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Chair

Mr. Paul Szabo

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● (1540)

[*English*]

The Chair (Mr. Paul Szabo (Mississauga South, Lib.)): Order.

This is the ninth meeting of the Standing Committee on Access to Information, Privacy and Ethics. Pursuant to Standing Order 108(2), we are working on our study of the Access to Information Act reform.

Today we have three witnesses on this matter who are appearing before us by video conference. They include Mr. David Loukidelis, Information and Privacy Commissioner of British Columbia since 1999. He has written numerous decisions on ATIP, both in the public and private sector. He is also engaged in securing full implementation of the ATIP legislation in his province. He is also a professor at the University of Victoria, where he teaches ATIP law.

We also have Mr. Stanley L. Tromp. Mr. Tromp is a journalist who became very familiar with the process of information requests while a reporter for the UBC student newspaper, *The Ubyssey*. His Freedom of Information Act request for the UBC Coca-Cola marketing contract in 1995 prompted a five-year legal dispute, a successful B.C. Supreme Court appeal, and an influential ruling on disclosure by the B.C. Information and Privacy Commissioner. He initiated the FOI caucus of the Canadian Association of Journalism and was one of the founders of the group of B.C. journalists for freedom of information in 1998. His stories, informed from B.C. FOIPP Act requests, have been published in the *Globe and Mail*, the *Vancouver Sun*, the *Georgia Straight*, the *Vancouver Magazine*, *The Vancouver Courier*, and many other publications.

Finally, we have Mr. Murray Rankin. He is a partner with the law firm Heenan Blaikie, where he practises and focuses on public law issues with particular reference to aboriginal law, environmental law, and information and privacy law. His interest in freedom of information and privacy issues has enabled him to work at the OECD in Paris in its directorate of science, technology, and industry on trans-border information flows. His résumé goes on extensively, but he has been a consultant to the House of Commons committee that conducted the reviews of the Access to Information Act and Privacy Act in 1987 and 1992.

Welcome, gentlemen. I understand two of you are in Victoria, and one of you, Mr. Tromp, is in Vancouver.

We have't talked in too much detail about how we'd like to proceed with you, other than to say we would like to have your input on a number of aspects, particularly your view and assessment of the condition of the access to information system as it stands now and of the legislation, your commentary on some of the consequences of that condition, and maybe some of the solutions, both administrative and legislative, to help us understand better the urgency of the work before us.

What I'm going to do is give you five to seven minutes each to make some preliminary comments to the committee. Then I'm going to turn the floor over to the committee members to pose questions to you based on the representations you've made.

We're going to start with Mr. David Loukidelis, commissioner for access to information and privacy of B.C.

Mr. Loukidelis, please.

Mr. David Loukidelis (Commissioner, Information and Privacy Commission of British Columbia): Thank you, Chair, and thanks to members of the committee for the opportunity to join you today by video from Victoria to share some perspectives from British Columbia on reform of the access to information law federally.

My work since 1999—in the last millennium—as commissioner here in B.C. has only strengthened my conviction that a well-crafted access to information law is absolutely indispensable to the proper functioning of any democratic government. These laws are entirely consistent with the theory in practice of parliamentary democracy and have indeed become a keystone of the foundation upon which our governments are accountable and open.

Of course all laws must be periodically reviewed and amended, whether to correct errors or oversights or to keep pace with changing needs and opportunities. It has been a generation now since Parliament's comprehensive review of the law—the *Open and Shut* report, to which the chair has already referred—recommended reforms to the federal act. Since then numerous reform initiatives have come and gone.

Since the act was passed in the early 1980s, many provinces and territories have passed much more modern access to information laws. We are now, I think it's fair to say, in the third generation of access to information laws in Canada. The Access to Information Act is, plainly put, a first generation law that has unfortunately not kept pace with the times. I believe, with deference, that this committee has an excellent opportunity to recommend reforms to improve the law in important, practical, and achievable ways. I thank the committee for its interest in the law, which again I say is a key tool in a democratic toolbox.

I would like to touch now on recommendations made to you by my colleague, Robert Marleau, Information Commissioner of Canada. With two exceptions, I don't propose to speak in any detail to each of the recommendations that he has made to you. He has, of course, already done that in appearing before you. I will say that his recommendations would, in my view, introduce important features that are already found in access to information statutes in British Columbia and elsewhere across the country.

● (1545)

The Chair: Excuse me. I apologize, but one of the things I failed to mention to you is that we are providing simultaneous translation through this feed here. I would ask if you would slow down, a little bit slower than your normal talking pace, so the translation can be done effectively.

Please proceed.

Mr. David Loukidelis: Of course. I'd be happy to. My apologies.

Again, with two exceptions, I don't propose to speak to each of the recommendations that Monsieur Marleau has made to the committee. I will say that those recommendations would introduce important features that are already found in access to information laws in British Columbia and elsewhere across the country, notably, but not limited to, Quebec, Alberta, and Ontario.

In this light, his recommendations would, in my view, address many problems with the existing legislation federally, notably in the crucial area of oversight and enforcement by the commissioner's office. These are important recommendations because an access to information regime is only meaningful if there's effective independent oversight of compliance.

The first specific point that I would like to make about the recommendations before you has to do with order-making powers. At present, the Access to Information Act provides for a *de novo* review by the Federal Court of an institution's refusal of access to information, but not, as I understand it, a review for administrative disputes such as fees or time extensions.

In this context, I fully understand why my colleague has made recommendation 3 in his set of recommendations, which would provide meaningful oversight powers to his office in matters of fees and time extensions and thus complement the existing role of the Federal Court respecting refusals of access to information.

In B.C., by contrast, I have full order-making power, as do commissioners in Quebec, Ontario, Alberta, and Prince Edward Island. In effect, we function as administrative tribunals, issuing binding orders that either uphold a public body's decision to refuse access or order disclosure of more information.

Now, this role extends to appeals regarding fees and time extensions, I should add, as well as other actions or decisions of public bodies under our access law. Our orders are fully subject to judicial review by our superior court, not *de novo* appeal, on the usual administrative law grounds, thus providing an element of accountability and a check and balance on our action and decisions.

Speaking only to the situation and experience in British Columbia, we have found, over the 16 years of our office's experience, that order-making power has served, in fact, to encourage dispute resolution. Using mediation, we consistently resolve some 85% to 90% of the access appeals that come to our office.

Lawyers generally don't get involved early on. In a small minority of cases where we do hold formal appeal hearings, which are held in writing, I might note, we're able to issue a reasoned, precedent-setting decision that educates both parties, the public, and government institutions. We are, on average, taking a judicial review only a few times a year, although the possibility of judicial review, I can assure you, focuses our attention on the quality of the decisions that we issue.

My second point relates to Monsieur Marleau's recommendation 7 that the access law should apply to records relating to “the general administration of Parliament”. On that, I will say only that this is not at present the case in British Columbia, although it is in Quebec. I certainly fully support that recommendation and will be making a similar recommendation on the upcoming legislative review of British Columbia's law, which is slated to begin this fall.

Before inviting questions from the committee, I would like to make two further points, by way of recommendation, for the committee's consideration.

The first point has to do with routine disclosure of records. I have long taken the position that a comprehensive program, mandatory in nature, of routine proactive disclosure of records, without access requests, should be made obligatory by law. Such an approach of proactive disclosure has two advantages. First, routine disclosure more meaningfully implements the law's goals of openness and accountability. Second, routine disclosure could reduce the costs of freedom of information by avoiding the more expensive business of responding to specific and often repeated access requests for the same information.

[*Translation*]

Mandatory disclosure would make a major contribution to a culture promoting transparency [*Technical difficulties - Editor*] which must remain up to date and be approved by the Information Commissioner.

● (1550)

[*English*]

The United Kingdom approach has much to commend it, and similar schemes have been recommended in Quebec and British Columbia. I note, also, that in 1998 the then-President of the United States mandated creation of electronic reading rooms so that a system of proactive disclosure could be implemented. I urge the committee to recommend a U.K.-style scheme of routine proactive disclosure without access request as part of a forward-looking and cutting-edge Access to Information Act reform.

The second specific recommendation I would like to raise with the committee has to do with access impact assessments. Public institutions and businesses across Canada have, for a number of years, used privacy impact assessments that are designed to assess the impact on privacy of proposed programs, laws, or systems. They allow mitigation or avoidance of impacts on privacy from the very outset, and as governments move more and more into the electronic realm and out of the paper world, I would argue that it is critically important that openness and transparency not suffer as new electronic information systems are adopted and expand.

It is not an option for public institutions to decline to grapple with ensuring that information rights are as meaningful in relation to large-scale electronic information systems as they are in relation to paper-based record-keeping systems. Access requests under current laws increasingly test the limits of usefulness of those laws, and public institutions ought to ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the law.

The public has a right to expect that new information technology will enhance, not undermine, information rights and that public institutions are actively and effectively striving to meet this objective. A legislated requirement to conduct access impact assessments at the earliest stage possible of system design, or of the consideration of new laws or programs, will help ensure access to information is designed in, not forgotten and then later frustrated. I urge the committee to recommend that access impact assessments be made a feature of the Access to Information Act and the federal scheme of access to information.

In conclusion, I thank the committee for inviting me to appear today and would welcome your questions when appropriate.

Thank you.

The Chair: Thank you very much, Mr. Loukidelis.

We're going to hear from the other two witnesses, and that way we won't be covering the same ground with each, and we'll keep the discussion focused for all.

We're going to move now to Mr. Murray Rankin.

Mr. Rankin, please.

Mr. Murray Rankin (Lawyer, As an Individual): Thank you, Mr. Chair.

May I ask if you can hear me okay?

The Chair: Yes.

Mr. Murray Rankin: Fine. Thank you.

My name is Murray Rankin and I am a lawyer practising in Victoria and Vancouver, British Columbia. It's a great honour to have been invited to testify before the committee today.

[*Translation*]

On a personal note, I must say that greater government transparency has been an issue of concern to me since university. I helped exercise political pressure for the first Access to Information Act before it was proclaimed in force.

As a representative of the Canadian Bar Association, I completed my thesis at Harvard Law School on the subject. I was greatly [*Technical difficulties - Editor*]

[*English*]

The Chair: Excuse me, Mr. Rankin.

