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Chair

Mr. Joe Preston

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● (1135)

[*English*]

The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)): Thank you, members. We should start. We do have a bit of a reduced quorum at the moment, but we're allowed to have our witnesses during a reduced quorum, and we have great witnesses today.

We have with us the Clerk of the House and the Acting Law Clerk. We're going to talk a little more about where we stand on the matter of privilege and access to information referred to us by the Speaker.

Madam O'Brien, I'd like to have you start for us, please.

Ms. Audrey O'Brien (Clerk of the House of Commons, House of Commons): Thank you, Mr. Chairman.

[*Translation*]

Good morning, everyone.

[*English*]

I'm very pleased to be here this morning. I'll be uncharacteristically very brief. I simply want to thank the committee for all of the work that it's doing on this question and exhort you to come back to the House with a robust report on parliamentary privilege.

As you will no doubt have realized yourselves from the testimony you've received, it's not a concept that's very well understood. Interestingly enough, it seems that the people who are most prepared to hold forth on it—I don't count myself among them—invariably start their interventions by saying, "I don't know much about parliamentary privilege, and I really don't know anything about constitutional law, but I'd like to tell you what to do." I'd like you to perhaps set those things aside and heed the words of the Acting Law Clerk, which are to follow.

Thank you very much for having us here this morning.

The Chair: Thank you.

Monsieur Denis.

Mr. Richard Denis (Deputy Law Clerk and Parliamentary Counsel, House of Commons): Thank you, Mr. Chair.

I have a statement, and I've distributed copies in English and French to I think all members.

Mr. Chair and members of the committee, thank you for your invitation to appear once again before you regarding your study on access to information requests and parliamentary privilege.

You will remember that when Mr. Bosc, the deputy clerk, and I appeared before you on October 16, 2012, we explained the background to the specific situation that gave rise to your committee's study, we reviewed the concept of parliamentary privilege, and we discussed how a process could be put in place to allow committees to deal with access to information requests made to the House as a third party for documents covered by parliamentary privilege.

[*Translation*]

Since then, your committee has heard from the Information Commissioner of Canada, Ms. Legault, and from Mr. Drapeau of the University of Ottawa, who explained the legal framework of the access to information regime.

● (1140)

[*English*]

Faced with this testimony stressing the limits that exist with the access to information legislation, but not having full information on the legal and constitutional impact of privilege, I can understand that the committee is now wondering how the law reconciles these two realities.

I note that a particular legal question has been raised on a number of occasions by members and witnesses, but has not yet, I believe, been squarely addressed or fully answered. Simply put, the question is as follows: given that there is no specific provision in the Access to Information Act that excludes or exempts disclosure of information covered by parliamentary privilege, on what legal basis can such information not be disclosed?

[*Translation*]

The answer is that the Access to Information Act, like all statutes, must be interpreted and applied in a manner that does not violate the Constitution.

As stated in the preamble and section 18 of the Constitution Act, 1867, parliamentary privilege forms part of the Constitution, and like any other part of the Constitution, it cannot be violated or infringed upon by the operation of a statute.

[*English*]

The concept of parliamentary privilege is not as well known as the Charter of Rights and Freedoms by many Canadians or some governmental officials, but it has the same status as all other constitutional provisions.

On two occasions, the Supreme Court of Canada has confirmed that parliamentary privilege has the same constitutional effect and weight as the charter, and that the charter cannot override parliamentary privilege: first, in the case of New Brunswick Broadcasting v. Nova Scotia—the Speaker of the House—where parliamentary privilege had to be measured against the charter; and second, in the case of House of Commons v. Vaid, where it had to be measured against the Canadian Human Rights Act. In both cases, privilege was determined to take precedence.

[*Translation*]

As members know, there is no provision in the Access to Information Act that indicates that information is not to be disclosed where to do so would violate the charter. However, I believe that departments and the Information Commissioner would have no difficulty in accepting that they are required to respect the charter rights even when the statute is silent.

[*English*]

And so it must be for parliamentary privilege: parliamentary privilege has equal constitutional status to the charter and must similarly be respected.

Where there is a conflict with a statute, it has always been a part of Canadian law that the Constitution must be respected and remain paramount. This is specifically set out in section 52 of the Constitution Act, 1982, which reads as follows:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This provision does not only relate to the charter, but to all the parts of the Constitution, including parliamentary privilege, which is rooted in the preamble and section 18 of the Constitution Act, 1867, as stated earlier.

[*Translation*]

As such, even though the Access to Information Act does not specifically mention parliamentary privilege as an exemption or exclusion to disclosure, the act must be read and applied so as to give primacy to parliamentary privilege.

[*English*]

Further, parliamentary privilege must be recognized whether or not the access to information legislation is amended.

In the Vaid decision noted above, the Supreme Court of Canada determined that the Canadian Human Rights Act generally applied to the House of Commons. However, the court also determined that the act did not apply in such a manner so as to infringe parliamentary privilege.

As was noted in my earlier appearance, there is at least one case in Canada where the issue of parliamentary privilege was accepted as an “exception to” or an “exemption from” access to information legislation, where the act was silent. This was the case of the Assemblée nationale du Québec against Bayle in 1998 under the Quebec equivalent of the Access to Information Act. The access to information regime applies to the National Assembly. A request was made to the assembly for documents that were covered by parliamentary privilege. Notwithstanding that the assembly was covered by the act and notwithstanding that there was no specific exemption for materials covered by privilege, the court determined that the act could not operate so as to infringe constitutionally entrenched privileges.

[*Translation*]

So, it was within this constitutional and legal framework that our office took the actions that it did last summer.

