all lawsuits are picked up and covered by the Board of Internal Economy.

We have to protect ourselves from this situation. If this motion I put forward today gets passed, I believe the Board of Internal Economy would be more likely to support members of Parliament with their legal costs, should such a scenario happen. I know one of my colleagues here today finds himself in that situation and may want to add some comments as well.

● (1545)

Colleagues, we can do this quickly. We have witnesses here waiting, and this shouldn't take more than a few minutes. You either agree or you disagree with this fundamental change to the Standing Orders and the conflict of interest codes for members of Parliament, to make it abundantly clear that we are not in a conflict of interest just because somebody slaps us with a lawsuit in a matter pertaining to our ordinary business as a member of Parliament.

Thank you.

The Chair: I have Mr. Hiebert, Mr. Holland, Madame Lavallée, Mr. Zed, Mr. Tilson, and Mr. Wallace.

Mr. Hiebert, go ahead, please.

Mr. Russ Hiebert: Mr. Chair, first of all, I think it's absolutely ridiculous that this motion has been allowed to stand, and that the challenge to the chair was upheld by the opposition parties, because this is not a partisan issue. This is a non-partisan issue. Any member of Parliament could have been subject to this situation. To suggest otherwise is simply absurd.

To pretend that this committee can now take over the responsibilities of the procedure and House affairs committee is absurd. It's absolutely ludicrous, as you stated in the House of Commons when you spoke to this issue not that long ago. There are natural limitations to what this committee can do. We can't rewrite history. We can't change the weather. We can't stop time, and we can't change the rules that the procedure and House affairs committee has authority over. It's simply absurd to suggest that we can now take this upon ourselves.

Mr. Pat Martin: I'm recommending that it be done by Parliament.

Mr. Russ Hiebert: You might be upset, Mr. Martin, about what the procedure and House affairs committee is doing with their agenda, but we can't simply take over that responsibility, whether we want to or not.

Let's talk about the substance of this matter for just a moment. What are we talking about? We're talking about a change to the Standing Orders that would provide additional power to members of Parliament to beat up on individuals who are perhaps rightfully suing them for libel. We're not talking about some hypothetical situation. We're talking about situations in which somebody has said something very offensive and very egregious outside of parliamentary privilege. We're not talking about what happens in committee. We're not talking about what happens in the House of Commons. We're talking about some other statement that was made outside of parliamentary privilege that has offended somebody to the degree that they are willing to take it to court.

First of all, we know there is no real history of this happening. These kinds of suits are rare. They are the exception to the rule.

Second, there are counter-measures that a member of Parliament can use. They can counter-sue if they think it's frivolous. A judge might rule a case completely out of order and force the frivolous plaintiff to cover the costs of the defendant. There are all kinds of natural consequences that prevent these kinds of frivolous things from happening, which is why we don't have a history of this happening. This is very rare.

In addition to that, let's contemplate what consequence this ruling might have had on our very committee had the Ethics Commissioner ruled in advance of our completing our duties. What would that have meant? It would have meant that Mr. Thibault would have been prevented from asking questions on an individual who had him in a lawsuit.

Does that mean Mr. Thibault is not allowed to do his job as a member of Parliament? Of course not. There are any number of Liberals who would have taken his place, and in fact many did during our hearings of Mr. Mulroney. Substitute Liberals came in and asked the tough questions. There was no limitation on the type or thoroughness of our investigation at that time. To suggest otherwise is nonsense. Mr. Thibault does not speak as the sole person for the Liberal Party. Other members can do the same. As we see here, other members are taking the place of normal members as well. There's no impact on our committee's work.

In terms of his parliamentary work, he can go about participating in debates, voting, if he would choose to—which I won't go into—on any number of issues as a representative of his constituents. The only thing he's prevented from doing is raising a particular issue about a particular individual in this committee, and only for the duration of the lawsuit. It's hardly menacing, and it's hardly a constraint on his function as a member of Parliament.

Mr. Martin asked what would happen if a drug company wanted to sue him—would that not prevent him from speaking about these issues? Of course it wouldn't, because the code of conduct has a rule of general application that says that laws of general application are exempt. If it's a law of general application, it applies not just to Mr. Martin, but to all Canadians or to a large population, and he can continue to ask those questions. I would invite him to review the code of conduct more thoroughly. There's no constraint on him asking questions of a general nature about drug company pricing or anything like that. He would be prevented from asking questions of a specific drug company if they were related to the lawsuit he's engaged in.

● (1550)

So there's no limitation here on dealing with the substantive issues in question. What he's proposing is providing a bully pulpit for members of Parliament to attack their litigious plaintiffs, which I think is unjustified. I don't think Canadians want members of Parliament to be able to throw stones from behind the wall without facing the consequences like every other ordinary Canadian, and that's exactly what he is proposing.

I think it's ironic that the opposition is attempting to rewrite this code. I think we all recognize that the code's place is to prevent members of Parliament from using their public office to perpetuate or benefit their private interest. I think the ethics ruling is correct, that when somebody faces litigation, it's tantamount to a liability, and if an individual can have an influence on an outcome of a case, certainly that's an advantage they have that an ordinary Canadian doesn't.

So I think in terms of procedure it's out of order. It's ludicrous that we're considering it. In terms of substance, I think it's not appropriate, and I would ask this committee to simply put this issue aside and let us get back to our work.

The Chair: Mr. Holland, please.

Mr. Mark Holland (Ajax—Pickering, Lib.): Thank you, Mr. Chair.

Mr. Chair, I had the occasion to speak with the Ethics Commissioner, and I was shocked, frankly, after having the conversation with her, to hear just how dangerous this ruling is and the extent to which this precedent is one that must be expunged immediately. I'll give you a few examples that I ran through with the Ethics Commissioner.

It was said by Mr. Hiebert a second ago that you can make general statements about an industry, but not specific ones about a company. Now, you can imagine, when we were dealing with Taser International—and I'm not saying anything for or against Taser International, but it certainly was a big issue before Parliament—if a member of Parliament had expressed concerns about Taser's technology or practices, they could simply launch a lawsuit that would cost them, by the way, just $1,000, and you wouldn't be able to say anything else.

I think all of us know, as members of Parliament, that in conducting our business it is imperative that we don't just speak in committee and in the House, but we also speak out of the House, to reporters or to our constituents, whatever the case may be. That's a continuum that occurs. If you're going to say something in the House, you're going to get asked about it outside the House. And what are we supposed to say? That our role as members of Parliament is now limited to saying things only in the House lest we be terrified by a lawsuit that's costing somebody only $1,000 to drop on us to totally silence us? I think all of us, as parliamentarians, need to take a pause here and to think about the serious ramifications of this.

Look, the government members were in opposition for a long period of time. They asked some tough questions, tough questions that I may have thought inappropriate or thought crossed the line or didn't like, of a minister or of a particular individual within government. But the idea that after a member is getting successful, maybe after a year of working on a file, putting in all of that time and effort, all you'd have to do to silence them, to shut them up, would be to spend $1,000 and initiate a lawsuit, send a letter—you don't even need to take them to court. After you file your statement of defence you can let the thing drag out as long as you want, for up to two years. So with minimal expense you can shut people down for two years, and just start going through the list. And why not?

I don't think we should look at this on the basis of Mr. Thibault, or even me, being in a similar circumstance. Ask the question about what the precedent is that's established here, and where it's going. And yes, absolutely, we as parliamentarians should at the first opportunity decry this, say that this is outrageous, it impedes our ability as parliamentarians to do our job and attacks our very democracy. Because if you say that parliamentarians are not able to ask legitimate questions, questions of importance of the day, simply because somebody has brought a frivolous or vexatious lawsuit, or maybe even a lawsuit that turns out to carry.... The courts determine that. But to shut us down....

I think we should all be jumping at the first opportunity to send something before Parliament to change this to ensure that doesn't occur, because it scares the heck out of me, and frankly, it should scare the heck out of us all.

● (1555)

The Chair: Madame Lavallée, *s'il vous plaît*.

[*Translation*]

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Thank you, Mr. Chair.

The position of the Conflict of Interest and Ethics Commissioner has really bowled me over. I was absolutely shocked to see how a situation that had never happened in the past resulting from... Mr. Tilson's complaint would ensure that the rich and powerful would now be able to silence any member dealing with any issue in order to keep the public in the dark.

This is really scary, all the more so since this Conservative Government has established a precedent by suing the Leader of the Opposition for what he said in the Cadman controversy. I wonder if these will be the new rules of the game. They will be the rules of the rich and powerful who have the means to hire squads of lawyers to sue anyone who might say or think something that would be against their interests. Because they have the money to hire lawyers, the rich will become powerful, if they are not already so.