[*Translation*]

Mr. Murray Rankin: ... to the House of Commons committee that prepared a report entitled—

[*English*]

The Chair: Excuse me, Mr. Rankin.

Mr. Murray Rankin: Yes.

The Chair: We have a slight technical problem.

Mr. Murray Rankin: I'm sorry. May I continue? Perhaps the translation is not—

The Chair: No. I think it's the quality of the sound.

Just give us a moment.

Does the translation need to have Mr. Rankin just say something in French? Speak a little French, and we'll see how the translation works.

Mr. Murray Rankin: Perhaps I can continue in English. Would that be easier?

The Chair: Could you proceed with a few words in French and we'll see how the translation picks up here?

Mr. Murray Rankin: It may be more efficient to do it in English, if it's difficult for me as well to hear the.... Maybe I can just say—

The Chair: No, it's okay.

We've got a problem. We want to fix it, so give us a couple of words in French. Let's just see if the system works from here.

[*Translation*]

Mr. Murray Rankin: As I was saying, I helped bring political pressure to bear with respect to the first Access to Information Act [*Technical difficulties - Editor*]

● (1555)

[*English*]

The Chair: Okay.

We do have a problem that we can't fix very quickly. The sound quality in the booth is not clear enough for the interpreter. If you could proceed in English, I think we'll pick up the French translation for our francophone colleagues.

Mr. Murray Rankin: I will say that if questions are posed in French, I will do my best to answer them in that language.

Let me just say this. I have in my hand a document that was prepared in 1987 by a committee very much like yours. I was proud to have been one of the research directors on the *Open and Shut* report, as it was called in 1987.

Interestingly, on that committee was a younger member of Parliament by the name of Rob Nicholson, now the Honourable the Minister of Justice, as well as a member from Burnaby named Svend Robinson and a gentleman from Montreal, Notre-Dame-de-Grâce, Mr. Warren Allmand. They produced a unanimous report containing dozens of recommendations. I regret to say that absolutely nothing resulted from their work, now some 22 years ago. Indeed, very few legislative changes at all have emerged over the years.

On the basis of this experience, therefore, you will understand that I am not optimistic about reform efforts in respect of the Access to Information Act. Yet, in the immortal words of the poet Alexander Pope, “hope springs eternal”.

I have given the clerk of your committee a paper that I prepared in both official languages last year and delivered at the Public Policy Forum in Ottawa. It summarizes the things I would propose for your consideration.

Let me say, however, at the outset that I am in substantial agreement with most of the 12 recommendations that information commissioner Marleau has provided to your committee. And of course I am in general agreement with the draft bill prepared by the former commissioner, Mr. Reid, which I am pleased to see has been taken up by a number of members of Parliament now. However, I sincerely hope that it is a government bill that emerges as a consequence of your deliberations. In my view that will signal the necessary support from the government for long-overdue reform of this act.

My message is very much in line with the mandate of your committee, namely that the time for study is over and the time for action is now. The Access to Information Act is over a generation old, over 25 years of age. It was brought in before computers were widespread, before the use of the Internet, e-mail, and the like. As Commissioner Loukidelis has told you, it is a first-generation act that you have before you; the world has moved on, and it is time for reform.

I look forward to your questions.

The Chair: Thank you, Mr. Rankin. Your paper was circulated in advance to the committee to read. I had a look at it last night, and it is excellent, including a number of exhibits that you sent along as well. I thank you for that.

Mr. Tromp also sent us a paper that was very concise and helpful to the committee. We appreciate that advance information.

We will now move to Mr. Stanley Tromp.

Sir, please proceed.

Mr. Stanley Tromp (Coordinator, Canadian Association of Journalists): Thank you, Mr. Chair.

Greeting to the committee members. I am very pleased and honoured to be speaking to you today from Vancouver.

I shall spare you my French language skills, of which I sadly have almost none—although I am trying to change that.

I am the author of the book *Fallen Behind: Canada's Access to Information Act in the World Context*. I believe the clerk has distributed a four-page summary of the report to you, and I have also posted a French translation of it to my FOI website. I hope you may find it to be a useful guide in formulating questions.

The report and the summary largely speak for themselves, yet there are some additional points I wish to advance.

Last week the Information Commissioner spoke to you on the need to align our ATI Act with more progressive regimes, both nationally and internationally. As he said, Canadians expect a common set of access rights across jurisdictions. Indeed, that is so. The commissioner's 12 recommendations are worthwhile, but we need to go much further.

I support the passage of either of the two private members' ATI reform bills of 2008, both of which were based on Mr. Reid's open government act, but with the crucial addition of full order-making powers for record release.

Why this report, *Fallen Behind*? Most of the discussion on reform of the ATI Act had become too narrowly focused and circuitous, so I wished to consider another viewpoint on the matter. We need, instead, to continuously reconsider and reform the ATI Act in the light of changing international and historical contexts. This approach could profoundly and positively alter what Canadians come to expect, and perhaps even demand, of their own rights to information.

Most relevant here is the 1999 document entitled *The Public's Right to Know: Principles on Freedom of Information Legislation*, which describes the generally accepted international FOI standards. These principles were drafted by Toby Mendel, head of the law program of the London-based human rights organization ARTICLE 19, and were then endorsed by the United Nations.

When reading this document I was startled and then deeply troubled to discover that Canada's ATI Act, even the most recent amended version, fails the principles on 12 points. Ironically, as the world moves forward, Canada appears to be marching in the opposite direction.

I then found other organizations with similar standards, such as the Commonwealth Secretariat and the Council of Europe.

I compiled and cross-referenced every relevant document I could find; that is, the text of 68 national FOI laws, 29 draft FOI bills, 12 Canadian provincial and territorial FOI laws, and the commentaries of 14 global and 17 Canadian non-governmental organizations. I compared all of these with the current ATI Act and the Prime Minister's eight unfulfilled ATI Act reform promises of 2006. The key topics I entered into a comparative FOI Excel spreadsheet to create the “World FOI Chart”, which is this report's foundation. You can read the chart on my website.

Most Commonwealth nations have moved far ahead of Canada, even the United Kingdom, ironically, which is Canada's model for parliamentary secrecy, and which passed an FOI law nearly two decades after we did. Canadian bureaucrats, to deter ATI reform, still invoke the great tradition of Westminster-style confidentiality. If so, how do they explain why the U.K.'s Freedom of Information Act 2000 grants the information commissioner there the power to order record release, contains a broader public interest override and a harms test for policy advice, and covers a vastly wider range of quasi-governmental entities, all of these features lacking from our ATI Act?

The best Commonwealth examples for Canada to follow for inspiration are, I believe, the access laws of India and South Africa, in most, but not all, of their respects.

In the preface to my report, Mr. Mendel wrote:

> the Access to Information Act and its implementation in practice are in urgent need of reform. Otherwise, Canada's international reputation as a country with a strong commitment to participation and human rights...[is] at risk.

The incentive for transparency cannot succeed without direction from the top. Yet in this country, one cannot recall any sitting prime minister speaking out on the value of an FOI law since the short reign of Joe Clark in 1979. By contrast, U.S. President Barack Obama, on his very first day in office, issued an executive order to reverse the default secrecy position of his predecessor. The new president very sensibly wrote:

> All agencies should adopt a presumption in favour of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government.

● (1600)

The required action in Canada is simple: the Prime Minister needs to enact the eight promises on ATI Act reform that he raised in the 2006 election campaign. If fulfilled, these would raise Canada up to global standards, mainly.

I believed in the sincerity of these ATI reform pledges, and I was chastised by others as naive. Yet just after the Conservatives were elected, many observers were truly shocked to see the new prime minister so sharply reverse his previous position on transparency.

Of the eight promises, this government is very proud that half of one of them was kept—that is, the addition of crown corporations and several foundations to the act's coverage. But the other seven and a half pledges were not kept in Bill C-2, the Federal Accountability Act. ATI reform has been exiled yet again to the graveyard of needless study, and that is how the matter stands in Canada today. Additional study is not required. When the wheel works well elsewhere in the world, there is no need to reinvent the wheel here.

To be fair to all, every party has at one time or another pledged to implement open government, yet none has fully delivered. I was also disappointed that, unlike the Conservatives, the Liberals made no mention at all of ATI reform in their 2006 election platform. We still await a detailed policy statement on the ATI Act from the current Liberal Party leader.

Historically, and around the world, unelected senior bureaucrats and crown lawyers have often staunchly opposed the passage of effective FOI laws, by warning ministers of speculative and illusory harms that could occur from their supporting greater transparency. By "bureaucrats", I mean those at the senior policy-making level, not the operational level. Such, indeed, would be an example of the tail wagging the dog.

Does the Canadian bureaucracy still expect us to believe that the other nations of the world, and our provinces, have all done it wrong with their FOI laws, and that Ottawa alone, with its 25-year-old ATI Act, has done it right? The justice department's 2005 discussion paper states: "...there is nothing seriously wrong with the Access to Information Act as it is today".

This claim has very little connection with the current global reality, and it is simply incorrect. In their view, apparently, our current ATI Act, with its exemptions, and its lack of a harms test, or a general public interest override, a lack of order power, and year-long response delays, is working quite well and should not be changed. Yet is it acceptable to them that more than 100 such quasi-governmental entities are still not covered by the ATI Act, including Canadian Blood Services and the Nuclear Waste Management Organization, whose exclusion could result in harm to public health and safety? Is it acceptable to them that two weeks for an FOI response is the global legal standard, and that in Canada some agencies grant themselves a 240-day extension, which is three times the previous average? In reply to my last ATI request, it took an incredible nine months to obtain 20-year-old cabinet meeting minutes.

Instead, I ask them to act in the original spirit of the law and to help parliamentarians raise our ATI Act fully up to world standards. To do otherwise is to place Canada's cherished global reputation for democracy and human rights at serious risk.

Times have indeed changed much since 1982, and our best hope is that a strong bureaucratic support for major reform will be seen in the government's next ATI Act discussion paper. One also hopes that the current committee membership will sustain the full reform drive of the former committee. In its report of November 15, 2005, the committee stated:

> This Committee believes that after almost 20 years of pressure for its reform, there can be no further delay in the modernization and overhaul of the Access to Information Act.