I hope this information will be useful to the committee in its study. There are also a few additional legal points that I would like to submit to the committee for its consideration.

The collective privileges of members belong to the House itself and no one else. It is then up to the House to determine how its privileges are to be exercised. Only the House can choose to not insist on its privileges in any particular situation.

[*English*]

What is important is that since the privileges belong to the House, the House has the sole authority to exercise them or to determine how they will be exercised. The Speaker's role, and that of those who work under his or her authority, is to safeguard and protect those privileges.

To sum up, parliamentary privilege forms part of the Constitution of Canada. As part of the Constitution, all statutes must be read and applied so as to respect parliamentary privilege, in the same way that statutes must be read and applied in a manner that does not infringe on the charter.

Finally, during your proceedings it has been suggested that the only way to resolve these issues is through amendments to the Access to Information Act. In my view, because of the constitutional nature of parliamentary privilege, this is not necessary. However, given the uncertainty expressed by some about how privilege applies, consideration of some other form of legislative approach could be considered. If this is the direction the committee believes would be desirable, my office is available to address how this could be achieved, making sure that the interests and independence of the House and its members would not be compromised.

[*Translation*]

I thank you very much for your attention and I am available to answer your questions.

● (1145)

[*English*]

The Chair: Thank you very much. It was very informative.

Mr. Albrecht, we're going to go with you first.

I'd like to go through a couple of rounds of questions with our witnesses, and then if there is time afterwards, I'd like us to go in camera to discuss our report on this issue. But first let's gather as much information as we can.

Mr. Albrecht, you're up.

Mr. Harold Albrecht (Kitchener—Conestoga, CPC): Thank you, Mr. Chair. I'm not sure I'll take all of my seven minutes, so if one of my colleagues cares to follow up, they can do that.

First of all, Madam O'Brien, thank you for your acknowledgement that this is not well understood. I can certainly say that if it's not well understood by you, it certainly isn't that well understood by me. And it's been very confusing. However, I want to thank Mr. Denis for the great preamble today.

It appears clear that you're saying that an amendment is not necessary in spite of the fact that Madame Legault indicated that might be the way to go. You do indicate on the last page of your remarks that you are prepared to give us some other ideas as to how we might proceed. I'd like to follow up on that later. But prior to that question, if I could just ask you, if we were to go the route of calling for an amendment to the act, what would you see as some of the primary, unintended consequences that could come from that kind of procedure?

It would seem to me that by placing an amendment in the act, we may be making provision for some exclusion that we may not have foreseen, and we'd have to come back many times to revisit that. Could you comment on some unintended consequences? Then following that, are you prepared to give us a bit of a heads-up on some of the ideas that you allude to under paragraph 22 of your remarks today?

Mr. Richard Denis: Certainly. Thank you, Mr. Chair.

In terms of the unintended consequences of an amendment to the Access to Information Act, I'll start by stating that yes, there are certainly issues with the act as it's drafted presently because it does not address the question of parliamentary privilege, and that's essentially the reason we are here today: we don't really know how to deal with it. But if the act were to be amended, you would be faced with a situation where only the access to information regime would be clarified, whereas there might be other situations in the general sense where the privilege of the House could be affected.

I'm not getting into too much detail, but there are situations concerning human rights or the Privacy Act, financial administration. There are other situations in the general context of the statute law that could also raise questions about the privileges of the House. So if you were to amend only the Access to Information Act, one of the consequences would be that you would solve one problem, but you could also have others.

We've identified a few here that I could just briefly read into the record. Legally and constitutionally, it is for the House to make the determination on whether documents are covered by privilege. If that were the case, could there be a judicial review of this? That is a question that would have to be looked into as well.

The other problem you would have is.... Remember that the study here is essentially to decide whether or not requests to the House from third parties can be refused or excluded. This is in the context of the definition of proceedings in Parliament and what are proceedings in Parliament, so that question would still remain. How far privilege applies, or how far or what kinds of documents could still be requested, could be clarified through a report of the committee, but these kinds of questions would be lagging.

My point is that by only amending the Access to Information Act, you're limiting the solution.

In terms of proposed solutions, there are a few we have considered in addition to proposing amending the act. In the Parliament of Canada Act there are provisions where the privileges of the House are recognized. I will just briefly quote section 5, which tells you that:

> 5. The privileges, immunities and powers held, enjoyed and exercised in accordance with section 4

—which recognizes them—

> are part of the general and public law of Canada and it is not necessary to plead them but they shall, in all courts in Canada, and by and before all judges, be taken notice of judicially.

One way of maybe solving or proposing an amendment would be to add to the Parliament of Canada Act a recognition of some sort that would make it necessary to recognize the nature of privilege. That way there could be language we could propose to the committee, in the sense that as a general rule the necessity would be imposed to take into account privilege in the application of all of the statute law. So you would have some sort of a head provision in the Parliament of Canada Act that would cover most situations.

● (1150)

Mr. Harold Albrecht: If I could just be clear, if your recommendation were to be followed, it would be not to change the Access to Information Act, but to change the Parliament of Canada Act with a moderate amendment.

Mr. Richard Denis: That would be one of our proposed solutions, because it is of a more general application. However, if the committee prefers to amend the Access to Information Act, we could certainly come up with a proposal that would take into account not only our concerns but also those of Monsieur Drapeau and Madame Legault, which were quite legitimate, looking at things from their angle, which I can understand.

Mr. Harold Albrecht: Am I out of time?

The Chair: No. You have time left.