During those testimonies, I was really astonished to see Mr. Mulroney's bunch of lawyers scrutinize everything we were saying or doing. Remember how many lawyers' letters we all received at the time. It was incredible. There were so many that at one time I told the researcher in the Leader's office that I would send him all those letters because I did not want to read them anymore. They were only aimed at distracting and intimidating us. I felt they wanted to intimidate us. When I learned that they wanted to sue Mr. Thibault, I thought that we would all be sued. I thought that would be part of their tactics.

You will understand that I cannot agree with the Conflict of Interest and Ethics Commissioner's interpretation. I cannot approve the new position that has been established. I believe that we must eradicate this interpretation immediately and move the debate to the House.

That is why I would like to amend Mr. Martin's motion. I would like to reinforce the fact that we will indeed report the matter to the House.

Therefore, I move that the motion be amended by adding the following at the beginning, before the word “That”

Pursuant to Standing Order 108(2)...

That is all, Mr. Chair.

[*English*]

The Chair: Thank you, Madam.

Colleagues, the amendment is to the effect that pursuant to Standing Order 108(2), the matter be reported to the House at the earliest possible time. It doesn't affect the intent of the motion, but it does reinforce or clarify the reporting request of the committee. We will deal with both of those separately, but I think the amendment is fairly straightforward.

We have Mr. Zed, Mr. Tilson, and Mr. Wallace. That will be it, I think.

Mr. Zed.

Mr. Paul Zed (Saint John, Lib.): Thank you, Mr. Chair.

Mr. Chair, I'm not a regular member of this committee, but I have served on this committee in the past. In fact, in the 1990s I chaired the ethics committee. That was part of a basket of issues, including the whole area of the ethics counsellor, when he was a counsellor and not a commissioner, and the Lobbyists Registration Act.

I find the recent ruling of the Ethics Commissioner very troubling. I could not have imagined in the 1990s, when we, as parliamentarians of all stripes, came together to develop a series of ethical standards, that we would have ended up in the situation we are in today with the commissioner's ruling.

Mr. Hiebert, I just want to say to you that there is indeed a strong chill. As a lawyer who practises in the area of corporate and commercial law, as many of the people around this table can tell you, lawyers who bring what I consider almost Republican legal tactics into the British parliamentary tradition are really altering the fundamentals of how we should be conducting ourselves as Canadian parliamentarians. I find it very litigious and I find it disruptive of why we are, in fact, sent to Parliament.

We are encouraged to express points of view. We are leaders of our communities. And we are not like every other Canadian. Respectfully, Mr. Hiebert, I would disagree with you. We have been elected by the people of constituencies throughout Canada. And to play the wordsmith game about this word and that word, I think, is very dangerous.

I must say that I'm ashamed, as a parliamentarian, to find that other committees aren't working. I'm a full member of the Standing Committee on Transport, Infrastructure and Communities, and I can tell you that our committee works very well. We have very serious issues before us, and we deal with those issues on a regular basis.

I'm ashamed, as a parliamentarian, to hear that the Standing Committee on Procedure and House Affairs, which I also chaired in the 1990s, when we shared very difficult, not dissimilar issues, is being disrupted by tactics that are not intended to advance the public's rights.

The libel chill and the chill generally that's occurring with this kind of ruling by the Ethics Commissioner is very deeply troubling to me. My four kids talked about it this weekend when I was home. We had a conversation about how crazy this kind of situation is. We end up having parliamentarians not even able to speak their minds about serious issues, whether it's tasers, drugs, or a variety of other subjects, and the ultimate consequences of where they could lead.

I'm not suggesting that we have more rights than other Canadians, but we obviously speak to our rights. We speak more frequently and in a more public way about a variety of issues. Surely we're guided by the same principles of libel. We're guided by the same principles of due process and guided by the same principles of Canadian common law. But, and I emphasize the “but”, by interfering with our rights as members of Parliament, I think the Ethics Commissioner has gone way too far.

Mr. Chairman, I don't think we can pretend that our opinions are not relevant. Our opinions, as they relate to standards and ethics and having them interfered with by the Ethics Commissioner in this fashion, I think require urgent public discussion, reporting, and change, whatever that change is, in the House of Commons.

● (1600)

I agree with you, Mr. Hiebert, that it's unfortunate the procedure and House affairs committee is not seized with this. Maybe it's more appropriate. But I agree and commend Mr. Martin for bringing this matter urgently to this committee, and I would support getting it reported back, as I expect would all members of the House, who should be equally ashamed of having this troubling matter before us today.

Thank you.

The Chair: Mr. Tilson, please.

Mr. David Tilson (Dufferin—Caledon, CPC): Yes, Mr. Chairman.

There are some members in this place who are lawyers or who have been lawyers in the past: Mr. Zed, I believe, Monsieur Nadeau —I'm not sure—Mr. Hiebert, myself.... He's not? Okay, he's a teacher. I don't know if that's a compliment or not; it's probably not a compliment.

Some hon. members: Oh, oh!

Mr. David Tilson: Well, you know, I'm going to have to suck someone up, because I can tell you people have made up your minds, and we're going to talk a little bit about this issue.

I'm disappointed that you brought it at this time, because I came here to talk about privacy issues. We invited some witnesses to come and speak at this meeting, and you decided to bring this at this particular time. Well, sir, I really think we invited our guests and you've pre-empted them. You ought to be ashamed of yourself.

An hon. member: It could have been done in five minutes.

Mr. David Tilson: Oh sure, no debate—no debate.

Mr. Chairman, the reason I raised that issue—

● (1605)

The Chair: Order.

Mr. Tilson, take a little breath here.

I understand it's a serious issue, and everybody understands that, and there is a difference of opinion. We do have to respect all honourable members. So let's listen to the member who has the floor.

Go ahead, Mr. Tilson.

Mr. David Tilson: Anyone who has been a counsel in a court of law knows that there are from time to time issues of conflict—on all kinds of matters. Counsel may have acted for someone connected with some corporation that the person on the other side is involved in, and it's deemed to be a conflict. That person has to recuse himself. If he or she doesn't recuse himself, the judge kicks you off and says you're not allowed to represent that person. It's as simple as that.

I have seen cases of possible conflicts in which the judge has had to recuse himself from the bench. I have seen matters in boards, quasi-judicial boards, where the same thing has occurred.

One could say that this isn't a quasi-judicial matter, that it isn't a judicial matter. One could say that, but we are making decisions on things in this committee. There was a move by the opposition to make some decisions about the former Prime Minister of this House. We are making decisions. Justice must be done. And to use an old expression, justice must appear to be done. Mr. Zed, I'm sure, has heard that expression many times. It's called “the appearance of fairness”.

Members of Parliament are not above the law. They can't come in this place and say absolutely anything and then go and say or do something outside the House of Commons and expect nothing to happen to them. They're not above the law. We're not above the law. We're people who have been elected to this place to represent constituents. We are not above the law, and we cannot act as if we are.

I'm disappointed in Mr. Martin. I respect him greatly, even though we come from different political stripes. I've sat on a number of committees with him, and I respect the way he handles himself and the issues he raises. Mr. Martin has been the great protector of accountability, insisting on the accountability of members of Parliament. He has said this in the House, in this committee, and in other places.

What's next? Maybe a member has a financial interest in something that would normally prevent him or her from voting. If you have a financial interest in something, you're supposed to declare it to the clerk and not participate. That's what the code says. Is that next? Are we going to say that's stopping a member from speaking in this place?

I'm going to read a portion of the decision of Mary Dawson, the Conflict of Interest and Ethics Commissioner, in what is known as the Thibault Inquiry. This isn't with respect to Mr. Thibault; it's with respect to her observation on this issue of the word "liability" and "potential liability". It says:

> Recognizing that the House of Commons shares its traditions and its privileges with other legislative bodies in Canada, and that the language used in many of the ethical codes and statutes established by those bodies is similar to that used in the Code, I consulted my counterparts at the Senate and in the provinces and territories to determine how they interpret the term "liabilities". Most have responded and have confirmed that they interpret "liabilities" to include contingent liabilities. Many added that they interpret pending lawsuits as falling within the ambit of the term "liabilities".
>
> I am of the view that lawsuits claiming damages that have been instituted against an individual constitute a liability. That liability will be contingent until judgment awarding damages against that individual is rendered. Should a court render judgment against the individual, the liability would become an actual liability. Both are liabilities for the purposes of the Code.

I would submit, with due respect to Mr. Martin—and I hold him in great respect—that what he's doing with this proposed amendment is lowering the bar. He's lowering the bar for the members' code, as compared with the Senate, the provinces, and the other territories.