As well, *Maclean's* magazine reported that Conservative MP Mike Wallace wrote to the justice minister on June 22, 2007, on his own behalf and that of three other Conservatives on the ethics committee, pressing for decisive action—nothing short of legislation—the next fall, to strengthen the ATI Act according to the party's 2006 campaign pledges. Such efforts would be most welcome again today.

In sum, it is important to recall that freedom of information is a subject that ideally transcends political parties and ideologies, and that any party in government today could be in opposition tomorrow —itself trying to use the act effectively, as it has so often done before. I ask all MPs to work together on needed reforms, with the goal of strengthening our democracy and creating a lasting legacy for their constituents.

● (1605)

On this issue indeed, the committee might even adopt the U.S. President's motto of “yes, we can”.

Thank you.

The Chair: Thank you kindly, gentlemen. I think it's been quite informative to set the table, as it were. I know the members are anxious to have a dialogue with you, so we're going to move directly to questions.

I understand that our technical problem is now remedied and that you are free to speak in either of the official languages.

We'll go first to Madam Michelle Simson, who is a new member from the Liberal Party, but very knowledgeable about these matters.

Madam Simson, please.

Mrs. Michelle Simson (Scarborough Southwest, Lib.): Chair, if I pose the question, can they each respond? Would that be acceptable?

The Chair: Sure.

Mrs. Michelle Simson: Okay.

Thank you, gentlemen, for taking time to give us your insight and your expertise in this area.

My first question is with respect to the recommendations that Commissioner Marleau has made. One of his recommendations is that access be granted to persons outside Canada, and that he would like to see some kind of web-based access.

Yesterday an Ottawa newspaper reported concerns that a web-based, globally accessible access to information system would result in bureaucratic chaos, that terrorist organizations could tie the public service up in knots, and it could also result in inappropriate information being released to groups like the Taliban or Hezbollah. Mr. Marleau didn't believe that to be the case, and I'd be interested if each of you could give me your opinion as to whether there's any basis for that concern.

● (1610)

The Chair: Who would like to start?

Mr. Loukidelis.

Mr. David Loukidelis: I'd be happy to address that.

Certainly this has not proved to be a concern in British Columbia. We find that removal of the citizenship restriction would not present those kinds of risks—in my estimation, certainly. I understand that there are differences between the kind of information held provincially and federally, but in B.C. we do not have a citizenship restriction. It is easily circumvented in any case, because there are professional access requesters or friends or family resident in Canada who are fully able to make requests on behalf of others. And certainly under the British Columbia legislation, public bodies are able to seek our authority to not respond to frivolous, vexatious, or abusive requests—requests that are an abuse of the right of access. When it comes to the substantive protections, British Columbia law fully protects law enforcement and national security interests because it contains robust exemptions that are designed to and do successfully protect those interests very fully.

The Chair: Mr. Rankin.

Mr. Murray Rankin: I would agree with what Commissioner Loukidelis has said, Ms. Simson. From my perspective, it seems difficult to believe that this could be the source of terrorism or abuse of that kind. It's been common in many parts of the United States that access is allowed electronically. It's difficult to believe, therefore, that Canada couldn't rise to the occasion. Mexico is, I think, in exactly the same position. I don't see it as being difficult.

The legislation in Canada, as you know, provides the right of access only to Canadian citizens, permanent residents, and Canadian corporations. You can imagine how easy it would be to get around that if one wanted to. So I believe Canada's laws should be brought into line with other Commonwealth jurisdictions—Australia, New Zealand, Ireland, the U.K.—and allow access in this fashion to everyone.

The Chair: Thank you.

Mr. Tromp, do you have any input here?

Mr. Stanley Tromp: Yes, please.

With respect, I cannot agree with the comments of the government member on March 9 that permitting foreign citizens to use our FOI law might harm our national security. I believe such fears are groundless for at least three reasons.

First, it is true that along with Canada, several nations, such as Pakistan and Zimbabwe, do not permit foreign citizens to use FOI laws, but the vast majority in the world do. The United States is of course at far higher risk of attack than Canada, so why has the Untied States allowed foreigners to file FOI requests since 1966? Why do all our provinces and more than 50 nations permit it, including France, Great Britain, Mexico, South Africa, and most eastern European nations? It is the accepted national standard.

Also, there are already safeguards in the ATI law, such as section 15, which would prevent the release of information that could affect national security.

Thank you.

The Chair: Thank you.

Mrs. Simson, do you have another question?

Mrs. Michelle Simson: Thank you for your answers, gentlemen.

Mr. Marleau also recommended that cabinet confidences at the federal level that are currently exclusions be instead exemptions. Apparently this is something that has been done in several provinces. Can you shed any light on how well this has worked provincially?

Mr. Murray Rankin: Maybe I can start, Mrs. Simson.

I believe I'm right in thinking that only the Canadian Access to Information Act has an exclusion. Perhaps I should explain why it matters.

No one for a moment is suggesting that a cabinet exemption is not appropriate. Indeed, all statutes that I know of have such an exemption. An exclusion, however, means that the act simply does not apply to that category of records. That is the difference.

Therefore, what matters, if there's an exemption, is that the commissioners are allowed to review the records and make the same kind of decision about cabinet records as about anything else, but remembering that it would be a very clear statement that current cabinet records, for reasons that I think are self-evident, ought not to be disclosed. However, there would be somebody there with the credibility to review that determination. That is the difference.

● (1615)

The Chair: Are there any other comments, or should we move on?

Mr. Stanley Tromp: I have one comment on that, if I have time.

In Canada's original freedom of information bill, Bill C-15 of 1979, cabinet confidences were subject to a mandatory exemption, not an exclusion. That was an enlightened early draft, and I hope the current ATI Act could return to that.

Also, nine Commonwealth nations have a mandatory exemption for records. Better yet, the United Kingdom's is a discretionary exemption, and five of those nine are subject to public interest overrides. More than 50 other FOI statutes in the world have no specific exemption for cabinet records at all. There are models abroad.

The Chair: We'll move on to the next round.

We'll go to Madame Mourani.

[*Translation*]

Mrs. Maria Mourani (Ahuntsic, BQ): Thank you. I'm here.

[*English*]

The Chair: She would like to pose a couple of questions to our witnesses as well.

Please proceed, Madame.

[*Translation*]

Mrs. Maria Mourani: Thank you, Mr. Chairman.

First of all, I would like to thank you for being here, even by videoconference, to answer our questions. I have three sub-questions and they are for you. You may answer them as you wish.

In the February 27, 2009 issue of *La Presse*, so not very long ago, the following remarks were reported:

> Lack of resources, excessive delays, inadequate training, serious deficiencies; management of access to information is in crisis in Canada, and the lack of political will appears to be its main cause, according to Information Commissioner, Robert Marleau.

It seems from what Mr. Marleau says that there is a lack of political will. I'll give you an example to put my question in context. In the February 23, 2009 issue of Trois-Rivières' *Le Nouvelliste*, what happened in the case of the listeriosis crisis is cited as an example. Canadian Press, which is the source, apparently filed a request for information. I'll read you the excerpt; you'll have a clearer understanding.

> For months, the experts say, the Conservative government delayed publication of the record of the teleconferences held during the listeriosis crisis last summer, in breach of Ottawa's own information laws. Acting under the Access to Information Act, Canadian Press submitted a request to the Privy Council Office (PCO) for all transcripts and minutes [...]

My main question is about this. If we improve the act and ensure we have all the necessary technologies but the information is blocked at its source, how can we correct that phenomenon? Recommendation 8 states that the Access to Information Act should apply to cabinet confidences. Is that enough? Is there anything we could do to improve the transparency of a government, whatever it might be? That's my first point.

My second point concerns finances. In the February 27 issue of the *Journal de Montréal*—

[*English*]

The Chair: Madame—

[*Translation*]

Mrs. Maria Mourani: Yes?

[*English*]

The Chair: You've covered a lot of ground on your first question, and although your next one may be related—

[*Translation*]

Mrs. Maria Mourani: Yes.

[*English*]

The Chair: —let's see if they understood where you're going. Let's take the first part and then we'll come back to you for the next part. Would that be all right?

[*Translation*]

Mrs. Maria Mourani: Yes, if you wish, but I also have an important point to raise concerning financing.

The Chair: All right.

Mrs. Maria Mourani: Please.

[*English*]

The Chair: But the first question I think can stand alone—

● (1620)

[*Translation*]

Mrs. Maria Mourani: All right.

[*English*]

The Chair: Okay.

Gentlemen, did you understand the gist of the concern raised by the honourable member?

A voice: Yes.

The Chair: Okay, would you like to give some preliminary response?

Mr. David Loukidelis: It's been my experience over the years in which I've been involved in access to information, including of course directly here in British Columbia, that you can have the best designed access to information legislation possible, but quite bluntly these things cost money. We have to recognize that access to information, as I said, is a key foundation stone for openness and accountability. These laws and the rights they mean to protect and advance are absolutely indispensable in our democratic system of governance, so investment in that area is critical, but I think it's also well justified, because of course we invest in other aspects of our democratic system, including elections and so on.

So I would argue that access to information merits the investment of public funds. That is quite frankly the bottom line here. We do see from experience across Canada that as well designed as your law might be, the commitment at a bureaucratic and program level beginning at the top, at the political leadership level, but also at the senior bureaucratic level, is indispensable to making sure these laws work well and there is timely and full access to information.

The one other point I would make in response is that the design of the law is of course important, as the member has correctly pointed out. Monsieur Marleau's recommendation around cabinet confidences is key. Other substantive aspects of these laws can be critical as well. Public interest overrides have already been mentioned, to allow disclosure where there's a public safety or public health threat.

Again, it's a mix of proper, substantive sets of rules, but also that commitment at the program and operational level as well, which is of course indispensable in any legislative regime.

The Chair: Further comments?

Mr. Stanley Tromp: Yes, please.

On the matter of the listeria case, I must say that in several countries there's a public interest override that records concerning health and safety must be released immediately, without delay, proactively. I wish it had been done in this case. There can be no more serious issue with regard to an ATI request than listeria, a problem that resulted in 20 deaths last year. An ATI request resulted in an important story in *The Globe and Mail* in August 2008 from briefing notes prepared by the Canadian Food Inspection Agency that found the Canadian government strongly opposed tougher U.S. rules to prevent listeria and lobbied the United States to accept Canada's more lenient standards. It is exactly that kind of thing that shows ATI use by the press at its best and most necessary.