Mr. Harold Albrecht: After having read through your remarks today, and having listened carefully to your remarks, obviously I don't understand it fully, but I understand it far better, and I'm satisfied at this point that the right decisions were taken in the previous matter. I just want to compliment you on that.

Mr. Richard Denis: Thank you very much. It's appreciated.

The Chair: Thank you, Mr. Albrecht.

Mr. Scott, for seven minutes.

Mr. Craig Scott (Toronto—Danforth, NDP): Thanks so much for the testimony and the quite well-articulated explanation about the relationship between constitutional law and statutes. But I do want to clarify a few things just to see if we're on the same page.

It is pretty clear from your remarks and the text—and hopefully this is where we're all at—that it's not possible for a government institution or a government department on its own to decide questions of privilege. That's correct, right? There has to be some consultation with Parliament for that.

Mr. Richard Denis: Yes. The question about privilege is for the House. Ultimately, it's only the House itself as a group that decides whether or not the question of privilege is at stake.

It's not for the clerk. As I've said before, it's not for the Speaker, who's only the servant, just like employees of the House are servants of the Speaker, if you wish, but we work under his authority. That decision could not be made by a government institution.

In fact, the only way the House is advised of such a situation is because a request is made of a department. Because the information requested by someone deals somehow with the House of Commons, we are advised as a third party. By looking at the information, we assess that it's privileged. That's what starts the process.

Mr. Craig Scott: And the Speaker, the Deputy Speaker, the clerk, or anybody can't make that decision unless Parliament has actually given them that role somewhere in Parliament's own decision-making process. Is that correct? It wouldn't be illicit constitutionally for us to say, in certain circumstances, the Speaker can respond to an issue of privilege, as the Speaker did over the summer.

Mr. Richard Denis: In the summer, because the House was not sitting, the Speaker essentially gave us the authority, just because we were facing a tight deadline, to request a judicial review of the decision of the Auditor General not to release the documents.

Mr. Craig Scott: I understand that. The question is, if we were to entertain, almost within a report, codifying when the Speaker could actually act in that fashion, just to make that clear, there would be nothing illicit about our not saying a decision has to only be taken by a committee or the House as a whole. We can delegate that authority. Is that correct?

● (1155)

Ms. Audrey O'Brien: Mr. Scott, yes, if the committee were to report wanting to codify certain instances, for instance, where they felt the privilege should be waived or how we should comport ourselves, and the report was concurred in by the House, then it's a directive of the House.

Mr. Craig Scott: Excellent. Just to make sure we didn't add any more confusion, that was my understanding. Thank you.

In terms of the third party, Mr. Denis, you did refer to the third-party notice, but of course one of the big points from Madame Legault is that the third-party notice provisions in the act don't explicitly apply. I think she'd be loath to say that the third-party notice procedure actually had been used, versus some, you would say, constitutionally mandated consultation taking place. The department knew that privilege was involved and therefore the department consulted Parliament.

But in the use of your language, do you consider that the best way to look at what happened is that the Access to Information Act implicitly contains a third-party notice provision on the parliamentary privilege issue, and that it sits there paralleling the general third-party application notice? Is that the way you would think of it?

Mr. Richard Denis: I would say no. The act does not specifically envisage privilege because it's not specifically described, but the fact that the information that is requested when the House is advised...we appreciate and realize it is covered by privilege, so that's essentially what starts the process, if you wish.

Even if a process was put in place by the committee for how to deal with a specific request, the point would have to be made that the documents always continue to be covered by privilege.

What the committee or the House ultimately would be doing is agreeing to the release of the documents, even though...and I guess that would be some sort of a caveat....

Mr. Craig Scott: The privilege continues to attach to it. I understand that.

Perhaps I could get it slightly clearer in my head. The point is, until a report from this committee comes, or until, for example, the Access to Information Act is amended, how do we think about the way in which a department or a ministry consults Parliament? Is this just as kind of a parallel constitutional process, or are you telling us that you think it's actually occurring within the Access to Information Act, albeit through read-in procedure?

Mr. Richard Denis: I'll going back to my initial statement. The constitutional principles are essentially overriding any provisions in the act, so they are always there, and they have to be accounted for and taken into consideration in any of these situations, whether or not you have the legislation dealing with it.

Ms. Audrey O'Brien: If I may, Mr. Chairman, if I understand Mr. Scott's question, I think we have in fact dealt with it as implicit in the legislation, and that has been something that has been recognized in our dealings on exactly these kinds of issues as a third party dealing with other government departments and agencies.

It was only when we encountered the Auditor General—and our initial discussions, which felt that the documents were privileged because they attached to proceedings in Parliament—and we found that the lawyers there took a different view because it was not explicitly referred to, which forced us into this series of events that you know.

But, generally speaking, that's how we've been operating, and it's been operating fine.

Mr. Craig Scott: To clarify, in previous instances where it's been operating in that fashion, with the view that it's effectively an implicit procedure within the act, it's also been in cases of parliamentary privilege. There have not been consultations based on, “Oh, we think there are confidentiality issues”, or “They're not picking up privacy or other issues”; it is clearly that there have been instances, apart from the Auditor General situation, where consultation relating to parliamentary privilege has been brought up.

Mr. Richard Denis: Yes, Mr. Chair, and specifically on the occasions we've had in the past, when situations were directly related to parliamentary privilege, because we also get a lot of situations that deal with things that are not privileged.

In the specific case of documents that we consider covered by privilege, up until this situation the departments accepted our position that the documents were covered by privilege. Of course, we don't know exactly what happens once we tell them that it's covered by privilege, because there's a process for them to go ahead with and we're not informed. We assume that they accept the position; we don't hear back.