● (1610)

This code needs to be looked at as a whole, and not be picked on by individual clauses. I, for example, took exception to Commissioner Dawson's report as well. The whole reason I raised this issue in the early stages of the Mulroney-Schreiber hearings, Mr. Chairman—and you made a ruling and that was that—and the whole reason for my doing that was so the commissioner could make a decision.

You do not have the jurisdiction to tell a member of this committee to leave; I don't believe you do. You may be able to comment as an aside, but I don't think you have the jurisdiction to order a member of this committee to leave.

My whole intention of making that complaint to the Ethics Commissioner was that she would make a decision before this committee rendered its report. Well, it didn't happen. It happened a month or two after. And we sat for over two months. My whole purpose in doing that was scuttled.

Mr. Thibault simply proceeded and carried on as if there was nothing wrong. I had problems with that, considering that was my purpose, to put pressure on him to recuse himself. I also found it very strange, in the decision.... And it may be the code needs to be reviewed; it may be that we need to review the code and look at a number of issues, but not one by one. Maybe we need to consider this provision. Maybe we need to consider a whole number of provisions.

She found him guilty of three counts—no sanctions. Wasn't that strange? No sanctions. I appreciate this has nothing to do with the motion before us, other than to say that Mr. Martin's motion may be a point for discussion if this committee reviews the whole issue of the code.

Let's talk to the people in the Senate. Let's talk to the people in the other provinces. Why are we lowering the bar for the House of Commons compared to the provinces, the Senate, the territories? Why are we doing that? Only Mr. Martin can answer that.

Mr. Chairman, with due respect, I believe this is an attempt to make the member of Parliament above the law. And we're not invincible. We're not.

An hon. member: [*Inaudible—Editor*].

Mr. David Tilson: Mr. Chairman, you know, they're going to get excited, but that's their life, I suppose, it's to get excited.

I'm simply saying this motion should be defeated, Mr. Chairman, and I would maybe encourage Mr. Nadeau to vote against it.

The Chair: Thank you.

Mr. Wallace, please.

Mr. Mike Wallace (Burlington, CPC): Thank you.

Can I start with a couple of questions to you and the clerk to clarify things for me?

The motion actually says "report to the House that the Standing Orders...be amended". To me, this isn't a request or a recommendation; this is a direct requirement. Do we have that authority, as a committee, to direct the House to do that?

The report would say that the standing committee orders be amended. It doesn't say "recommended to be amended"; it says "be amended". My question is whether we have the authority to do that—yes or no?

● (1615)

The Chair: That's a very good question. We did raise it. In fact the notices of motions from members usually include some editorial preamble and then the actual motion.

If you look at Mr. Martin's motion, the actual amendment being proposed is to section 3(3). It starts at the words "in section 3(3)" and goes to the very end. That's the actual motion for the House. But in the preamble, it's that our committee report to the House that the conflict of interest code be amended. The recommendation specifically starts with the word "in".

On your question about whether we can change the Standing Orders, in terms of having a vote here and reporting to the House, the answer is no. There could be a concurrence motion moved in the House. There could be a debate in the House and a vote in the House. But as you know, there are long-standing practices. Matters of amendments to the Standing Orders, in our normal practice, are through the Standing Committee on Procedure and House Affairs for appropriate review, or by special committee established by the House.

Mr. Mike Wallace: I don't know where you're reading from, but what I have in front of me says:

> That the Standing House Committee on Access to Information, Privacy and Ethics report to the House that the Standing Orders of the House of Commons be amended so that in s. 3(3) of Appendix 1

That's not our full name, but we know who we're talking about.

It says “be amended”; it doesn't recommend that it be amended. Am I wrong? Does he have the word “recommended” anywhere in this? I don't see it anywhere.

The Chair: We cannot amend. It can only be a recommendation.

Mr. Mike Wallace: That is my next question, Mr. Chair. Is a report a recommendation in itself? Does the report itself have the recommendation in it? If the report says “Mike Wallace is a great guy”, is that a recommendation? I'm just using an example here, if that's okay.

The Chair: The motion you and I are reading from is the one that was circulated to the committee on May 9.

Mr. Mike Wallace: Let's say this passes and there's a report that gives us direction. It's not a recommendation; it's a requirement. There's no concurrence on this report. Does that just become law then? Does it change, or what happens to it after that?

The Chair: A report to the House that is not concurred in simply dies.

Mr. Mike Wallace: It just simply dies. Thank you very much.

Now, on the issue, first of all I have to take some exception to Mr. Zed's language. I'm sure he didn't mean it on purpose, but the Ethics Commissioner did not interfere in this case. The Ethics Commissioner was asked to review the law as it stands now in the Standing Orders, based on the information she provided, based on an inquiry from another member of Parliament who happens to be with us here today. She did a professional job in reporting back on the law as it stands today. I do not call that interference, and I think that was a poor representation of the commissioner doing her job. I'm sure he didn't mean it that way, but that's the way it could have come across.

That being said, I am not going to support the motion as it comes forward. I've been listening to the conversation here. I think there are limits. Just because you're a member of Parliament doesn't mean you can be libellous of somebody. It doesn't give you that right. In my view, this has that opportunity. For a wild example—and this is obviously a wild example—what if somebody is libelling me as a cheat and a liar from across the way? Based on the law now that if I can prove and have proof, I guess, that it is not correct that I've stolen money from a bank or whatever it is, I have the right as a Canadian to take that person to court. If they happen to be a parliamentarian who says that about me, based on this change they can continue to say this as long as they want, as far as I can see. I'm not positive about that, but I don't see where there are some limitations.

There should be limitations on all Canadians, including parliamentarians, on what they can say about individuals or organizations. Just because you got elected should not exempt you from all pecuniary interest you have on this. This could do that. The ruling from the Ethics Commissioner isn't whether he had the right or not to say that to the individual, but it was a pecuniary interest they had because they would have to pay out and it affected their pocketbook based on the lawsuit. It was the lawsuit that drew the pecuniary interest, the financial implication to the individual.

I'm concerned that if we give a carte blanche to anybody to say anything they want in any forum, as long as they're a member of Parliament, it's a very dangerous precedent for us to set. I'm not in favour of this change. I think we have lots.... I was surprised, as a new member of Parliament, how much immunity we have to say whatever we want in committee and in the House of Commons. That immunity should not continue on outside, whether you are talking to your friends at CBC or CTV or Global. There have to be some limits to it.

The fact of the matter in the particular case that's in front of us is that Mr. Thibault spoke outside the realm where he has protection as a member of Parliament, which we all share, and that's what got him into trouble—not what he was saying in the House, not what he was saying in committee, but what he was saying to the television cameras and print reporters. That's how they were able to bring that action against him.

I think we have a tremendous amount of protection as members of Parliament to speak on behalf of our constituents, both in the House and at committee. But there still needs to be a line drawn for what we can say in public, to the press, at public meetings, or wherever it might be. I think the law as it stands now protects not only the member of Parliament but also those who might be damaged by those comments. So I will not be supporting the motion that's in front of us.

● (1620)

The Chair: I understand Mr. Martin and Mr. Holland both have very brief comments. Did you want to be the last speaker, Mr. Martin?

Mr. Pat Martin: No, I just want to raise one big point of clarification. If I could do it now, it would be useful.

Mike, what you're failing to understand is that nothing in my motion would say you can't be sued for saying something libellous. You would continue to be vulnerable to a lawsuit if you were silly enough to go out and say something libellous. It just means you can't be silenced for being sued. So you could continue then. Hopefully you wouldn't be dumb enough to go out and say the same thing again and invite being sued again, but you could ask questions about the same issue or make comments about the same subject matter and continue to do your job.

It's an important clarification, because I would not have put forward a motion that gave us some blanket permission to go and say wild things about anybody we wanted, inside or outside Parliament. That's not what this motion does.

The Chair: All right.

Mr. Holland had a very brief comment to make, I think.

Mr. Mark Holland: I think that has to be underscored, because there's a real attempt here to pervert what's at issue. We have the courts that determine libel and slander. That is their domain. The concern is that for $1,000 you can silence anybody. And that's all it will take for years, because if you launch a frivolous and vexatious lawsuit—it will cost you $1,000—you can shut an MP up on any specific issue.

● (1625)

Mr. Mike Wallace: That's outside of the House.

Mr. Mark Holland: Well, of course.

You can imagine, as a member of Parliament, trying to conduct your job. If what you're trying to say is that our job is strictly limited to these chambers and that's the only place we conduct business, that we should no longer have conversations with media or anyone outside of this place for fear of a chill that would then stop us, by the way, from even asking questions in the House or in committee, that is absurd. And I think we have to think about this.

No one is saying you would be blocked from saying things that are slanderous. You wouldn't. The courts would deal with that. This is dealing with the fact that you'd be able to speak at all, and that's the concern.