The Chair: Thank you.

Shall we move back to another question?

Madame Mourani.

[*Translation*]

Mrs. Maria Mourani: I'm going to cite another article, from the February 27 issue of the *Journal de Montréal*. That paper filed an access to information request to obtain the travelling expenses of employees of the Canada Mortgage and Housing Corporation. The corporation demanded $21,700. The answer was that they would have had to pay an employee for 2,205 hours, which would amount to 13 months of full-time work, to respond to the request. Of course, printing documents on paper costs money. I believe it costs 20¢ a sheet.

In the recommendations we could make on access to information, we should also include the recommendation that it should be free, in particular because some people don't have any money, but would nevertheless like to know what society they're living in. Don't you think that, as a state, we should help ensure that access to information is financially available for everyone?

[*English*]

The Chair: Who would like to start off?

Mr. David Loukidelis: I could again.

I think this is an opportunity to underscore two points in response. The example of travel expenses is a good example of the kind of information that should routinely be disclosed without access request, because it is information that is generally of interest to members of the public, whose tax dollars are going to fund travel. I know this is an increasingly widespread practice. My colleagues federally do this routinely. In our own office as well, I publish my own travel expenses without request every month on the website.

As to the cost of access to information, Canadian access laws do provide for the imposition of fees for access. They are not designed to be a complete cost recovery, generally speaking, nor should they be, because of the public benefit in making information available for accountability and transparency reasons. Even in those cases where fees are imposed, most statutes, certainly the second and now third-generation laws in Canada, have really comprehensive schemes for relief from fees, a public interest waiver of fees. In British Columbia one can have fees waived if you're not able to pay, if you simply cannot afford to pay. Our office is very active in overseeing decisions on fees and ordering the reduction or refund of fees on those important grounds.

● (1625)

The Chair: Is there any further comment?

We're going to move on to Mr. Siksay now, and we'll be able to come around again.

Mr. Bill Siksay (Burnaby—Douglas, NDP): Thank you, Chair.

Thank you, folks, for attending today and for your testimony. I hope that the next time we hear from you is when we're examining actual legislation that's before the committee, having made it out of the House to the committee.

My first question concerns the order-making power. Mr. Loukidelis and others, you addressed this today. Mr. Marleau's recommendation around order-making power is really only a half measure in some of our minds. It doesn't go the full distance in terms of order-making powers. Certainly it wouldn't match your order-making power, Mr. Loukidelis. It was good to hear you say that you saw your ability to order the release of information as actually a positive and you saw that it stimulated dispute resolution and you thought it might actually help the process. I wonder if you could say a bit more about that.

The Chair: Mr. Loukidelis, could you hear the question?

Mr. David Loukidelis: Yes, indeed.

Mr. Murray Rankin: I heard the question very clearly. If I may, I can proceed to answer.

Mr. Siksay, this is a hobby horse of mine, I must confess, so I welcome the question a great deal. To me, a statute that does not have full order-making power is a bird with one wing, and a crippled bird at that. I do understand that the recommendations made by Mr. Marleau are essentially a compromise on the issue of order-making by which he would seek powers to deal with what he calls administrative matters and make final orders on that, and he would have a different role on what I call the main event, the ability of the commissioner to order the government to release information. To me, this is an absolutely integral part of the statute. Most meaningful statutes, if not all meaningful statutes I'm aware of, have the ability for someone to order the government, after due deliberation, to release the record. In the United States that's the courts, and in most provinces, five of them at least, it is the commissioner who has final decision-making authority—always, I hasten to add, subject to ordinary laws of judicial review of jurisdictional error or other errors that the commissioner might make along the way.

I do not believe the record shows that has caused an undue legalization of freedom of information in Canada. On the contrary, in British Columbia 85% to 90% of matters are dealt with by mediation without resort to courts, and maybe one or two judicial reviews a month is all that we have. That record is not dissimilar in other provinces, such as Ontario. So in my opinion, this is an absolutely central feature that must be part of your reform package for it to have any credibility.

Lastly, I will simply say that 22 years ago a unanimous committee like yours made just that recommendation.

● (1630)

The Chair: Are there any further comments?

Mr. Tromp.

Mr. Stanley Tromp: If I could add to this briefly, it's worth noting that the FOI statutes of 16 other jurisdictions grant an independent administrative appeal body the power to order record release. This includes Mexico, India, New Zealand, Scotland, and the United Kingdom.

Some critics say we don't need to amend the law because all we need to do is better enforce the ATI law we have now. That is not correct, because the great paradox, and a sort of catch-22, is that the law cannot be run effectively unless it is first amended to put enforcement powers into the law.

Mr. Bill Siksay: Thank you, folks.

On a number of occasions you mentioned the way the law in the United Kingdom functions. There were two issues there, and I wonder if you could say a bit more about that. I wonder if you could say a bit more about how the discretionary exemption on cabinet confidences works in Britain. Has it been successful? Are there issues that have arisen from that? How long has it been in place? Could we have a little bit of background about that kind of thing?

The other issue might be the approach to routine disclosure that has been adopted by the United Kingdom: proactive routine disclosure.

Mr. David Loukidelis: My understanding is that in the United Kingdom the discretion exists for the government to decide whether or not it wishes to assert cabinet privilege, in effect, under the legislation. Always having regard to other considerations, to public interest considerations, it is open for cabinet—again, it is my understanding—in response to a freedom of information request to choose to disclose what would otherwise be shielded as a cabinet confidence. This has been the case since the law came into force in early 2005.

The review that is available for that, of course, lies first with the Information Commissioner, who makes a determination on these issues, with an appeal, in that instance, to the specialist information tribunal and then the possibility of judicial review after that. A good example of how that review process has worked over the last year or so is that my colleague there, Richard Thomas, in February of 2008 ordered disclosure of the minutes of the cabinet meeting at which the decision was taken to go to war in Iraq. That decision was upheld earlier this year by the information tribunal.

Ultimately, it would fall to the government to decide whether to seek judicial review or issue a ministerial notice declining to respond to the binding orders at two levels, and ultimately having to be accountable for that in Parliament.

Mr. Murray Rankin: On your second question, concerning routine disclosure, Mr. Siksay, it's a classic example of how we are not using the technology that has emerged since the act was passed many years ago.

If two or three people ask for the same record and the government has chosen to disclose it, perhaps severing certain things along the way, why on earth can't that be put on the Internet for all to see? It's a classic example. Why do we have to reinvent wheels? That's an example of routine disclosure that makes sense.

The Chair: Thank you very much.

We're going to go now to Mrs. Block.

Mrs. Kelly Block (Saskatoon—Rosetown—Biggar, CPC): Thank you very much, Mr. Chair.

I would also like to thank our witnesses for joining us today.

It has been referenced that a government's commitment to disclosure and the impact this has on legislation can really impact on its effectiveness.

In his testimony before this committee on Monday, the Information Commissioner told us that the Conservative Federal Accountability Act was the most significant reform to the Access to Information Act since its inception in 1983. I was wondering if each one of you would comment on that and if you agree with Mr. Marleau's assessment.

Mr. Stanley Tromp: I am pleased to see crown corporations and their subsidiaries and several foundations added to the coverage in the accountability act. This accounts for about one-half of one of the eight promises for accountability. Of course I can quote the other seven and a half that were not fulfilled, such as those that a Conservative government will "implement the Information Commissioner's recommendations for reform of the Access to Information Act; give the Information Commissioner the power to order the release of information; expand the coverage of the act to all Crown corporations, Officers of Parliament, foundations"—

● (1635)

Mr. Pierre Poilievre (Nepean—Carleton, CPC): Point of order, Mr. Chair.

Mr. Stanley Tromp: And so on.

You perhaps have the list of eight pledges before you. I would hope those would all be fulfilled.

Mrs. Kelly Block: So that's a yes?

Mr. Murray Rankin: Ms. Block, maybe I could just add to that answer.

The Federal Accountability Act was indeed the largest reform to the law since its inception. One of the things it did was expand the coverage, as Mr. Tromp has noted, to other crown corporations. There are many that are still not covered by the act.

The other noteworthy thing is they have covered the Office of the Information Commissioner itself. For the first time, they are subject to the legislation. And interestingly enough, there is one wrinkle that might be of interest to you. As a result of that change, the commissioner has had to figure out who would deal with issues concerning his disclosure of records or problems in his office, just as he is the oversight body for the other agencies of government. And he has appointed a retired Supreme Court of Canada judge to serve in that role.

I would commend to this committee the possibility—and I wrote about this in the report that is before you that I prepared earlier—of appointing what's called an adjudicator, where the cabinet would appoint somebody like a retired Supreme Court of Canada judge, who would have that responsibility, not on an ad hoc basis, but on a permanent basis, as is done, for example, in Alberta and British Columbia. That might be something that would be of value as well.

The Chair: No further comments?

Let's move back to Mrs. Block for another question.

Mrs. Kelly Block: Your report, *Fallen Behind: Canada's Access to Information Act in the World Context*, makes mention of the promises made by this government in its 2006 election campaign and repeatedly criticizes the government for not achieving 100% of its promises thus far. Yet I think you would agree that this Conservative government has taken action and it is reforming the ATIA by covering 69 new institutions in ways the previous Liberal government never acted on. Isn't that true?

Mr. Stanley Tromp: Yes, Madam, that is in fact true. I wish they would go further and cover the at least 100 that are not covered, such as the nuclear waste industry and the Canadian Blood Agency as well.

It was a step forward, and we do appreciate that. And of course no FOI advocate ever expects to get everything they want quickly. It does take some time. But I believe that 20 years of study is quite long enough, and the global standards are very clear.

Mrs. Kelly Block: Thank you.

The Chair: Okay, now we're going to move to Mr. Poilievre.

Mr. Pierre Poilievre: I just wanted to be on the list.

The Chair: Okay. Mr. Poilievre will be following Ms. Coady.

Ms. Siobhan Coady is from Newfoundland, so east is going to meet west here.

Carry on.

Ms. Siobhan Coady (St. John's South—Mount Pearl, Lib.): Thank you.

Thank you for your quite comprehensive interventions here this afternoon. I thank those who are presenting today. I especially want to thank British Columbia. I actually sat on a review panel for the Freedom of Information Act for Newfoundland and Labrador, and they were quite helpful at that time as well, so thank you for that.