So we assumed that the position that had been taken by the House up until then was accepted by many departments, not just one specifically.

● (1200)

Mr. Craig Scott: All right.

Does anything about your analysis change—

The Chair: Mr. Scott, you're over by about a minute. I was really interested in the last bit, so I let you go longer.

Mr. Williamson.

Mr. John Williamson (New Brunswick Southwest, CPC): Thank you.

And Mr. Scott, thank you. Those were all good questions.

I have two questions, I think, and I'll lead off from the top. It was suggested that if this change were made in the act, it could have unintended consequences. Is that true of...if we step back? If we were to begin as parliamentarians to reinforce this right in certain pieces of legislation, might a future court—if that were not done down the road—say, well, because Parliament didn't explicitly reinforce its privilege, we're going to assume they didn't want it to be there in another piece of legislation?

You could actually have a cascading effect. You maintain, I think correctly, that this right is there. If we follow that up in legislation, what would the ramifications be where it's not done?

Mr. Richard Denis: The risk is always there, but another solution could be envisaged. As opposed to just amending, for example, the Parliament of Canada Act, as I was proposing, you could maybe have a hybrid solution where you would amend both the Access to Information Act and the Parliament of Canada Act. You would cover most of the situations.

Mr. John Williamson: I guess that's where I'm a little confused. Your testimony was actually quite strong and firm that this is a right, and it is a right in the Constitution, and all legislation must fall under that. Where your position weakens a little bit is that you're suggesting remedies to that. But if I had not read your last two points, I would have said that we can actually do nothing, that courts will uphold this right, as they would any other constitutional right. So in fact it might be best—the way the clerk's nodding, perhaps it is best—

Mr. Richard Denis: I'm nodding too.

Mr. John Williamson: —to do absolutely nothing and just uphold this right, close the book, and move on.

Mr. Richard Denis: I apologize for not having been clear.

Yes, essentially the "doing nothing" solution is one that would definitely work, because as I expressed, the concepts are there, the Constitution is clear, and the fact that privilege is of a constitutional nature is an overriding principle that, in the absence of any change to legislation, would be, I would argue, a process that ultimately a court would recognize.

Mr. John Williamson: You kind of pulled back there. Is it the optimal solution, in your opinion, to just leave things as they are?

Mr. Richard Denis: Well, doing nothing would work, but we'd still be faced with the situation where....

Let's say we dealt with a mechanism by which the House would know how to deal with specific documents, and we went with that. We would claim privilege to certain documents—assuming the department would accept that position, because it would be expressed by the House in a forceful way. So that's assuming they would accept it, but they could still say, "We don't agree with your position"—essentially, they don't agree with the House—"that the documents in question are privileged."

So it would still end up in the courts, and you would still have that same battle.

Mr. John Williamson: True, but—

Mr. Richard Denis: That's why a solution could cover that by being a little clearer in how to deal with the cases.

Mr. John Williamson: Perhaps someone else will pick up on that. I'm running out of time, and I want to ask a broader question out of that.

A change that was made could also open up that unintended consequence as well; this is not a solution that's also going to bring certainty.

Mr. Richard Denis: It's not a definitive solution, no.

Mr. John Williamson: Those are my questions. Thank you.

The Chair: Thank you, Mr. Williamson.

Mr. Scott.

Mr. Craig Scott: I wanted to start by asking if Madame Latendresse could begin, and then I'll take over.

The Chair: Certainly, by all means.

[*Translation*]

Ms. Alexandrine Latendresse (Louis-Saint-Laurent, NDP): Thank you.

I understand quite well that in any case, the Constitution has precedence. However, the problem raised by Ms. Legault when she appeared before the committee is that she does not have a choice. She has to comply with the Access to Information Act. Currently, given the text of the Access to Information Act, in such a situation, she will not have a choice. She will have to go to court to explain that there is nothing in the document she depends on that prohibits her from divulging information because of parliamentary privilege.

I understand that in court, the Constitution will always have precedence. That is understandable. Would there not be some way of preventing that and of arranging things so that they are clear immediately, so that there is no need to initiate long, costly legal action to obtain a final decision that will most likely be in favour of the Constitution?

● (1205)

Mr. Richard Denis: Without a legislative amendment, the solution would be that the commissioner or the departments recognize the fact that the constitutional status of parliamentary privilege gives it precedence over laws, and among others over the Access to Information Act. Operationally speaking, if the House of Commons affirmed its privilege in a report passed by the House, the departments would have to acknowledge in a formal way, through some practice, that privilege must be recognized in the case of requests involving the House of Commons.

[*English*]

Mr. Craig Scott: Okay. That is a key point, and I think Mr. Lukiwski has made it himself, about avoiding conflict. We have a slightly different legal template going on between the approach you've taken and the approach of Madame Legault. Part of the issue is one of avoiding conflict and lack of clarity for too long. That's at least one reason why we would be considering some form of amendment to the act, as a recommendation. But I understand your view that it wouldn't be necessary.

In the interaction between a statute and constitutional principles, rules around privilege, if that statute is viewed by the Supreme Court as quasi-constitutional in nature, it's in fact giving expression to principles that may have some constitutional basis and putting them in statutory form. Does that change any of the dynamics? Does it make it even more pressing that we create clarity through an amendment?

Mr. Richard Denis: It makes it more pressing to create clarity. But if you were to look at it from a constitutional point of view, and if you were looking at two constitutional or quasi-constitutional principles, a court would have to look at them and weigh one against the other, or at least ensure that one does not play against the other. That would create maybe a situation under which both would have to be recognized. That was what happened in the Vaid case or in New Brunswick Broadcasting, where the charter and privilege, both being constitutional, both had to be recognized at the same time.