The Chair: We're getting into a little bit of repetition.

Mr. Hiebert, please.

Mr. Russ Hiebert: There's a lot of misinformation flowing here.

I've heard Mr. Martin say that MPs can't be silenced. I've heard Mr. Holland say that for $1,000 somebody can be silenced. That's nonsense. That's absolutely ludicrous. That's not what Mr. Martin's motion does. All Mr. Martin's motion does is prevent a member of Parliament from asking questions in the House or in committee about a specific party. That's all it does.

MPs can speak their minds on any other subject, and they can speak their minds even on this particular party in public. The only thing he's trying to prevent is having a member of Parliament attack or question a party, whether it's a corporation or an individual, while they're at committee or in the House of Commons on that subject. There's no silencing here whatsoever.

To suggest that people are being silenced, to suggest that for $1,000 you can silence anybody, is absolutely ridiculous. That's not what this motion will do at all.

The Chair: Thank you.

I want the committee to know that I also consulted with the Clerk of the House of Commons on the admissibility, and the clerk was in agreement that the matter was out of order with regard to the mandate of this committee.

The Standing Committee on Procedure and House Affairs still has opportunities. They have had some agreement to do some work. There may be a way for this to be dealt with.

We have a motion now, at least. I think it's clear that there is some disagreement. I would like to now put the question.

With the concurrence of members, Madame Lavallée would like the reference that pursuant to Standing Order 108(2), this be reported to the House. So we can assume that is part of the intent.

Mr. Wallace is quite right about the word “recommending”. According to the clerk, after looking at Mr. Martin's copy, it should read “report to the House recommending that the Standing Orders be amended”. We don't change them, and we know that. So I think we want to put in the words that we are recommending to the House that it be changed, with the amendment. The actual amendment for the House to consider starts with the words “in s. 3(3)” and goes right to the end.

With that clarification of Standing Order 108(2) recommending the amendment and that it be reported to the House, I'm going to put the full question right now. Is that all right?

(Motion as amended agreed to) [See *Minutes of Proceedings*]

● (1630)

The Chair: Thank you very much.

In our committee I don't think we've ever taken a recorded vote. We can count and we can see.

I'd like to move on with our witnesses. We still have some time left, and I think it's important that they've been patient with us.

We have two witnesses. From the Royal Canadian Mounted Police we have Mr. Bob Paulson, chief superintendent, acting assistant commissioner, national security criminal investigations. Welcome, Mr. Paulson.

From the Canadian Security Intelligence Service we have Mr. Geoffrey O'Brian, advisor, operations and legislation. Welcome.

Gentlemen, we apologize. We've taken a fair bit of time on a very serious matter. As I indicated to you, the most important part of the meeting is the dialogue—the questions and answers. I understand that you have submitted to us some opening comments. They have been received by us, so you may want to just highlight some of the points. We'll see if we can get to questions and comments as soon possible, if that's okay.

Mr. O'Brian.

Mr. Geoffrey O'Brian (Advisor, Operations and Legislation, Canadian Security Intelligence Service (CSIS)): I'm happy to defer my brief opening remarks, which were only about a page long, if members would like to go straight to questions. I was simply going to introduce the service and make some general comments.

The Chair: Do you have any specific recommendations or commentary on the input of the Privacy Commissioner with regard to—

Mr. Geoffrey O'Brian: No. I was going to wait for questions for that. My only general comment is that in some cases her remarks are quite general, and I think it's important to look at particular agencies, mandates, and situations.

The Chair: Thank you.

Mr. Paulson, how would you like to proceed? Would you like to make a few opening comments?

Chief Superintendent Bob Paulson (Acting Assistant Commissioner, National Security Criminal Investigations, Royal Canadian Mounted Police): I'm in your hands. I have opening comments but they're quite lengthy. I'm happy to summarize them if you like.

The Chair: If you could give us the essence of them, that would be great.

C/Supt Bob Paulson: Thank you.

The essence is that we in the RCMP feel there could be significant impact on police operations, not only within national security criminal investigations, but also across the board in other serious transnational organized crime and serious violent sexual assaults against children. We're concerned that the recommendations of the Privacy Commissioner may impact those operations and we would encourage you—I would encourage you, respectfully—to canvass all senior law enforcement within Canada for their input on the proposed recommendations for changes to the legislation.

Briefly, I would simply say that the balance of individual freedoms and security is one that I think Canada has right. I think we lead the world in that regard. I think we do that because of the existing legislative framework and policies and our ability to manage ourselves—and not just the mounted police, but everyone—in the checks and balances that are there.

Those are my opening comments in a nutshell.

The Chair: Let's go right to questions.

I have Mr. Zed, Madame Lavallée, Mr. Martin, and Mr. Van Kesteren.

Mr. Paul Zed: Thank you, Mr. Chair.

Welcome to the committee, Mr. Paulson and Mr. O'Brian.

Does the current Privacy Act unduly limit the RCMP or CSIS from conducting its work?

C/Supt Bob Paulson: No.

Mr. Geoffrey O'Brian: I'd make two comments. One is that we have been subject to privacy and access since CSIS was created in 1984. Privacy legislation was passed in 1983. In some ways that makes us unusual, because a lot of our sister agencies are not subject to equivalent legislation. So I think the shorter answer is no.

I think the longer answer is that with technology changing and the issue of the collection, use, and disclosure of information because of technology and databases and the kind of information that is now available, there are issues that probably would be worth exploring. And I know a number of countries have explored them.

Mr. Paul Zed: Thank you.

What principles, in your view, should Parliament consider when deciding on how to balance the right to privacy with our security needs? Perhaps you both could comment on that.

Mr. Geoffrey O'Brian: I guess I'd start by saying—and maybe you would expect me to say this—that this kind of balance, in fact, very much informed the whole process of the birth of CSIS. As you probably know, we had four years of the McDonald commission. It spoke about the need for agencies like ours to meet both the requirements of security and the requirements of democracy. The parliamentary committee that reviewed us talked about the delicate balance between collective rights and individual rights. So that has been built in, I would argue, from the get-go, but that's the sort of surface answer.

I think the more difficult question to answer is what kinds of things can you spell out for certain, and what kinds of things lend themselves to a process answer? Frankly, we went through that with the birth of CSIS. We defined our mandate in quite general terms. If you look at section 2 of our act, it talks about activities directed toward or in support of espionage or sabotage—the most general statement. But we built in a whole system of controls and review that then provide the process part to the substance. As you know—and it was quite unusual for its day—SIRC, the Security Intelligence Review Committee, and the inspector general both have complete access to all of our records, and report on a regular basis.

I think part of the answer to that balance is to define what you can, but build in a process to ensure that the world behaves properly. Presumably, that's why, for example, under section 59 of the act, both the Privacy Commissioner and the access commissioner review us. They have complete access to all of our records, and there are only four employees—as you probably know—under section 59 of the act who have the permission to look at all of our stuff. So it's isolated, but there's a system.

● (1635)

Mr. Paul Zed: Go ahead, Chief Superintendent Paulson.

C/Supt Bob Paulson: What I would say, in respect of security, is that I think you should first consider the need for operational effectiveness and for mitigating the threat with respect to both national security concerns and serious criminal concerns. I think you must consider the principle of reciprocity among like-minded states and even with those states that don't share our values. And you must consider how we can expect our agencies and the RCMP, in particular, to manage those issues in a principled way.

On the other end of the spectrum, in terms of personal freedoms and the need for our citizens to access information, I think transparency and accountability are key principles you would want to consider.

Mr. Paul Zed: In the vein of internationalism, and referencing some of the friendly or not so friendly states you can recall, are there other countries whose privacy laws Canada could review or should review? And what can we learn from them?

The other question I would pose, Mr. Chair, in terms of convenience for the witnesses to answer, is whether you can comment on our laws and data breaches. In other words, where may there be some deficiencies or some breaches in data that need to be strengthened?

C/Supt Bob Paulson: I'm not an expert in privacy law, and I don't think I'm in a position, really, to direct you to which countries you ought to canvass.

In terms of data breaches, my understanding of data breaches is limited to those instances, say, when material or information is misused or is perhaps inadvertently subject to disclosure or is perhaps mishandled, and those sorts of things. As for any other breach of a policy or regulation, that requires the application of the policies we have for understanding and rectifying the root cause of the breach, assessing the seriousness of the breach, and taking action to fix it.

Mr. Geoffrey O'Brian: Like Bob, I'm not a member of the Privacy Act club. My old law boss always used to say that the world is made up of clubs, and it just depends which club you're a member of. There is the Privacy Commissioner's club. I noticed that when the Privacy Commissioner testified here, there was a conference in Montreal with 700, I think it was, participants, and so on and so forth. It seems to me that getting the transcripts and sharing the experiences of different countries, obviously like-minded countries, can be hugely useful. But that's a general statement.