I just want to go back to a question my colleague asked with regard to the Access to Information Act as it applies to cabinet confidences. I know you talked about the access for the commissioner with regard to reviewing cabinet confidences, but I wonder if you think there should be parameters around that access in terms of time limitations or a delay before you actually have access to cabinet confidences. I know that tends to be a shield for governments with regard to saying it's a cabinet confidence, but do you see any challenges with having a carte blanche access?

Thank you.

Mr. Murray Rankin: I see no need for the kinds of restrictions that you might contemplate—timelines or the like. To me, it's critical that an independent officer have the ability to reassure applicants and Canadians at large that they have reviewed the records. I'm not for a moment suggesting when I say this that the records ought to be disclosed. There's a big difference. If the exceptions apply—law enforcement, national security, personal privacy, or the legitimate business of cabinet—then I think that clearly those records should continue to be withheld.

What I do say, though, is that there needs to be the credibility that general oversight provides. That credibility is sadly lacking at the federal level, certainly as compared to the United Kingdom and most of the provinces of Canada.

I think it's an essential feature that we reverse this compromise that was put in so long ago in our law and that is unprecedented anywhere in the world.

● (1640)

Mr. David Loukidelis: If I could just add to that, it is a feature of these exemptions for cabinet confidences and other Canadian access laws that there are certain parameters drawn around them. On the question of timelines, there are very often so-called sunset provisions, after which it is not possible to rely on the exemption.

As for other provisions, there are cases, for example, when the government has publicly cited a decision that was taken in cabinet. In that instance, some of the protections that might otherwise exist are carved back. Obviously, it lies with the particular legislature to decide where those lines should be drawn.

Ms. Siobhan Coady: Thank you.

I'd like to move to a second question. This is about extensions beyond 60 days. I would like you to review and talk about that a little bit. One of the questions is about the approval of the Information Commissioner being required for all extensions beyond 60 days. I know that when I ATIP, typically I get back a response that they're looking for an extension. Could you comment on your provincial acts, specifying in detail what constitutes reasonable grounds for an extension?

Mr. David Loukidelis: Yes, I think one of the key tools my office has in its ability to police, if you will, the question of delayed responses to access to information requests is our ability to oversee extensions. As it stands, there is a 30-day response time under the legislation. A public body may, on its own account, extend for a further 30 days, but they can only have a further extension beyond that with my permission beforehand.

In the case of both extensions, whether it's the first extension by the public body or the one we approve, they are on limited grounds—a large number of records is requested, or there's a need to consult with other public bodies. Essentially, the grounds are complexities related to the request itself. In the case of a further extension, I can extend on further grounds that I consider appropriate. But that, again, limits the number reasons overall to appropriate reasons for extension. That second look we take on the further extension allows us to say yes or no and therefore gives an incentive to public bodies not to take excessive time extensions.

Ms. Siobhan Coady: Thank you.

The Chair: Thank you.

We'll go to Mr. Poilievre, please.

Mr. Pierre Poilievre: My question is for Mr. Tromp.

Mr. Tromp, you had some praise for President Obama and his declaration on access. I think all of us are excited about the announcements that are coming out. But I'd like to cut through the hype. What exactly did he do on access to information that has so excited you?

Mr. Stanley Tromp: Well, his declarations are on the White House website. He has issued a direction from the very top, which one would hope could be done in Canada, as well, that "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure because errors and failures might be revealed or because of speculative or abstract fears."

What he did was reverse the presumption by his predecessor that if in doubt, information should be withheld. He reversed that to say, if in doubt, information should be disclosed. That is a clear reversal of policy, and that is a major step.

Mr. Pierre Poilievre: Does the Government of Canada have any default position? That's a yes or no question.

● (1645)

Mr. Stanley Tromp: The other speakers can speak better to that, but the informal default position seems to be more closed than open, overall.

Mr. Pierre Poilievre: Okay.

I always appreciate when someone makes a declaration and that declaration is followed by a great deal of exhilaration. I'm just wondering, if we were to make such a declaration as that, it doesn't seem like that kind of declaration is very hard for anyone to make. But if that would be all it would take to—

A voice: If I may....

Mr. Pierre Poilievre: No, you may not. I'm still speaking to Mr. Tromp.

If that is all it would take to get the same kind of excitement from opinion leaders like you, maybe all we need to do is make a declaration.

Mr. Stanley Tromp: Well, I agree that it would be a good start, and it would be great to see the Prime Minister try it and see what occurs as a result. I think it might be positive.

Mr. Pierre Poilievre: Okay. What we've done here, by contrast to a declaration, is add 69 new bodies, agencies, and organizations to the act and broadened its scope. I see that as being more substantive than a mere declaration of intent, but you may disagree. That's why it's so great we live in a democracy.

Mr. Murray Rankin: It's not a mere declaration but what is called an executive order, and therefore it's binding on the U.S. administration. It's a formal EO that was issued by the President of the United States; it therefore has an effect on the way in which executive discretion is exercised by the agencies to which the act is subject. I don't want members to think it's a mere declaration by President Obama; it's a formal executive order.

Mr. Pierre Poilievre: All right. That clarifies why we're all celebrating.

Thanks very much.

The Chair: Madame Thi Lac is next. She is a member from Quebec.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac (Saint-Hyacinthe—Bagot, BQ): Gentlemen, thank you for taking part in our videoconference today. I particularly want to thank Mr. Rankin and the Commissioner, who spoke a few words in French for us francophones on the committee. I appreciate that enormously and I wanted to thank you for it.

Commissioner, my first question is for you. Before writing and making his recommendations, Mr. Marleau said he had consulted people working in the field. Were you consulted by Mr. Marleau?

[*English*]

Mr. David Loukidelis: I've had numerous discussions with my colleague, for whom I have great respect, since he became Information Commissioner and in his previous post. These are matters we have discussed generally in sharing experiences and information between our jurisdictions on how the law is framed in British Columbia, how it works here, and vice-versa. Yes, we have had discussions in this area.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac: Mr. Marleau recommends that the commissioner be granted discretion on whether to investigate complaints. In another of his recommendations, he suggests that complainants should have direct recourse to the Federal Court for access refusals rather than comply with the current complaints process.

Isn't there a risk of increasing the number of complainants by adopting these two measures? If the commissioner refuses to investigate and the requester turns directly to the Federal Court, doesn't that add a tool that will complicate requests and complicate the system? I would like to hear what you have to say on that subject, commissioner.

Mr. David Loukidelis: Thank you very much for that question.

[*English*]

In the second part of your question you expressed concern that perhaps a discretion on the part of the commissioner to not investigate could increase the number of Federal Court actions. When we're talking about court appearances and court proceedings, there is always the issue of cost and whether the courts would be accessible to more complainants, in view of what it costs to retain counsel, file proceedings, and pursue them.

In British Columbia we have a discretion to not investigate. That applies on the access to information side as well as the privacy protection side—I play both roles. Of course we only decline to investigate a relatively small minority of cases, and we only do so consistent with administrative law principles. In good faith and acting on relevant and rational grounds, we may decline to investigate something that may be within our jurisdiction, but for a variety of reasons there may be another remedy through another process where it's more appropriate to pursue that remedy, or we will use other grounds to decline to investigate. Again, that applies to a small minority of cases, but it is an important feature of our law that we have the ability to turn away those cases that deserve to be turned away.

● (1650)

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac: According to the answer you've just given us, if people turn to the Federal Court, there will be costs with that. did I understand correctly?

[*English*]

Mr. David Loukidelis: That's right, but simply to say that if people were turned away from the commissioner's office, the question would be how many more of them would be going to the Federal Court, given that it can be quite expensive to do so. I would wonder whether in fact you wouldn't see a big increase in cases there because of the costs involved.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac: Precisely, isn't there a risk of doing the opposite of what we want to do? Instead of improving the act to make information more accessible, isn't there the risk that we'll deprive certain persons of access to information, since the cost will be exorbitant for those who have to go to Federal Court? I believe we are doing the opposite of what we would like to do, that is to say make the system much more accessible. On the contrary, we're going to complicate it. People who want to request information will be deprived of it because they won't be able to afford it.

[*English*]

Mr. David Loukidelis: Certainly the opportunity to make requests and receive information would not be impacted by the recommendation, as I understand it. I should underscore that although we have a discretion not to investigate cases in B.C., we do that only in the clearest of cases, and it is a small minority of cases. So we turn away very, very few people. It is a valuable tool for us. But in the vast majority of cases we still take on the appeal, so that we fulfill our role to vindicate the public's right of access to information by reviewing administrative decisions to deny access.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac: As the Privacy Commissioner of British Columbia, you have even broader executive authority. That authority is not limited to merely administrative matters. Does the British Columbia act state how you will exercise your decision-making authority and the criteria on which it is based?

[*English*]

Mr. David Loukidelis: The order-making power extends both to the access to information and privacy protection provisions.

In relation to access to information, if someone who has sought access to information is denied access or a fee is imposed that they believe is unjustified, or if there's another inappropriate action by the public body, they can appeal to us. It's called a request for review. We mediate settlement in about 85% to 90% of the cases, depending on which year you're looking at. If the matter doesn't settle, we send it to a formal hearing, which is done in writing. I then have the ability to make findings of fact and law, based on evidence, and essentially arrive at a decision on whether there should be more access granted or whether the public body was justified in denying access, based on the provisions of the law. I then can order the public body to disclose more information and I can order it to reconsider its decision; I can uphold its decision, and in some cases I do a bit of both: partially upheld on certain exemptions, or entirely on some exemptions, and perhaps ordered to disclose more information in other parts of the request or the actual appeal. That order is binding, and must be complied with, subject only to judicial review.

So, really, it's a full *de novo* review of the decision of the public body with that binding order to compel the public body to do what is set out in the order.

● (1655)

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac: I haven't asked the other witnesses here any questions, but I want to tell you that your evidence has shed a great deal of light on a number of my questions. Thank you for being with us this afternoon.

The Chair: Thank you, madam.

[*English*]

We're now going to move to Mr. Bob Dechert, from Ontario.

Mr. Bob Dechert (Mississauga—Erindale, CPC): Thank you, Chair.

Mr. Loukidelis, I wonder if you could share with us your experience in British Columbia with respect to the percentage of users of the B.C. access to information system that are commercial organizations, to your knowledge.