Mr. Craig Scott: Right. That's kind of where I was going, so I appreciate the answer.

The chief justice gave a speech this year reminding us that the court in the Lavigne case referred to the Access to Information Act as quasi-constitutional. If you look at the purpose of the act, in subsection 2(1), it addresses giving effect to "the principles that government information should be available to the public". If you look at the notion of transparency and how it's connected to the underlying constitutional principle of democracy itself, in the Supreme Court's reference case you can see where the quasi-constitutional idea comes from. I just wanted to make that clear.

Mr. Richard Denis: Essentially, it also confirms the importance of recognizing parliamentary privilege.

Mr. Craig Scott: Oh, absolutely, I'm not gainsaying that at all.

Do I have any time that I can pass on to Mr. Martin?

The Chair: Sure.

Mr. Martin, it's good to have you here this morning.

Mr. Pat Martin (Winnipeg Centre, NDP): Thank you. I appreciate that.

I have had a long-standing interest in the issue of freedom of information. The point I was going to make was exactly the one Mr. Scott just made about the quasi-constitutional nature of the reference we've heard often.

It puts us in a bit of a conflict, even as members of Parliament. We are duty bound to uphold the concept of parliamentary privilege as parliamentarians. But as representatives of the general public, trying to protect and defend this public, what we believe should be a public interest overrides it. If there are going to be competing interests, which ones have primacy should be on the side of the people, I think, and the people's right to know should be considered absolute.

Freedom of information is the oxygen democracy breathes. It is a fundamental cornerstone of our democracy. In trying to consider whether we should follow other jurisdictions and put in place a discretionary exemption versus an absolute exclusion, I don't think we should have to debate that for very long. The idea of a codified discretionary exemption I think should have more weight than the notion of exclusion and having to fight for the public's right to know. I think that should be considered absolute by members of Parliament. The public has a right to know what their government is doing, subject to very few limitations, such as national security and commercial privacy, etc.

How do you reconcile the fact that other jurisdictions have in fact managed to codify those competing interests, and which one do you think does it best?

● (1210)

Mr. Richard Denis: Well, Mr. Chair, transparency and privilege don't necessarily have to be at odds. The question here is about control, by the House, of the documents it considers privileged. Even if certain situations or documents are considered privileged, it doesn't prevent the House, as a whole, deciding to release them.

Mr. Pat Martin: It's up to Parliament to make that determination instead of going to the courts.

Mr. Richard Denis: Right. But in the context of documents that touch on the House of Commons, it's for the House itself to decide whether that privilege would be waived. The House could decide that in certain specific situations it would define that maybe what the committee would do—

Mr. Pat Martin: So it should be the Information Commissioner who would make that determination.

Mr. Richard Denis: No.

Mr. Pat Martin: Why not?

Mr. Richard Denis: It would be the House developing a process by which it would characterize or qualify different types of requests. Although it would still remain privileged, it would allow them to be released.

The Chair: Thank you.

Go ahead, Mr. Reid. We are in a four-minute round, but we have been quite generous.

Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC): My intervention is to seek some clarification from Mr. Scott vis-à-vis his comments regarding quasi-constitutionality. I'm not sure what he thought was quasi-constitutional.

Mr. Craig Scott: Sorry, Scott. I was talking to the real brains here.

Mr. Scott Reid: Well, we all know that's false modesty.

I was just asking you what you were referring to as being quasi-constitutional.

Mr. Craig Scott: It is the statute.

Mr. Scott Reid: It is the statute.

Mr. Craig Scott: It's the same way the courts refer to and approach the Canadian Human Rights Act, for example.

Mr. Scott Reid: I assume that when you say quasi-constitutional, you mean it in the sense that it is a bill that supercedes any other piece of legislation written afterwards, unless that piece of legislation says "this applies, notwithstanding such and such act".

Mr. Craig Scott: It can actually be a looser idea than that. It could be the idea that where there are conflicts or interpretive debates on how the statutes interact, the one that is quasi-constitutional would presumptively prevail in a case of conflict.

Mr. Scott Reid: You are actually talking about something different from what I am describing. What would be in, for example, the Official Languages Act that applies in the interpretation of any later statute, including one that contradicts it, unless that act specifically says that it applies notwithstanding...?

Mr. Craig Scott: Quasi-constitutional would include the exact dimension you referred to, which doesn't seem to come up here.

Mr. Scott Reid: Is that actually written into the act? I'm just trying to confirm that. It has some importance to our discussion.

Mr. Craig Scott: No, it's a Supreme Court interpretation, and it's language used by the court. This is where we get the same idea of the Canadian Human Rights Act being quasi-constitutional.

Mr. Scott Reid: I think the Canadian Human Rights Act says it applies in a manner that requires any future act to specifically say "this act applies notwithstanding".

It's an important distinction. I'm not saying that the law shouldn't say it, but if it doesn't say it, we're talking about a different concept. It's important to clarify that.

It sounds to me as if what you're saying—you may not be saying this, and it just sounds this way to me—is that the act is dealing with an area that is not actually part of the written Constitution; it's part of what would be effectively the unwritten constitution we've inherited from our Westminster predecessors. When it's dealing with those unwritten areas, one of which would be parliamentary privilege, the act should be read in a very broad, large, liberal manner. Is that effectively what you are saying?

● (1215)

Mr. Craig Scott: That's very close to what I'm saying. We can talk later....