In terms of data breaches, CSIS is in a rather unique position, because our information holdings have been in electronic form operationally for a long time. Administratively it has been less—for the last ten years or so. We have no contact with outside systems. Therefore, in terms of breaches, frankly, in some ways our world is simpler, because we don't have a lot of holes in the toothpaste tube. We're self-contained.

● (1640)

The Chair: Okay, I want to move to Madame Lavallée, *s'il vous plaÎt.*

[*Translation*]

Mrs. Carole Lavallée: Thank you for your patience. We had a few matters to deal with and I am sorry that you were forced to wait.

My first question will seem a bit naïve to you. I have some idea of the answer but I would like to make sure. Could you tell me what type of information you collect? I suppose you have a huge mass of information on the bad guys who are in Canada and perhaps even abroad. However, what type of information do you collect on people?

Also, you probably have information on your staff, which would be another type of information. Are there still other types of information? From what I have seen in the legislation, you are not exempt from the Act. There are some specific exemptions in your case. For example, you are exempted from the obligation to provide information when some categories of persons ask for it.

Before anything else, what type and quantity of information do you have in your files?

[*English*]

Mr. Geoffrey O'Brian: As you probably know, with CSIS there's always a question as to how much information is out there. However, Info Source is the government-published directory under the Privacy Act of all of the data banks that every department and agency has. We're in there, and we've listed ten different data banks—which is publicly available—and they're described in some detail. Of the ten, I believe one is an exempt bank, but all the rest of them, all nine, would have to be reviewed individually when someone makes a Privacy Act request, which happens a lot.

In terms of the information that we hold, we obviously have a lot of investigative information. Our standard operating procedure is that we take a raw product and we write a report. That report goes into our electronic holdings, and that is searchable.

[*Translation*]

Mrs. Carole Lavallée: Does Mr. Paulson want to answer?

Mr. Bob Paulson: Yes. I will answer in English if I may.

[*English*]

The types of information that we have, much like my colleague describes, are essentially in the operational field—all kinds. I'll limit my response to the national security context.

As you asked in your question, we do have personal information about suspects who are identified by one means or another. We have statements of witnesses and suspects. We have background checks, we have intelligence, and we have a fair bit in the criminal context of personal information around the people we are investigating.

I don't think I could limit the types of information. Where we execute a search warrant, for example, we would have banking records or we would have other records. Where we have wiretap we would have very sensitive and personal intercepts of communications. So there is a full range of information in the operational setting.

Sadly, I don't think I'm qualified to speak on our HR holdings around our employees, but we would have your typical employee file, from entry into the force to their current standings with movements and quite a bit of personal information there. And I'm doing a poor job of explaining it, so I'll stop.

[*Translation*]

Mrs. Carole Lavallée: Have you read the recommendations of the Commissioner to update the Privacy Act? There are 10 recommendations. Have you read them?

● (1645)

Mr. Bob Paulson: Yes, I have read them.

Mrs. Carole Lavallée: Do you agree with them, generally speaking? Do you have any concerns at all about some of them?

Mr. Bob Paulson: Yes I do.

Mrs. Carole Lavallée: Is it in your preliminary statement?

Mr. Bob Paulson: No.

Mrs. Carole Lavallée: No, I read it but I did not see anything.

What are your concerns?

Mr. Bob Paulson: We have concerns about recommendations 1, 2, 3, 7 and 10. Do you want to know what they are?

Mrs. Carole Lavallée: Of course.

Mr. Bob Paulson: All right.

[*English*]

The first one is a legislative necessity test, which may place an unnecessary burden on the efficiency that we need to exercise in collecting information. When we collect information on individuals, the judicial test that we have to meet is very strict in respect of search warrants, wiretap authorizations, and so on. This first one, then, could get in the way of the efficient collection of information.

In respect of number 2, it's my view that this is going to change the whole reason for being. The whole act would have to get changed around into a different animal. It wouldn't end up as the same act. They're not quick amendments. While we're not actually opposed to number 2, we have concerns that this is completely different from the spirit of the existing act.

As for number 3, we do privacy impacts already. We do privacy impact assessments on all data banks that we want to modify or put in place, and we consult the Privacy Commissioner on those things. So we feel it's unnecessary to create a law to require this to be done.

In respect of number 7, it seems to be a complete departure from the stated purpose of the existing act. We have concerns in respect of the legitimate criminal video surveillance of subjects, the physical surveillance of subjects. The existing DNA legislative framework seems entirely capable of moderating the privacy concerns of those individuals who may be affected by those things. It seems unnecessary and inconsistent with the spirit of the act as it now exists.

Lastly, the provisions for sharing information with countries abroad is very important—particularly in national security, but also in the control of trans-national organized crime and trans-national crimes of any nature. Mr. Justice O'Connor made some pretty clear recommendations on how we should conduct ourselves. He stated unequivocally that there was an absolute need for law enforcement to share information with international partners, but that it must be done in what I referred to as “the principled way” or, as he put it, with a view to accuracy, reliability, and origin of information. In other words, he prescribed a qualitative assessment of the nature of the information, its intended use, and the human rights record of the country in receipt of the information. We follow this prescription.

We have implemented Mr. Justice O'Connor's recommendations in respect of national security investigations. We have centrally controlled it. In fact, my job as the acting assistant commissioner is to exercise central control over all these things. So in view of the nature of the threat that we face nowadays, I'm concerned that legislating a repository for these agreements, because law enforcement is so vast....

Do you want me to stop, Mr. Chair?

The Chair: I want to hear the last part of your comments. Please continue, even though our time is up. It's important to the committee.

C/Supt Bob Paulson: I was on a bit of a run there, and I don't recall exactly where I left off.

[*Translation*]

Mrs. Carole Lavallée: You said that you did not agree but that you were already doing it. If you are already doing it, if it is your practice, why you be opposed to it?

● (1650)

Mr. Bob Paulson: One cannot foresee all the circumstances that might require exchanging information with another country.

[*English*]

You cannot, in my view, prescribe terms and conditions that would envision every instance in which we must exchange information with friendly countries and countries that don't share our values. I think that's why Mr. Justice O'Connor stressed that principled approach to these things. That's why we're opposed to this. We need flexibility, but we also need to apply rigorously the centralized model that we follow, while remaining open to review and transparency.

The Chair: Okay.

Mr. Martin.

Mr. Pat Martin: Thank you.

[*Translation*]

Mrs. Carole Lavallée: I would like to add something. I would have liked to hear Mr. O'Brian's answer but I hope that one of my colleagues will ask him the question. Those are the rules of the game.

[*English*]

Mr. Pat Martin: Thank you, Mr. Chairman, and thank you, witnesses.

Mr. Paulson, I find both the tone and the content of your report sobering and even worrisome. On page 4 you essentially serve notice to us. You say you are not an alarmist, but you are the officer responsible for the national security of the country.

You remind us that the terrorist threat to Canada is a real and present danger and that we have been named as a country al-Qaeda intends to attack. In fact, there could be Canadians training abroad at this moment in time, getting ready to follow through with that threat.

We are one of the only countries al-Qaeda has named that has yet to be attacked—it's a sobering reminder for all of us to meet you and to have you explain that to our committee. I don't think there's anybody on this committee who wants to tinker with the Privacy Act in such a way that it's going to actually put Canadians further at risk, or more so than we already are.

I should say that when we open up legislation for review, it's to add to or subtract from, and just because there are ten specific clauses recommended to us for change, we're not limited to that. You can change everything—from the name of it, to the summary, to every clause in it, or chuck the whole kit and caboodle.

I also note, and I think I can say for every member of this committee, when you talk about child sexual exploitation, that if it ever came down to choosing between the rights of privacy of a pedophile pervert or the right of a child to be protected and safe, every member on this committee is going to come down on the side of the child. We wouldn't want to do anything that has the inadvertent consequences of enabling bad people to continue doing what they're doing.

In the few minutes we have, given your cited objections to those clauses, is there anything you would add to or subtract from the rest of the Privacy Act in order to do your job better?

C/Supt Bob Paulson: Thank you.

The only thing I would suggest is that there be.... I don't want to appear to be pushing my luck, because we go to great lengths to comply with the Privacy Act. As you know, we also recently had trouble with our exam bank, and we got that on track and we fixed it. So we're going to slip from time to time.

There are exemptions for legitimate law enforcement activities within the act. Both the Treasury Board policies and our policies recognize the special nature of these investigative responsibilities that we carry—balancing against the need to ensure the charter is upheld. I would suggest there be a more precise recognition of the nature of operational necessities in terms of national security investigations and other serious investigations.