Mr. David Loukidelis: I don't have the numbers at my fingertips, and I ought to. I apologize for that. I can make them available to the committee afterward, if that is the wish of the committee.

Mr. Bob Dechert: Sure.

Mr. David Loukidelis: But if you include media—

Mr. Bob Dechert: Could you take a guess at the numbers, including media and not including media?

Mr. David Loukidelis: Yes, I was going to say if you include media as commercial requesters, you're probably talking about 8% of all requesters. If you take the media out, you're probably left with 4%.

The vast majority of requesters under the B.C. law are actually individuals seeking access to their own information. There are political parties, advocacy groups, interest groups, and commercial applicants as well.

Mr. Bob Dechert: Mr. Marleau mentioned to us last week, I believe, that a significant number of complainants he deals with under the federal system are what he described as “data brokers”. I understood that to mean commercial organizations that gather information for their clients and resell it to them. Perhaps that points out a difference between provincial areas of jurisdiction and federal areas.

If that were the case, would you agree that commercial organizations, such as data brokers or lobbyists or even lawyers in private practice, as I was before coming to Parliament, should pay a reasonable cost of providing that information, given that they're going to resell it to their clients in any event?

Mr. David Loukidelis: You're quite right to point out that the situation federally does differ from the situation in British Columbia in terms of the proportion of commercial requesters.

Under the British Columbia system, the schedule of fees that are set out in regulations to our law enables public bodies to charge commercial requesters—requesters who make an access request for commercial purposes—the actual cost of providing access, whereas with other requesters the fees are not based on cost recovery.

Mr. Bob Dechert: That's very interesting. I don't believe the federal system currently provides that kind of distinction between commercial and non-commercial users. That's certainly something I think we should examine.

I wonder if you could also comment on what percentage of the cost of providing information in British Columbia is recovered through user fees. And perhaps you could comment on the difference between commercial users and non-commercial users.

Mr. David Loukidelis: My clear sense of the proportion of actual cost that is recovered from fees is that it is minimal. Certainly it's not substantial.

I think that's for a variety of reasons. Some public bodies—and we do cover over 2,000 of them, at all levels in British Columbia—simply have a policy decision that they're not going to charge for access to information. Again, we have a high number of individual requesters seeking their own personal information, and under our law they cannot be charged for access to their own information. In the main, as a key component of the democratic governance system that has evolved in Canada, I think it's also a recognition that these laws are not intended to be on a commercial footing. That's subject to what I said about commercial requesters, of course.

Mr. Bob Dechert: Thanks very much for that.

I'd like to pose a question to Mr. Rankin.

Mr. Rankin, I know you are a lawyer in private practice, as I was. Certainly in my practice, over 25 years, I was often in the situation of requesting information on behalf of clients for preparation of memos of law, and also preparation of cases.

Could you comment on your view about cost recovery in relation to information from the government in the same way that lawyers often pay, for example, fees for legal search services when they're putting together memos of law?

● (1700)

Mr. Murray Rankin: Thank you for your question.

Of course many lawyers, as you point out, use the legislation as a discovery tool. They may get a certain amount of information from traditional civil litigation rules involving document discovery or examination for discovery, but often when the government is a party, getting information from the relevant agencies is critical to the case. It serves as a check on what you might have received through the other sources I mentioned.

I haven't given any thought to the fees that should accompany that. If it were the lawyers themselves, you might treat them differently than if it were their clients, with the clients having a right to information.

I wonder if we would create an unnecessary barrier by subjecting the lawyers to a different set of rules from what their clients are subject to. It might be inefficient to regulate that.

However, I must say that's a question I've never put my mind to.

Mr. Bob Dechert: Do I have any more time, Chair?

The Chair: I think we're going to have to move on.

Mr. Bob Dechert: Thank you.

The Chair: Let me advise the members where we are right now. I have Mr. Siksay, Madam Simson, Mr. Dreeshen, and Mrs. Mourani. Then I think we'd also like to give our witnesses an opportunity for final words. And then we have one other item, the motion with regard to the Oliphant Mulroney-Schreiber inquiry that we have to deal with before we leave. If we put all that in perspective, I think we will just get it in, if we keep everything nice and tight.

Mr. Siksay, please.

Mr. Bill Siksay: Thank you, Chair.

This is probably a question for Mr. Rankin, given that it relates to a complaint that Mr. Tromp has before Mr. Loukidelis. It's on the issue of crown copyright and how it's been used to seemingly place limitations on the use of information obtained under access to information.

Mr. Rankin, can you tell us whether you have any concerns about this? I gather it's a Copyright Act issue, not necessarily an ATI issue. Would it be an appropriate area for the committee to review as well, in your mind?

Mr. Murray Rankin: Thank you. As you suggested at the outset, I won't speak to the particular case to which you alluded. I must say that I find disturbing any use of crown copyright to thwart rights that are provided to citizens of Canada under the Access to Information Act or its provincial equivalents. It seems to me wrong-headed. I don't understand it.

If there is an issue here that needs to be addressed, then putting a simple section in the Access to Information Act that says, "notwithstanding any rights under the Copyright Act that might pertain to crown records, the rights are as follows".... If that's necessary to do, let's do it.

Mr. Bill Siksay: Thank you.

I want to ask also about the whole issue of the requirement to keep records and of standards in records-keeping. I understand from comments that Mr. Marleau made to us that this may be an issue of the archives act federally, but I'm wondering whether the experience in British Columbia tells us anything about what should be done or, if you have suggestions from your experience of the federal act, whether there are shortcomings in it or whether this is something that should be included in ATI reforms specifically.

That question is for anybody.

Mr. David Loukidelis: I have recommended in the past that there be a legislative duty to document here in British Columbia—not, I would argue, an onerous one by any means, but some duty on the part of public servants to record actions and decisions and reasons therefor. One can control this by prescribing certain criteria that would surround the extent of it. Again, if you were making a policy decision or taking a decision to embark on a program or cancel it, it seems to me there should be some duty to document. This is not just a question of creating records for the purposes of openness and accountability. One could argue, and I do argue, that it is a question of good governance and good government operation, and it fits into this larger context that I believe archivists and librarians and others are deeply concerned about in relation to the information management and information holdings of governments across the country, and to the state of information management legislation and practice here in Canada.

● (1705)

Mr. Bill Siksay: I have one final question, Chair.

Mr. Rankin, in the paper of yours that was distributed to the committee, you talk about the issues around outsourcing and alternative service delivery whereby government services have been outsourced to private sector organizations, and about ATI possibly not applying in those areas. Could you talk about whether you have any experience of how this is handled federally and tell us, if you have any comments on that situation for our deliberations around access to information?

Mr. Murray Rankin: Thank you. The issue is rather straightforward. If the government chooses to outsource certain functions that in the past have been government functions, does the law continue to apply? That's the threshold question that is being addressed.

Commissioner Loukidelis addressed that issue, raising concerns about it to a committee that studied the B.C. legislation, and the government now routinely confirms in contracts that public bodies and their contractors, when they produce records, are subject and continue to be subject to the legislation. I think that needs to be confirmed in legislation.

There are a number of ways it can be done. Certain American states define by statute what are public records and public services, even if they're provided by an outsourced government service provider. To me, as we talk about this being third-generation legislation that we hope your committee will recommend, this is an issue that really ought to be addressed.

There are some additional things in my paper that I would commend to you for consideration.

The Chair: Thank you.

Madam Simson, please.

Mrs. Michelle Simson: Thank you.

I just have one final question, and I want to make sure that I'm summing up what I've heard from all three of you gentlemen. I appreciate it; I have gotten a great deal of insight into this.

I believe I heard Mr. Tromp say that 20 years of studying this particular issue of reforming the act is more than enough. What I've taken away is that, really and truly, this is an easy fix, but it requires political will. Am I safe in assuming that, because we're lagging so far behind the rest of the world in access to information, you would categorize this as a significant human rights violation—to not act?

Mr. Murray Rankin: I'm not sure whether that's directed to Mr. Tromp, but may I just—

Mrs. Michelle Simson: No, it's to all three of you.

Mr. Murray Rankin: Thank you for your comments. I agree with you entirely about political will. It's a matter of great sadness that Canada has not been able to rise to the occasion for over 25 years. I commend the current government for the Federal Accountability Act and the extension of the law to a number of additional agencies. I think that needs to be said and reinforced. However, it is a disturbing fact that our law does not pass muster vis-à-vis other Canadian laws or other international laws. We simply need to acknowledge that we've fallen far behind, and that's why so many of us are delighted that your committee has taken on this challenge.

Our courts have said that access to information is a quasi-constitutional right. The human rights acts of Canada are also termed quasi-constitutional. To give you an idea of just how important this is, access to information is of the same order of importance, our courts have said, as human rights legislation. That is, I think, why your question is so well placed and why the work of your committee is so important and timely.

Mr. Stanley Tromp: I'll just add that the required action is simple. The Prime Minister in 2006 had the foresight to see what needed to be done, in the eight promises on ATI Act reform that he raised in the election campaign. If he fulfilled these, they would mainly raise Canada up to global standards.

If he had the foresight to see that in 2006, then why not today?

The Chair: Did you have any further questions, Madam Simson, or would you like us to move on?

Mrs. Michelle Simson: By all means, you can move on.

The Chair: Okay.

Next is Mr. Dreeshen, please, from Alberta.

● (1710)

Mr. Earl Dreeshen (Red Deer, CPC): Thank you very much, Mr. Chairman.

And thank you very much, gentlemen, for appearing before us today.

I have a couple of questions, and one of them regards what you mentioned, political will. We've been in a minority government situation, and I suppose as a new member I'm starting to see how some of this works and how easy it is to get some of the things through that you might want to have happen.

We were speaking with Mr. Marleau a few days ago about the report cards. They are somewhat skewed by the volume we have. It was mentioned earlier that the committee was told there has been an overwhelming number of complaints by three individuals, and in fact that nearly 50% of all the requests come from 10 individuals. You mentioned not having that same kind of concern as far as British Columbia is concerned. If you had that type of problem, what strategies would you be using and what strategies would you suggest we use to handle this concentration of activity?