Mr. Scott Reid: No, no, I just wanted to get it clarified, because there was then a discussion. There was then kind of a cascade of other comments all going back to it, and I just wanted to make sure we're talking about—

Mr. Craig Scott: It is about the fundamental principle being reflected in the act itself having some kind of a constitutional basis, and the way the courts talk about that particular act, themselves choosing to use the word "quasi-constitutional", tells us something about the importance of the values and thereby the procedures giving effect to the values.

So whether or not it has this added dimension of prevailing over other acts in direct conflict situations, that's not what I'm talking about.

Mr. Scott Reid: Okay. I just wanted to clarify that point.

That was my intervention. Thank you.

The Chair: Thank you.

Thank you, Professor Reid, Professor Scott. What time is the paper due?

Voices: Oh, oh!

The Chair: Monsieur Denis, did you want to throw in on the...?

Mr. Richard Denis: I have a very quick comment. I would just comment that if you're faced with "quasi-constitutional" provisions and "constitutional" provisions, which is what parliamentary privilege is, you would have to argue that the fully constitutional provisions would prevail in a situation like this.

Thank you.

The Chair: Certainly.

Thank you, Mr. Reid.

Mr. Williamson.

Mr. John Williamson: Thank you.

I want to follow up on some of the thoughts Mr. Martin had. I'm going to disagree with him, I think, but I do first want to say that I agree with his thoughts on access to information, and I would actually look favourably on suggestions that we consider extending that law to cover the House of Commons.

But the point I want to make—and I'm curious to get your comments. Is that issue not a different issue than that of privilege? We ought not to surrender that privilege unless we choose to do so—sorry, we ought not to surrender our privilege unless we choose to do so in order to achieve the access to information.

I'm not sure I'm asking this correctly. I think we're two planes trying to go in the same direction; we're just flying at different altitudes. By that I mean we can applaud what Mr. Martin is suggesting here and the need to open up the Access to Information Act, but this is not the way to do it.

Mr. Richard Denis: No, and in fact it's really up to the House, and members in the House, ultimately, to decide what they want to do with the documents in question being covered by privilege and how they are to be released. On the question that we're dealing with documents that are privileged or covered by parliamentary privilege, it is only for the House to decide how they can be released. Certainly transparency might be a way for the committee to encourage and deal with it in a manner...but it's for the members and then ultimately the House to make that decision. It cannot be surrendered in any other fashion.

The clerk is just mentioning that you have to make that distinction between what is confidential and what is privileged, and again that distinction has to be kept in mind. That's why, through a process where types of documents can be identified, the release could be done to the satisfaction of most requesters. But ultimately, though, it's for the House itself to make that decision, because documents, in our opinion, would have to remain privileged, be covered by privilege, even though they're released.

The Chair: Madam O'Brien.

Ms. Audrey O'Brien: Mr. Chairman, if I may, one of the things that we found especially frustrating, particularly about all of the kind of outside chatter when this Auditor General case came up, was the idea that somehow or other it made equivalent the idea that something was covered by parliamentary privilege, meaning it was something that we wanted to sort of keep hidden in some way, when in fact a lot of the material that's privileged is actually fully accessible. It's the transcripts of committee hearings; it's anything related to proceedings particularly. There are all kinds of other ways to get it.

We don't want to be ceding the privilege, that not being something that we ourselves or the Speaker can do. It rests with the House. We were trying to protect that sort of technical, although very important key point, but at the same time, there was an enormous amount of misunderstanding attaching to that, partly I think because of the semantics of it—"parliamentary privilege" sounds as if you're putting somebody off into some enthroned room and therefore inaccessible. That's not it at all. I think what the fundamental principle is, what you're trying to protect, is the idea that the House controls its own work and its own proceedings and its own deliberations, and that is what's ultimately sacrosanct.

The other stuff is available in all kinds of fashions. It's up on our website and whatnot. It's getting at it through access to information that raises the privilege flag.

● (1220)

Mr. John Williamson: Right, and it would be a bit unusual—perverse, perhaps—for that power to be turned over to an officer of Parliament.

Ms. Audrey O'Brien: Yes.

Mr. John Williamson: Thank you.

I have one other question. You suggested—

The Chair: Make it a short one.

Mr. John Williamson: Okay.

You suggest an amendment to this document in front of you.

What is it?

Mr. Richard Denis: It's the Parliament of Canada Act.

Mr. John Williamson: Thank you.

What impact would a change to that document have? What would it cover? Perhaps as a new parliamentarian I should know this, but I don't, so I'd like a little more light on it, please.

Mr. Richard Denis: In general terms, an amendment would be to the effect that no legislation could operate so as to infringe parliamentary privilege unless expressly provided for in a specific statute. So the constitutional status of privilege would be clearly stated.

In practical terms, if you applied that concept to the Access to Information Act, without an amendment a request would come to the House as a third party, but as part of the process, the Information Commissioner would have to consider the documents, and privilege would be considered. That would be clearly stated in the law, which is not the case right now.

Mr. John Williamson: Thank you.

The Chair: Thank you.

I'll go to Mr. Toone next, for four minutes—or thereabouts.

Mr. Philip Toone (Gaspésie—Îles-de-la-Madeleine, NDP): All right. Thank you, Mr. Chair. So we'll go for an even 10 minutes.

Some hon. members: Oh, oh!

Mr. Philip Toone: No, I'm sorry.

The Chair: I like your rounding up.

Mr. Philip Toone: Actually, it will be a fairly brief question to follow up on the conversations there were on quasi-constitutional laws and the hierarchy.