I'll make this short. In understanding the Privacy Act, many corporate people and other areas of government are overly restrictive in how they interpret the act and what information they are prepared to share with us as we go forward. We find ourselves often getting production orders and search warrants for matters in which I think many senior lawyers would argue they are not necessary, out of concern over the Privacy Act. But other than that, I'll limit my comments.

● (1655)

Mr. Pat Martin: That's very helpful.

Mr. O'Brian, I have a few minutes left.

Mr. Geoffrey O'Brian: Yes, I'll just pick up on that point, because I think my colleague and this committee did a review of PIPEDA recently, and I know that you focused in on subsection 7(3), for example.

Mr. Pat Martin: Yes, I was hoping you would comment on that.

Mr. Geoffrey O'Brian: That's one of the areas I think is a very good example of what Bob was talking about. We believe there is a capacity there. However, in some ways the chill—and perhaps I shouldn't mention the litigious nature of our society, of which we had, perhaps, an indication in the first 40 minutes of this meeting—has meant that people are cautious.

Somehow, at least in my view, it is terribly important to send a message that you should be able to cooperate with the intelligence authorities and the law enforcement authorities when you believe you can help them and when you know there is going to be proper review of that help. The Privacy Commissioner has an important role to ensure agencies are cooperating properly, not excessively, and so on and so forth.

Mr. Pat Martin: Don't those sections go as far as to be able to deputize private individuals to gather information that would otherwise be blocked through subsection 7(3), which was so controversial in our review of PIPEDA? We found in the act, through a literal or careful reading of it, that things law enforcement agencies could not do they could in fact get employers to do—search a locker, for instance, or turn in somebody they suspected. You'd be compromising their privacy rights by any other definition, but it would give extraordinary powers. Is that something you find useful?

Mr. Geoffrey O'Brian: Frankly, I'd go back to my opening remarks about a process answer rather than a substance answer. First of all, you try to define it as well as possible to minimize the effect that we would be either tempted or able to do something indirectly that we couldn't do directly. The first thing you would try to do is come up with words that would ensure that wouldn't be the case.

Second, you would hopefully have a process, as we do with SIRC and the inspector general, of constant review so that if you did abuse it, it would pop up on the screen. People would be able to say, "Hold it. We think the intent of this is not being met, and we think in fact that this is being abused." It seems to me these are not issues that necessarily lend themselves—as Mr. Justice O'Connor said in his report talking about foreign information sharing—to prescriptive rules, but rather they lend themselves to principles and then review.

Mr. Pat Martin: That's probably very wise.

The Chair: Thank you.

I'll move on to Mr. Van Kesteren, please.

Mr. Dave Van Kesteren (Chatham-Kent—Essex, CPC): I thank you both for appearing before our committee.

I have a few questions, and if there's time I would like to share my time with Mr. Hiebert.

First of all, Mr. O'Brian, I think that part of the problem many of us have is that we're really not too concerned about collecting information except when it's abused. You can know how old I am, and you can know this, that, and the other thing about my habits, but we just don't want that to be abused.

You made mention of a watchdog. Do we need to put something into this act that possibly gives you a little more flexibility in information, but ensures there's somebody who is going to oversee and make sure there is no abuse?

What I'm saying is basically that there might be a time when I'd like to know what you have in my file. There could be something that's incorrect or something along those lines. Do we have some safeguards there?

Mr. Geoffrey O'Brian: The first answer would be that if you asked about your file you probably would get a "we neither confirm nor deny" answer from us if it was part of the operational holdings. That wouldn't be the end of it, because our system is set up so that under section 41 of our act, any person can complain about any act or thing that they believe the service has done. They can complain to SIRC about it. SIRC will review it, and they will give you an answer. It may not contain all of the details, and it may not be the answer you like, but you will be assured that there is someone who will have looked at it and will have had complete access to all of the records.

In some ways that's my understanding of what the Privacy Commissioner is supposed to do. Under section 34 of the Privacy Act,

> ...the Privacy Commissioner may...examine any information recorded in any form under the control of a government institution...and no information...may be withheld....

● (1700)

Mr. Dave Van Kesteren: Mr. Paulson, do you feel that's pretty much the same for the RCMP?

C/Supt Bob Paulson: Yes. My view is that she has very good powers now. I think a good example is the exempt bank review that she did with us. We weren't abusing it, but we were perhaps neglectful of the information that was in there. Through her review—and she was statutorily entitled to do that review—the commissioner found those shortcomings, and they're fixed.

Mr. Dave Van Kesteren: My second question is directed to you, sir.

With regard to the Internet—and I understand that much of your work, especially on child pornography and those sorts of things, is done on the Internet—we had a witness here last week who suggested that we didn't need to expand those powers. Do you feel we need to expand the powers regarding what you're allowed to do now with Internet providers? I know you need some cooperation at times, and presently you're having some difficulties. Do you want to comment on that?

C/Supt Bob Paulson: Again, I'm no expert on the Internet, but it is a growing area in which crimes are being facilitated and committed, and we are of the view that in many instances we need to be able to get to the names and addresses of those people who are registering websites and are engaged in the activities. But we apply the existing laws, the Charter of Rights, and all of the existing sort of legal framework around protecting Canadians' rights when it comes to screening the Internet as well.

I guess those would be my comments.

The Chair: Thank you.

Mr. Hiebert, please. There's three minutes left.

Mr. Russ Hiebert: Thanks.

The comments you made a moment ago about the ten recommendations, do you have those comments in writing? I've reviewed your statement, and it doesn't specifically address the ten recommendations that were provided to us by the Privacy Commissioner. Do you have those comments? Could you provide them to us in a more substantive manner?

I heard your general comments about how recommendation 1 would get in the way of wiretaps or some form of investigation; and that recommendation 2 you don't really like, but other than saying that it would change the nature of the act, you weren't really specific about the particular part you're concerned about.

We've had a number of witnesses come before this committee saying they're glad the committee is reviewing the Privacy Act, that it's important and has to be done, but we've not had as much substantive consideration of the ten recommendations that the Privacy Commissioner has put forward, or any other recommendations that we should be considering. I am not speaking for my colleagues, but I'm really looking for that kind of substantive comment.

This is an area you're responsible for. I'd like to know in detail what restrictions this would place, if this were adopted. Are you seeking an exemption? We understand that this is a law of general application. There are many ministries it would apply to. Perhaps there should be an exemption for national security or for other forms of surveillance, but that's what I'd like to hear.

I don't expect you to have that comment for me now, so I'll move to some other questions, but if you could provide us with that substantive review of the ten recommendations and other thoughts on the Privacy Act, I would very much appreciate it.

In terms of my remaining questions, you talked a moment ago about how you have to share information with other nations to protect our national security. What agreements do you have with other countries right now, when you share the information of Canadians? Do you have any agreements with any other nations on how to protect the privacy of Canadians?

● (1705)

C/Supt Bob Paulson: Yes, we have a number of MOUs. But more importantly, when we share, in the national security context now, information with other countries or receive information from other countries, it's done, as I've indicated, in writing for the most part and with caveats attached to it. But we do have MOUs with other countries.

Mr. Russ Hiebert: Okay, so that governs.... So Canadians don't have to be worried that when their information is sent to another country, that information will somehow get into the hands of the wrong people.... Have other countries given us a commitment that they will protect the privacy of the information we give them?

C/Supt Bob Paulson: Yes.

When I say that, I'm talking about the written caveats that Justice O'Connor spent a lot of time speaking to.

Mr. Russ Hiebert: Okay.

C/Supt Bob Paulson: But the caveat and the seeking of the agreement by the receiving country is only as good as their word.

Mr. Russ Hiebert: Okay. I'm apparently out of time.

The Chair: I have Mr. Pearson, Mr. Wallace, Madame Lavallée, and that's it. That will take us to about 20 after the hour, so there will be a couple of minutes left if anybody else wants to jump in. You might want to think about it.

We'll go with Mr. Pearson to start.

Mr. Glen Pearson (London North Centre, Lib.): Thank you, Mr. Chair. I'll be brief.

As a follow-up, I agree with Mr. Hiebert. When we were talking with a witness the last time we were here he kept trying to hone down on this, to try to find the substance of what it is we're looking for.

When you talk about transborder things, are you saying that there are MOUs? Part of what the Privacy Commissioner said was that there need to be written agreements. Are you saying that there are written agreements?

C/Supt Bob Paulson: There are some written agreements, yes.

Mr. Glen Pearson: Some?

C/Supt Bob Paulson: Yes.

Mr. Glen Pearson: It seems to me she was implying that there needed to be more substance to those kinds of agreements. Can I get your view on that?