Mr. David Loukidelis: You're quite correct that we don't have in British Columbia, to my knowledge, anything approaching that small a number of requesters being responsible for that large a proportion of requests. What we do have is a fairly comprehensive set of remedial provisions that allow my office, on request by a public body, to authorize that public body to not respond to requests that are frivolous or vexatious or an abuse of rights under the act, or that are systematic and that unreasonably interfere with the operations of that public body. This is a remedy that is not often sought by public bodies, but it is one we've certainly been prepared to use in those cases where there is clearly an abuse.

That's not to suggest, I should be clear, that the situation vis-à-vis three or four requesters, whoever these people might be federally, is an abuse. It may just be that at a particular point in time there is interest in a certain variety of areas in the federal government and that these individuals are being assiduous and diligent in seeking access. I simply can't comment.

Mr. Earl Dreeshen: The other question I would like to ask is that this committee has been reviewing the 12 recommendations made by your federal counterpart, and we've noted in the report, *Fallen Behind: Canada's Access to Information Act in the World Context*, that you recommended opening this up to everyone, not just Canadian citizens and others with direct ties to Canada. Given that Canadian taxpayers fund this program—not users, but the Canadian taxpayers—do you think it's appropriate for a Canadian request to be given priority over requests made by foreign nationals who don't pay Canadian taxes and who don't cover the costs of their requests?

A voice: Are you addressing that to me, Mr. Dreeshen?

The Chair: It's an area for consideration, obviously. I'm sure there will be some debate on that.

Does anybody have anything specific about foreign nationals versus citizens or landed residents?

Mr. David Loukidelis: The only thing I would mention is what I referred to already, which is that when you have a citizenship or residency restriction, they're relatively easily circumvented. You can always find somebody who qualifies who will make the request for you. And I'm not sure how you would police or enforce compliance with that restriction.

Mr. Earl Dreeshen: And I suppose that's where I'm coming from with the question I had previous to that. When you do have, in the federal system at least, people really pushing the system and trying to get so much from the departments, I'm just curious whether or not that particular problem would continue. Do you have any comment on that?

Mr. David Loukidelis: One perspective goes back to the question of fees. It's commonly said that you don't want to see fees for access to information become a barrier to appropriate access. But a system or a regime of appropriate fee imposition rules under an access law can, to some degree, address concerns such as those you've raised, subject always to full remedial oversight by a commissioner who can relieve against inappropriately imposed fees that would improperly raise a barrier to access to information.

● (1715)

Mr. Earl Dreeshen: Thank you.

The Chair: We will have a quick question from Madame Mourani.

[*Translation*]

Mrs. Maria Mourani: Thank you, Mr. Chairman.

I would like some clarification. I'd like to go back to the listeriosis tragedy. You said that, in that kind of case, we should be proactive in the disclosure of information. In concrete terms, what should we include in the act, what should we do so that the Privy Council Office is not only proactive in regard to this kind of request, but also discloses the information. I get the impression the Privy Council Office is a little above the law in this very particular case.

[*English*]

Mr. David Loukidelis: If I may, I can speak to the B.C. legislation, of course. And we do have, as Mr. Tromp mentioned, an obligation in the legislation—the so-called public interest override—that applies directly to public bodies and that requires them, without delay and without access request, to disclose to the public or an affected group of people information about a risk to public health or safety.

It could include an issue such as the one you have raised. It's used quite regularly here in B.C. to warn the public about dangerous offenders, usually violent sexual offenders, who are being released from custody at the end of sentence and who are at high risk of reoffending.

My office gets those notices, and I've yet to disagree with one of them, after ten years. That's an example of how public interest notification can be used. But it is a positive obligation, without access requests, to make that information known publicly, so that the public is warned about risks to health or safety.

Mr. Stanley Tromp: Indeed, I could add that of 68 nations with FOI laws, there are at least 38 with some form of public interest override, and most of those include health and safety matters. So it is a standard.

[*Translation*]

Mrs. Maria Mourani: All right. Thank you.

[*English*]

The Chair: Thank you.

And finally, I believe Mr. Dechert had a brief follow-up.

Mr. Bob Dechert: Thank you, Mr. Chair.

Mr. Loukidelis, I'd like to go back to the line of questioning we were discussing earlier, about fees. Mr. Marleau mentioned that about three individuals have really overwhelmed his complaint system federally.

And I know that in British Columbia you have a system of distinguishing between commercial and non-commercial users in terms of costs. I wonder if you could comment on the possibility of requiring or instituting a regime of escalating fees for frequent users of the access to information system, especially in cases where you might consider it to be abusive. But in terms of cost recovery, it seems to me that people who just continually use the system should probably pay more than the average person who is just looking for a bit of information on their own case.

Mr. David Loukidelis: I'm quite sure that regardless of what I say, the frequent users would probably argue for a volume discount. But certainly my remarks earlier were directed to a situation where you had a small number of requesters, as you just said, making a large number of the requests to the institutions. And it wasn't, of course, addressing what Robert Marleau was speaking about, which is the small number of appellants who are frequent customers, if you will, in terms of his appeal process.

I think that the situation in B.C., where commercial applicants are charged full freight, if you will, when they're making requests for commercial purposes, would probably deal with a number of those kinds of requesters. I don't know that I would support an escalating fee structure to be a disincentive to the exercise of the right of access. Frankly, from a policy perspective, that's certainly not the choice taken here. And I think that what ultimately might happen, of course, is that people will find work-arounds. Similar to the situation with the residency or citizenship requirement, you'll find those people who are engaged in this having requests made by other individuals so that they get their numbers of requests down and therefore escape any escalating fee structure. So I'm not sure how well that could be enforced as well.

Mr. Bob Dechert: On a bit of a different tack, I wonder if you could comment for us on what in your view is the Canadian public purpose served by allowing foreigners unfettered, anonymous Internet access to Canadian government information, in particular, for example, with respect to cabinet documents or cabinet confidences. And how would you prioritize a Canadian's request over a non-resident's request?

● (1720)

Mr. David Loukidelis: One of the interesting features of this discussion, of course, is the idea that access requests could be made electronically. That's the situation in Mexico. They have a very advanced system there with their federal law when it comes to making requests. It's not to say that access would be granted to cabinet or other records electronically. In fact, I would suspect that for some time to come we'll still be dealing with a situation in which disclosure will be through paper records, copies of electronic records. That's certainly the case in British Columbia.

In terms of prioritizing between Canadian and non-Canadian requesters, I don't understand that to be a feature of any of the provincial laws or many of the other laws internationally. And again, the work-around challenge I think would still exist in terms of trying to administer that kind of priority.

Mr. Bob Dechert: One of Mr. Marleau's recommendations, as I understand it, is to go to a web-based system, and I certainly understand the efficiency reasons for that. But I'm concerned that foreigners might make up a very large percentage of the users. I wonder how Canadians who are trying to get access to their personal information then might be put at a disadvantage while the system is dealing with answering the information requests from foreigners.

Mr. David Loukidelis: Again, recognizing that the information holdings in the B.C. public sector are different from those in the federal public sector, I also note that my federal colleague has suggested a five-year review of the legislation by Parliament. And one option might be to put this on the table for that first five-year review. If such a change were made, there would then be an opportunity to review it in five years and to see whether the concerns that I well understand you've raised are such that changes should be made back to the existing residents and nationality-based approach.

Mr. Bob Dechert: Thank you.

The Chair: Okay. We have covered a fair bit of ground.

I'm going to give each of you gentlemen, if you wish, an opportunity for a minute or so just for a final comment on a matter that hasn't been touched on by members that you'd like to be sure we keep in mind.

I can assure you that there is a good will here among all of the honourable members to make the strongest possible case for consideration for amendments to the Access to Information Act, and that it really does have to come from the government, in fact, through the justice minister. So we certainly hope to complete our work on this as quickly as we can and to make the necessary report to in fact have that go to the minister. But we are going to want to hear from the minister first.

The House is not sitting next week, but the following week. I understand either the Monday or Wednesday we will have him before us to provide his perspective so that we can round off the picture. Then we'll be in a position to do our report to the House, and then it's in the hands of the government.

So I think that's where we're going, and I will thank you now all for appearing before us on short notice. And if you wish, I will give you all a chance for a brief final commentary.

Mr. Murray Rankin: Perhaps, Mr. Chair, I could simply say thank you very much. I respect enormously the undertaking you have before you. I think it's terrific you're taking on this challenge. As someone who's been an observer of this for a long time, I'm just so delighted with your initiative. Thank you for the opportunity to participate.

Mr. David Loukidelis: If I might simply echo what Mr. Rankin said, I am deeply grateful to all members of the committee for having taken on this issue. It is of course critically important that Canada has a modern access to information regime and legislation to underpin it. The committee's work in this respect is very important, and I'm grateful for the opportunity to share some perspective from British Columbia on the situation here, in the hope that it might be of assistance to the committee as you move forward in your deliberations.

Thank you very much.

The Chair: Thank you.

Mr. Tromp.

Mr. Stanley Tromp: Thank you very much for this opportunity. I'm honoured by it. I know your time is very valuable.

I have nothing more to add at this moment. The report speaks for itself. I humbly ask the Prime Minister to enact his very enlightened promises on ATI Act reform he raised in 2006. If fulfilled, these would mainly raise Canada to the global standards.

Thank you.

● (1725)

The Chair: Thank you again to all of you. We very much appreciate your participation in this consultation. You are all now excused.

We're going to proceed with some other committee business at this time.

Colleagues, as you know, I raised with you a matter related to correspondence coming from the Oliphant inquiry on the Mulroney-Schreiber inquiry, related to parliamentary privilege issues. I think there have been some discussions, and materials have been circulated to you. We now have the 48-hour notice, and I believe the motion is formally being submitted by Mr. Wrzesnewskyj.

Do you care to move that motion, Mr. Wrzesnewskyj?

Mr. Borys Wrzesnewskyj (Etobicoke Centre, Lib.): Yes, I do.

The Chair: Okay.

It is moved as circulated to the committee, rather than being read in. That's okay?

Mr. Poilievre.

Mr. Pierre Poilievre: The motion from Monday?

The Chair: The one that was just put in front of you with the other package. It's a little bit different. There are a couple of changes.

We have Mr. Walsh and Mr. Tardi.

Mr. Borys Wrzesnewskyj: There's less, as opposed to more.

The Chair: There's less. It's a little tighter.