The Parliament of Canada Act is a constitutional act. Is that right?

Mr. Richard Denis: Yes, it's a statute.

Mr. Philip Toone: So if there were to be statutory changes, where would be the place to put them, especially if we want this to be bulletproof, as something that isn't actually below the access...?

If I'm understanding correctly, and I'm not clear that I do, the access to information law has been interpreted as being quasi-constitutional, even though the statute itself doesn't include any reference to that effect. Is that correct?

Mr. Richard Denis: Yes, that's correct. This is what Mr. Scott was explaining.

Mr. Philip Toone: So if we were to put in amendments to perhaps enlarge or maybe clarify the access the public has, where would be the best place to put them? Would it be in the Parliament of Canada Act? Do we want to change the access to information law itself?

Do you have any opinions on this matter?

Mr. Richard Denis: As I was explaining earlier, an amendment to the Access to Information Act would only deal with the situation as it relates to access to information.

To cover in a general fashion in the statutes other situations in which privilege could be invoked or dealt with, I was proposing an amendment to the Parliament of Canada Act, which is a statute, but one that recognizes the privileges of the House, just as the Constitution does itself. The link to the Constitution and the fact that privilege has that nature would still be maintained and clearly expressed: that it must supercede, if you wish, and be recognized by the operation of the different statutes or in situations when privilege was raised as an issue.

Mr. Philip Toone: Thank you.

The Chair: Thank you.

Could this committee adopt rules that ask or compel government institutions to notify when privileged records are sought?

Mr. Richard Denis: Well, you're dealing with the separation of powers, Mr. Chair, so it would be hard for one branch to ask another to do something. However, the House—or the committee, and then the House ultimately—could highly recommend that a certain approach be taken—

The Chair: I like highly recommending things.

But carry on; I'm sorry.

Mr. Richard Denis: —because ultimately it would show that Parliament itself, at least the House of Commons, has a view about respect for its privileges. In turn, the government would have to take that into account, I suspect, but you could not force them to put in place a specific process.

We're trying to look at a practical solution that would work for both. That's the objective here.

● (1225)

The Chair: Yes, I know. We keep running up against little curves as we try to do that, though; that's the issue.

I have no one else on my list.

Madame Latendresse, do you have a quick one? We'll try to finish up at the bottom of the hour.

[*Translation*]

Ms. Alexandrine Latendresse: I apologize for coming back to this, but I wanted to see what Ms. Legault had said specifically, which led to some confusion, as I was explaining earlier.

When Ms. Legault appeared before the committee, she said this, and I quote:

> As a result, if Parliament does not want disclosure on the basis of parliamentary privilege, it certainly puts this entire self-contained scheme of disclosure under extraordinary pressure. What you will find, if you have a clear case where there's no other exemption in the act and there is an assertion of parliamentary privilege, is that there is going to be a complaint to my office. I am going to review that, and I am going to basically have to say that I think I have jurisdiction to take the matter to Federal Court if I think the claim is not appropriate. You would also have the House of Commons taking this matter to court to prevent disclosure.

She explained that she would go to court in such situations. I think we should find some mechanism to avoid this type of situation.

Ms. Audrey O'Brien: Ms. Latendresse, I must say that we were a bit disappointed by the way in which the Access to Information Act was explained when Ms. Legault appeared before the committee. Parliamentary privilege was not taken into consideration, although it is a pillar of the Constitution and a parliamentary principle that is very well recognized.

Naturally, we do not share her legal interpretation. Perhaps this is a matter of semantics, but we insist on the fact that the documents, for instance in the famous case of the Auditor General, are protected by privilege. It is not that they were confidential.

In my opinion, what Mr. Martin was saying a few minutes ago makes an enormous difference with respect to access to information. In certain cases, you may be dealing with confidential documents, such as when you sit in camera, for example. However, in the situation that was of concern to everyone, that was not the case.

There is quite a marked difference. My colleague, who is a lawyer, may have some comments in this regard.

Mr. Richard Denis: I will quickly complete the answer.

It is true that this creates pressure on the system which, as it stands, allows Ms. Legault or the commissioner to look at things from the angle of the Access to Information Act. From that perspective, we understand her position.

However, there is a broader context, that of the Constitution and the effect of parliamentary privilege. We are talking here about information that affects the House of Commons or Parliament in general, and so it is very important that the House itself have the opportunity to express an opinion, and not a third party on behalf of the House. That is the solution we are trying to devise to solve this problem.

[*English*]

The Chair: We'll turn to Mr. Martin for a couple of minutes.

Mr. Pat Martin: I'll be brief.

Thank you, Mr. Chair, and thank you for the opportunity.

The Chair: I'm writing down that you said that.

Mr. Pat Martin: I'm trying to be as gracious as I can. I still need your cooperation.

It strikes me that in our interest of defending the principle of parliamentary privilege, which I wholly support, we have to be cognizant of the fact that there's such a thing as too much privilege. There can be a surplus of parliamentary privilege.

I just read a book by Joseph Maingot on parliamentary privilege versus parliamentary inviolability. In the European Union, in some countries fugitives from justice hide behind being elected: they can be members of Parliament who can't be prosecuted, because they hide behind privilege.

The public has just about had it with concepts and notions like that. We live in a political environment. Guys like Berlusconi stay immune from prosecution while they're in office. The shroud of secrecy is over certain activities of Parliament because of parliamentary privilege.

These are not good things for us to run an election campaign on. I think we have to remind ourselves from time to time of the Open Government Act of John Reid, the former information commissioner.