C/Supt Bob Paulson: Well, yes, I think what we talked about earlier was this need for flexibility and accountability in how we exchange information. Let me give you a very quick example. We have our integrated border enforcement teams that are along the border, and they work together, shoulder to shoulder often with American law enforcement people. So you can't envision a set of circumstances that would guide and restrict conversations that they would have in these joint investigations they engage in. However, there is an overriding memorandum of understanding between the two countries in respect of those things.

But the greater challenge for us is in terms of our practice and our policies around ensuring that this principled approach is applied to those key areas that present the risk. So I know what the Privacy Commissioner recommended, and our written arrangements and information exchanges are in writing with other countries. I'm just concerned that we try to prescribe, as my colleague said earlier, every sort of circumstance in which this exchange would happen.

Mr. Glen Pearson: There is such a delicate balance we're trying to achieve here for the committee about private information and also for the need of protection. But I'm still trying to understand. If the privacy impact assessments are running the way they are, and you feel it's suitable, why, then, are you against legislating it? Is it because it provides you with a certain amount of flexibility with that? You would like to have that flexibility, and legislation might impede that?

C/Supt Bob Paulson: Yes.

Mr. Glen Pearson: Mr. O'Brian, do you agree?

Mr. Geoffrey O'Brian: I'll answer the first one, if I may, which is the one about information-sharing and foreign arrangements, because I think it is an important point, and this was one that again came up when the CSIS Act was first passed in 1984.

The way we dealt with it was that in section 17 of our act it says that before we enter into any arrangement with a foreign agency.... We too have some written arrangements, but a lot of them, frankly, are not written. But before we enter into an arrangement with a foreign agency, we have to get the permission of the Minister of Public Safety, and he has to consult with the Minister of Foreign Affairs, and that consultation is done on paper. So the arrangement, even if it is verbal, has to be described on paper, if you see what I mean.

Then under section 38 of our act, the Security Intelligence Review Committee is specifically mandated to look at all of our arrangements and to review the provision of information and intelligence pursuant to those arrangements, and they do that every year. For example, although the details are not public, every year they look at that. I notice in their last report, which was just out last fall and tabled in the House last fall, as of March 31, 2007, CSIS had 271 foreign arrangements with agencies in 147 countries.

SIRC reviews all new enhanced or modified arrangements. SIRC found the service had informed itself of the human rights situation in all the countries and agencies in question. Moreover, the service had proceeded cautiously with exchanges of information involving countries with questionable human rights records. So the difficulty, of course, is that in some cases the information is not public. What you are dealing with in some cases, again, are surrogates for the public, because of the nature of the information. SIRC appears before Parliament to talk about its report, and the Privacy Commissioner, of course, has the same kind of access. Again, it's that bit of process versus substance.

● (1710)

Mr. Glen Pearson: Understood.

Do I still have some time, Mr. Chair?

The Chair: A couple of seconds, sure.

Mr. Glen Pearson: What do you do with your unused information? You collect and there's a bunch of it that you don't end up using or don't require, which is part of what the Privacy Commissioner was getting at, right? What do you do with the unused information?

Mr. Geoffrey O'Brian: There are several answers to that. One is that in some cases the Privacy Commissioner, frankly, wouldn't like us to get rid of it, because you want to leave a paper trail or a trail so that someone can check up afterwards as to whether you were collecting it properly or not, if you see what I mean. That's the first answer.

Mr. Glen Pearson: She didn't imply that, but go ahead.

Mr. Geoffrey O'Brian: Yes, I know. But in fact what happens is the first time, frankly, you destroy something, someone comes along and says, “Why did you destroy it? We wanted to review it to ensure that you collected it properly.” So there is again that balance, and we're subject to the archives act, and all of those kinds of things.

In terms of communications that we intercept pursuant to warrants, we debrief them, put in operational reports, and then the tapes are destroyed after a certain length of time. And that length of time varies according to the investigation.

The Chair: We'll have Mr. Wallace, please.

Mr. Mike Wallace: Thank you, Mr. Chair.

Thank you for coming today and listening to us for an hour before you got a chance to speak.

Mr. O'Brian, I'm going to give you a chance to answer the question Madame Lavallée asked, which Mr. Paulson thoroughly answered.

Have you reviewed the ten quick fixes, as she calls them, the commissioner has put forward on the Privacy Act? That's the first part of the question. The second part is to both of you. Those are ten things she's recommending. As indicated by our parliamentary secretary, that is what we have to work with, basically. Are there other things we should or should not be doing? Or should we just be saying that we looked at it, there are no changes, and we'll just leave it alone for another 25 years, or whatever it has been?

Those are my two questions, and I'll start with you, Mr. O'Brian.

Mr. Geoffrey O'Brian: Well, in terms of the ten, I have reviewed them. I confess that I don't have written notes.

The first recommendation is about the necessity test. You will see, from my opening remarks, that we actually have a necessity test for collection in our act. Section 12 of our act says that the "Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary", information and intelligence respecting activities we suspect of being threats to the security of Canada.

Now, the devil is in the details, and the devil is in how you interpret that. Frankly, the British have, I think, quite a good phrase. They talk about information they collect being necessary and proportional. Those are judgment calls, in some ways. I think what Chief Superintendent Paulson and I are saying is that we have to be able to exercise our judgment, subject to review, but not be hamstrung. Now, we have learned to live with that strictly necessary test. But if you drill down—and I'm sorry, because the devil is in the details—it helps if you look at specifics.

Frankly, what we collect that may be strictly necessary when we are attempting to look at someone.... In the case of a foreign diplomat, for instance, who we believe is a member of or may be engaged in espionage, our goal would be to recruit that person. Therefore, what we would collect and what we would think of being collection that is strictly necessary could be immense. We would want to know where he goes in his off hours, whether he fishes, and whether his children take skating lessons. We would want to look at ways in which we could make an approach. I think you would argue that in a different kind of investigation, one in which you were looking at a different kind of potential threat, this kind of extensive collection might not be appropriate. So it's difficult.

So that's the comment on recommendation 1.

Recommendation 2 I'm not an expert on in terms of the power to award damages.

Recommendation 4, having a clear public education mandate, seems fine.

With regard to greater discretion of the Office of the Privacy Commissioner to report publicly, again, we wouldn't have concerns about that, obviously, within the bounds of our security concerns. Yet we vet documents that are made public all the time. So hopefully, that would be fine.

On amending the Privacy Act to align it with PIPEDA by eliminating the restriction, I confess that lawyers could say much better than I whether access is sufficient now. Frankly, when I read the act, it seems to me that the intent is that she or he should have access to information—and I read out part of that section—however recorded. I don't know what the problem is, frankly.

The final one, which is strengthening the provisions governing the disclosure of personal information to foreign states, we've talked about. I believe that the CSIS Act, with SIRC and the inspector general and the requirement for them to review all the arrangements, and the fact that two ministers of the crown have to approve every single one of our foreign arrangements, builds in those kinds of protections, frankly.

I would be wary, again, of something that could be interpreted as restricting as opposed to something being an important subject that has to be reviewed on an ongoing basis.

So those are, in many ways, my general comments. My general comment at the beginning was that we're all engaged in national security: the RCMP from a law enforcement point of view, CSIS from an intelligence point of view, CBSA from a borders point of view, Transport Canada, and so on and so forth. Each of us has slightly different powers and mandates. CSIS has no powers of arrest and no ability to take measures to enforce security. We have a broad mandate: Reason to suspect an activity. So I think one has to look at the individual mandates when you're making the kinds of difficult judgments you have to make.

● (1715)

Mr. Zed asked me at the beginning what I would look at. I wasn't smart enough to recommend to him a book that I think is particularly good. It's a Canadian book that was written recently by Stan Cohen, from the Department of Justice. He's sort of "Mr. Charter". He's probably been seen on the Hill a number of times testifying about the charter standards with respect to particular bits of legislation. He wrote a book called *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril*. There are chapters on privacy, privacy in the Privacy Act, information sharing as it affects the interests of law enforcement, national—

Mr. Mike Wallace: Do you agree with what he's written?

Mr. Geoffrey O'Brian: It's a very good discussion and a very thoughtful book. I highly recommend it.

The Chair: We'll go to Madame Lavallée, and then I think we'll be done.

[*Translation*]

Mrs. Carole Lavallée: When a foreign government asks for information, is it always information on individuals and organizations? Is there any other type of information that might be exchanged?

[*English*]

Mr. Geoffrey O'Brian: Yes. We exchange all sorts of information. At times we have to make judgment calls.

Again, the answer is in part a process answer and in part a substance answer. First of all, we have to have an arrangement with the country. Second of all, we have to have had enough experience with them that we know they are going to respect our caveats that we've put on the information. In other words, we've had a history with them in which information has not been abused. Then we have a process by which within the service, individuals sign off as that information is sent abroad, and it's signed off by a director general.