Scott, I think you were probably aware of that in those days. The Conservative Party adopted it in its totality as a platform plank in 2006. He talked about “public interest override” having primacy over all other considerations in the administration of freedom of information, as he called it.

I see us drifting away from those laudable concepts.

I just had a conversation with Dominic here. Guys like David Dingwall ran afoul in trying to explain privilege to the public. It ain't no beach party trying to explain privilege to the general public. “Entitled”—he's still wearing that.

I think we should be really cautious. If there's a way to codify in legislation the notion that on a discretionary basis some activities of Parliament will be subject to freedom of information and some will be reserved, for good reason—such as what the Information Commissioner does on a daily basis in making that adjudication.... The notion of being excluded completely and—what's the other term?—exempted—

● (1230)

The Chair: Do you remember your promise of brevity?

Mr. Pat Martin: Yes. I'm pretty well done.

I would like your comments on perhaps the former law clerk's recent book on the surplus of privilege, how privilege has to be curbed and contained or it can get out of control, Madam Clerk.

Ms. Audrey O'Brien: If I may, Mr. Chairman, through you to Mr. Martin, Mr. Maingot's book on privilege and parliamentary inviolability uses privilege in the more global sense of that, where, as you so correctly point out, there are various rogues and miscreants who under the umbrella of privilege, because they're parliamentarians, can't be arrested, can do heaven knows what with impunity.

By contrast, sadly, the phrase "parliamentary privilege" is what we're stuck with here. But what it does is it basically attaches to the proceedings of Parliament and the independence of the House, so that we're stuck with the semantic thing. And I take your point about the fact that people tend to misuse it and misunderstand the phrase. I think one thing that would be helpful is that there have been suggestions.... And I believe the committee is looking at the possibility of setting up a way to deal with these third-party requests for documents so that committees, for example—very often it refers to committee stuff that went on, work or documents from committees—could be consulted about the documents in question, simply because they're proceedings of Parliament; that is to say, they have to do with the debate of the elected officials

If you take it back to its simplest, it allows members in the House freedom of speech that they enjoy on the floor of the House or in committee. To back away from the idea of parliamentary privilege because people don't understand it and think that it has been excessively used, which is only too true in many jurisdictions, I would strongly say that I don't think it's the case here. But certainly I think you have your work cut out for you in describing—and I think your report could play a very useful role in this—privilege in the Canadian context...and far too verbose clerks.

Mr. Chairman, I see you very kindly looking at the clock.

The Chair: I was only verifying that I had the same time as that.

Ms. Audrey O'Brien: I'm exhorting you to an education role.

The Chair: Far be it for the chair to ever hurry my favourite witnesses.

I think that will bring us to a conclusion.

Mr. Williamson, you're not going to let that happen, are you? There is a Conservative spot open there, so take it.

Mr. John Williamson: I appreciate—

The Chair: Your time is up.

Mr. John Williamson: No, it's not. I can at least finish the sentence.

Could you remind us what the documents were that the auditor wanted to release? I believe I know.

Mr. Richard Denis: They were essentially e-mails about witnesses' appearances, about who would be coming. There might have been some about the Auditor General's presentation, or things like this. They were very innocuous.

● (1235)

Mr. John Williamson: The point I'm trying to make is that they were innocuous, but they actually dealt with.... I think the point the clerk was making was that it comes down to a question of the free flow of information. It wasn't financial. It was that dialogue, that freedom to have that discourse—

Ms. Audrey O'Brien: Yes.

Mr. John Williamson: —openly amongst parliamentarians.

Mr. Richard Denis: And witnesses.

Mr. John Williamson: And it did not deal with the disbursement of tax dollars or the efficiency of.... I think that's an important point.

The point I raise in bringing this up is very much that as we have the ability to speak freely on the floor of the House of Commons, which we understand is our right, we have the right as parliamentarians to express dialogue amongst ourselves in the certainty, as we do in camera and elsewhere, that this right shall not be infringed upon.

Mr. Richard Denis: That's correct. Ultimately privilege is the control of the House over its own proceedings, so it's the House itself that decides how it wants to deal with privilege and what issues it wants to be changed or not. That's ultimately the question here.

The Chair: Thank you.

Half time to Mr. Reid—two minutes.

Mr. Scott Reid: Very briefly, the question, whether innocuous or not, is not something that ultimately the commissioner is in a position to decide on, nor should she be in a position to have to decide on that kind of question.

Thanks to the Access to Information Act, I am sent, the odd time, a piece of correspondence from the commissioner asking me to sign off—"Is it okay that we release the piece of correspondence that you sent to a minister?"—presumably because someone is looking to see what the content of that correspondence would be. Typically these are cases in which I have written to a minister because I found the department is not working out and doing its job properly, and the minister's personal intervention is needed.

Ultimately, whether I sign off or not—it doesn't happen all the time, but it has happened a few times—is based on whether there is anything in the item that indicates the identity of the individual in question. Sometimes you can put it together from the facts, and these can be things that are embarrassing to them. Some degree of sensitivity to this has to remain in the system or we will find ourselves abusing the...I won't say the rights or privileges, but we'll be abusing people, if we aren't careful. That would be the unintended consequence.

I'm not sure I can point to a solution for it. I think what Mr. Martin said is valid, that there is a distinction between what we're allowed to do without violating the law and what the public thinks is a legitimate limit. That's an area that we want to keep as close as we can. But we have to remember that there is this second item that won't become obvious until somebody gets hurt.

The Chair: Thank you for summing up as well as I could, Mr. Reid. That's great.

Thank you very much.

We will suspend for a minute while we go in camera.

[*Proceedings continue in camera*]

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