● (1720)

[*Translation*]

Mrs. Carole Lavallée: When you exchange this type of information, is it substantial information, large documents, or just two or three pieces of information about an individual? How is the information provided? By e-mail, by Internet?

Mr. Geoffrey O'Brian: Frankly, it depends on the situation.

[*English*]

We have situations—and perhaps we could take the O'Connor report as an example—where there is a seizure of hard drives. Because we're not capable of processing it, we may give a copy on CD of that hard drive to our allied services to assist us in the processing. That could contain a huge amount of information. On the other hand, it may simply be a request such as "What do you know about this person?"

Again—I'm speaking for CSIS—we would rarely answer a question that was not put into the context of why the question is being asked and for what purpose.

[*Translation*]

Mrs. Carole Lavallée: I would like to put this question to each one of you. Have you ever lost information that you were exchanging, for example information on a USB key or a CD? Have you ever lost information? I want the truth, the whole truth and nothing but the truth.

Mr. Bob Paulson: Indeed, it has happened that we have lost information here in Canada. Over the course of their work, some officers lost a piece of paper or a USB key. It has happened but not during an exchange with another country

Mrs. Carole Lavallée: This means that information on citizens ended up in the hands of people who should not have had it. When you lost a USB key, I suppose that the individual who found it probably connected it to his computer to see what was on it and saw that Carole Lavallée is not a criminal, for instance.

In such a case, depending on the type of information, do you feel obliged to advise the individuals whose information has been lost?

Mr. Bob Paulson: It depends on the type of information.

Mrs. Carole Lavallée: I suppose so.

Mr. Bob Paulson: Each case is different. If it is personal information on people who are not involved in criminal activity, yes.

Mrs. Carole Lavallée: Have you ever advised people in such circumstances?

Mr. Bob Paulson: Yes.

Mrs. Carole Lavallée: All right.

Does each one of you has his own data bank?

Mr. Bob Paulson: Yes, we each have our own a databank.

Mrs. Carole Lavallée: Have you ever considered merging them in any way?

Mr. Bob Paulson: No, never. At the RCMP, information is used as evidence. That is our interest.

Mrs. Carole Lavallée: You look for evidence, they look for suspicion. Is that it?

Mr. Bob Paulson: Yes.

Mrs. Carole Lavallée: All right. Is it too simplified?

Mr. Bob Paulson: No. It is true.

Mrs. Carole Lavallée: Is it really that?

Mr. Bob Paulson: Yes.

Mrs. Carole Lavallée: I hit the jackpot then.

[*English*]

Mr. Geoffrey O'Brian: You have touched on a very important point. I sometimes think that after the terrible events of 9/11, 7/7 in Britain, and so on, part of the cry that went out was for information sharing *über alles*. If we just broke down all the walls and shared all our information, the world would be a safer place.

I don't agree with that. I frankly believe that walls and differences are important, and our country should be prepared to exchange, for intelligence purposes, information—properly controlled and reviewed when you know what it's going to be used for—that you would not be prepared to share for law enforcement or enforcement purposes.

The intelligence world deals with and in the world of suspicion, as you say. We often ask, "What do you know about...? Has this person come across...?" and you don't want someone to do something about it. You don't want someone to take action or make life difficult for someone. You simply want to put together the pieces of the puzzle. It's terribly important that the same information you might want to exchange for some purposes, you might not want to exchange for different purposes.

● (1725)

The Chair: Mr. Hiebert has a couple of closing questions.

Mr. Russ Hiebert: I have just one.

Mr. Paulson, you suggested earlier that you didn't support recommendation ten because you couldn't foresee or envision every instance when there might be a need to share information with a friendly nation. I heard from you—and also Mr. O'Brian—that many of the agreements you have with these other nations are in writing; some of them are not. Some of them have caveats that would prevent the information you share with the other nation from being shared with a third party; some of them don't. As I read it, recommendation ten from the Privacy Commissioner is just asking for consistency—that all the agreements be in writing, and that all these countries have these third-party caveats.

Considering that some of them already have them, would it not be reasonable to expect every agreement to be in writing and every country to have a caveat to prevent them from sharing the information?

C/Supt Bob Paulson: It's reasonable to expect we'd apply a caveat to that information when we share it, that we do a qualitative assessment of the information when we share it, and that we get assurances from the receiving country on its intended use.

But let me give you an example. I'm told that last year Interpol requested information from us 4,000 times. Our liaison officers around the world exchanged information, under a multitude of circumstances for a multitude of reasons, roughly 3,000 times. That's just a little hint of the volume we are dealing with.

Particularly in serious cases where we must make these decisions and assessments quickly because all the facts are different, I cannot envision a process or a registry that could service the sort of volume in which we are engaged in sharing information.

Mr. Russ Hiebert: I think you're misconstruing my question.

C/Supt Bob Paulson: Perhaps I am, because you keep asking it.

Mr. Russ Hiebert: I'm just saying you both indicated that you have agreements with these other nations when you share this information. Sometimes they're in writing; sometimes they are ministerial notes. I'm not trying to suggest there be constraints on the kind of information or what it's used for. I'm suggesting that the Privacy Commissioner is simply saying let's make sure they're all in writing. Even if they're broad, why not put them all in writing, and why shouldn't all have caveats?

Mr. Geoffrey O'Brian: The problem is, you're dealing with only one side of the equation, our side. Frankly, there are countries—for reasons good and bad—that will not and do not as a common practice reduce these kinds of arrangements to writing.

Some very civilized countries interpret agreements in writing as treaties and require them to be brought before their legislatures. It would be difficult to do this for a whole range of things. Some countries have this rule, and make it a practice not to do this. Some follow this practice for other reasons.

We reduce what we do to writing so that the people reviewing it know exactly what the terms are. We separate our arrangements into three kinds: security screening exchange, intelligence exchange, and technical exchange. We reduce it to an understandable form, two ministers of the crown approve it, and the provision of intelligence and information is reviewed under these arrangements.

To insist that other countries cooperate with us only when the terms are reduced to writing seems a bit of a “bridge too far”—though I suppose we could say we will not do business with people who won't sign things.

● (1730)

Mr. Russ Hiebert: Or we could say that we will continue this practice, but for our part we're going to put it in writing.

Mr. Geoffrey O'Brian: That's what we do.

C/Supt Bob Paulson: Yes, when we exchange the information, we put it in writing.

The Chair: Gentlemen, your input has been very good. It's so good that I want to ask you something formally. We'd like you to provide your opinions to us on the ten areas, and to give this some consideration. Now that you've heard a little more, you will have a sense of where we're going.

We've heard a little too much of one side of the story. You have brought to the table some other thoughts for consideration on some of the items. Some are not terribly applicable, but it's nice to know that this is something you don't have strong feelings on one way or the other.

Some of the points you have raised are significant, and our practice is always to refer to representations from witnesses as we lay out the rationale for our recommendations and our reports. We want to be comprehensive, and I want you to have the opportunity to push the point home on those matters you feel strongly about.

This is not something we need tomorrow, but if we could have it within a reasonable period, we would much appreciate it. We would like the researchers to continue to work with us. Within a week to ten days would be great.

No? Two weeks?

C/Supt Bob Paulson: I'm happy to summarize my program's interests there, but there is a broad police community. The Canadian Association of Chiefs of Police have an interest in this, as do other organizations. I'm happy to try to canvass them all to help you.

The Chair: I think what you have said today pretty well got it, but I want you to be sure. We don't have it in writing, but we do have a transcript, and we could get it to you. We could send the transcript of this meeting to both of you.

That's what has whetted our appetites. We would like to see anything more that can put a little meat on those bones, anything to drive home your point, because I think this is important.

C/Supt Bob Paulson: Yes, we can do that in two weeks.

The Chair: We're not in a real hurry. But if we gave you too much time, you might get busy with other things, and we want it while it's still fresh.

If you could provide us with that assistance, it would be greatly appreciated. We look forward to it. You could provide it to the clerk.

Mr. Geoffrey O'Brian: I just want to be a public servant, which is what I am. Public servants are supposed to supply information and assist. We don't set policy. Some of these items are generally phrased. It would be something for the Minister of Public Safety and all of those folks to comment on.

The Chair: Your comments on matters that you feel you would like to make comment on are all we're asking for.

I think you are in two extremely important areas. And in terms of the public concern, it would certainly be with regard to policing intelligence and transborder areas, etc. So you're it; you're our principal witness in this regard—other than those who study it. You're on the ground.

Thank you kindly, colleagues. I appreciate your indulgence.

We're adjourned.

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