Mr. Walsh and Mr. Tardi are here. I believe Mr. Walsh has a very brief statement to make to the committee to clarify exactly the reason for and the intent of the motion he helped to draft for the committee's purposes.

Mr. Walsh, please.

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

The motion you have before you now is an edited version, if you like, of the one you might have seen a few days ago. On further examination, we found it had a lot of repetition, so we brought it down to a smaller size.

Mr. Chairman, the material I've asked the clerk to circulate to committee members, which I believe has been done, contains correspondence on this matter and also a decision of the Federal Court dealing with the privilege of testimony before committees not being subject to consideration in other legal proceedings. The correspondence began last August 12. At that time, a letter was received from the commissioner seeking various documents from the committee. I took the matter under consideration, and we had some discussions with the commission. I answered the letter on September 15, but we were into an election by that time, so it never came for consideration before the committee, but I give it to you today by way of background as to what happened.

Then you have the letter most recently of March 6 received from Ms. Brooks, the lawyer at the commission, in which they are in effect seeking permission to use the transcripts. It's apparent from the letter, in my view, that what we're looking at here is a situation similar to the one we had with the Gomery inquiry in which lawyers sought to use testimony of witnesses before the committee for purposes of cross-examination of that witness when the witness appeared before Commissioner Gomery.

Without getting too legalistic here but just to explain, what you're talking about here is that the lawyer will try to use previous sworn testimony to discredit the testimony now being heard at this later point in front of the commissioner. In effect, the lawyer says to the witness, “you're saying this today, but look what you said before when you were sworn to tell the truth”. You do a lot of this sort of thing, and eventually, the lawyer certainly hopes, the credibility of the witness is diminished, to say the least, and hopefully the lawyer will have enabled that witness's testimony to be discredited.

So I anticipate—and this is my own speculation here, but I think it's sufficiently apparent from the letter from Ms. Brooks—that probably is what the lawyers before that commission may seek to do with respect to a few of the witnesses who appeared in front of this committee. I don't need to name to you which witnesses those would be, but I expect members can surmise that.

To that end, it is necessary and it's part of the process that we come to this committee and seek the committee's decision. The decision then goes from the committee to the House. The House is asked then to affirm the committee's recommendation, which would then be reported to the commission, and it would be clear on record for the commission what the response on this issue is.

I might just add that I have reason to believe—and I guess it is speculative—that what the commission counsel is trying to do here is get this issue off the table, in effect, so that it doesn't come up and take up the time of the commission with lawyers arguing about wanting to use parliamentary testimony for purposes of cross-examination. I suspect the commission counsel, in preparing for the start of hearings—which I think will be at the end of this month—wants this issue closed off and dealt with. In anticipation of that, they've started this process, so I'm here today.

I don't want to take up any more of the committee's time than necessary, given the hour, but I do recommend to committee members.... I'm prepared to read to the committee members the salient points of the judgment of the Federal Court where they affirmed this privilege. I have distributed an English version and a French version of the judgment. It's a very good judgment, not simply because it says what I would want the court to say, but because it also is a very thorough treatment of the importance of the right of parliamentary committees to not have their testimony questioned elsewhere in courts. It's a very good read. I won't take up your time going through that, but it is an important consideration. It arose in the instance where Minister Gagliano, who was a witness before Justice Gomery when this ruling was made by Justice Gomery, went to the Federal Court seeking judicial review on that point and was unsuccessful. The court held that it was quite proper and understandable that the committees would want to see to it that the testimony of witnesses before them not be used in other proceedings.

Let me just add, though, and I'm sure this must have occurred to committee members, but for the record I suppose I should say it. Were it the case that this committee were to allow this testimony to be used by this proceeding or any other proceeding, I would venture to say that it would be very hard in future for this committee or any other committee to give assurances of protection to its witnesses. I suspect witnesses would not take that assurance seriously, and that would then bring along, in the case of high-profile witnesses, a battery of high-priced counsel ready to argue why the client should not have to answer the question of the committee.

● (1730)

In my view, it is very much in the interest of committees to keep their business within their four walls and enable the witnesses who come before committees to speak freely and openly on the matters of interest to the committee. The committee should be able to insist that witnesses speak freely, openly, fully, frankly, and truthfully, and not have any concerns that what they say will be used against them in some other proceedings.

So as your legal counsel, I can only urge the committee to give every consideration to this motion, in the hope that this principle will once again be sustained in the interest of this committee and all committees.

The Chair: At this point I want to be absolutely sure that all honourable members understand what is before them and what is being asked. I think Mr. Walsh has said that if we adopt this motion I will go to the Chamber for routine proceedings tomorrow morning and table it from the committee. Because we're going to be on break, I will probably also be seeking the unanimous consent of the House to adopt or concur in the report without debate. Mr. Walsh will then be in a position to take the report adopted by the House and fully respond to counsel of the Oliphant inquiry.

Are there any questions by honourable members to me, Mr. Walsh, or Mr. Tardi?

Madame Mourani.

[*Translation*]

Mrs. Maria Mourani: Thank you.

Good afternoon, Mr. Walsh. If the committee agrees to this motion, will the remarks made in the House on this matter be subject to the same requirement? Does the motion concern only what has happened in committee or does it include comments made in committee that are repeated in the House of Commons? In that case, the comments in the House of Commons can be used.

Mr. Rob Walsh: The same privilege applies to the House and to the committee.

Mrs. Maria Mourani: All right. So the privilege we have in the House is transferred to the committee. That's the purpose of the motion.

Mr. Rob Walsh: Yes, but it is the House that has the authority to state that there is a privilege. The committee can send a recommendation to the House, but it is up to the House to state—

Mrs. Maria Mourani: It is up to the House to decide whether it accepts it.

Mr. Rob Walsh: That's correct, but the privilege applies to both the committee and the House.

Mrs. Maria Mourani: So the comments can be used in any other context, except in the courts.

● (1735)

Mr. Rob Walsh: No, the principle derives from section 9 of an English act that dates back to the 21st century, but it is a constitutional principle in Canada. No tribunal, commission of inquiry or other legal process may conduct investigations into comments made in the House or in parliamentary committees.

Mrs. Maria Mourani: All right. Thank you.

[*English*]

The Chair: Thank you.

Mr. Siksay.

Mr. Bill Siksay: Thank you, Chair.

Mr. Walsh and Mr. Tardi, I just want to be clear we're not saying that the area of inquiry the committee undertook is out of bounds to the commission. This means they will have to establish those facts on their own, without reference to the work that was done in committee. Am I correct about that?

Mr. Rob Walsh: That's quite correct, and I recall once before having to make the point to a committee that the subject matter is not privileged; it's the testimony before this committee and the remarks the members of this committee make in the course of the committee proceedings that are privileged. But the subject matter is certainly available to this commission or any other court to look into.

Mr. Bill Siksay: The commission seems to be seeking that we waive our parliamentary privilege over that entire body of testimony. Is that correct?

Mr. Rob Walsh: Potentially, yes, that's correct.

Mr. Bill Siksay: Now, is it possible that the commission could approach individual witnesses and ask them to waive their individual rights to parliamentary privilege?

Mr. Rob Walsh: No, it is not. The privilege is not owned by the witness. The witness is a beneficiary of the privilege, but it's the property of the House of Commons and its committees indirectly. Only the House of Commons can waive that privilege.

Mr. Bill Siksay: A similar issue came before the Standing Committee on Procedure and House Affairs, and a similar process was undertaken. I believe the report that went to the House at that time had another clause that read:

> That the Speaker of the House of Commons be authorized to take such steps as he deems appropriate to defend the privileges of the House of Commons as they may be at issue before the Commission of Inquiry, or in such court reviewing any decision or anticipating decision of the Commission of Inquiry relating to the privileges of the House of Commons, its Members or witnesses.

Is that a crucial piece that we should have as part of this amendment? I'm wondering why it's not part of the amendment drafted before us. Does the Speaker need to have the House's authorization to pursue this matter further? Would that be a helpful thing for the House to make explicit?

Mr. Rob Walsh: When we put that clause in on that earlier occasion, we were somewhat in uncharted waters, in the sense that this has not been an approach that has been engaged in in living memory. So we responded by putting everything we thought might be relevant in there.

On this occasion, in my judgment, I think because of the benefit of that earlier precedent case—the situation with Justice Gomery's commission and going to the Federal Court and the Federal Court subsequently affirming those privileges—I don't anticipate there being those kinds of difficulties. In my view, it was adding a dimension to this particular initiative that would perhaps draw unwarranted attention to this process, so I thought it was quite safe to leave that provision out. I'm confident that should there be a further difficulty, either I could return to this committee or I could indeed consult the Speaker, and it may be a matter that would readily be taken care of.

I don't see with this commission of inquiry the same difficulties that we had with the Gomery inquiry. On the Gomery inquiry, we even had Justice Gomery expressing disagreement with, if not dislike of, the idea of his not being able to use this material, so I saw that as we need a little extra force in our order to make sure we do whatever is necessary.

I didn't know when I'd next see the House, at that time. I remember there was some uncertainty as to would I have the House with me at a time when something could arise, but I don't think that's necessary here.

Mr. Bill Siksay: Chair, the reason I raise it is that when I read the motion that's before us—and not being a lawyer, and it's in somewhat legalese—it seems rather bloodless, in the sense of there's no urgency about it. I believe that this is an extremely serious issue. We need to express our determination that it be followed up on and that kind of thing.

Now, I hear what Mr. Walsh is saying, that he sees a difference in circumstance. But I'm still uneasy about that, because it strikes me that the other paragraph makes it very clear that we're not going to let this go and that we think that should it work out differently, we want somebody, namely the Speaker, to be actively engaged in ensuring our privilege.

Mr. Rob Walsh: Mr. Chairman, if I could, I'll just respond in saying this.

First of all, you have the clause, apparently, in front of you, Mr. Siksay. I suppose by amendment it could be added. It wouldn't hurt the order to have that in there. I'm not objecting to it being part of the order. On the other hand, I don't know that we want the House to be unnecessarily aggressive vis-à-vis a commission. There's no evidence yet that this was ever going to happen; it's simply a request by the counsel. In that sense, it's a rather tame matter. Of course it could escalate to where it becomes more pressing, but I have no cause to believe that will be the case.

You might disagree with my judgment here, but I'm prepared to proceed more calmly, rather than unnecessarily escalate things.

● (1740)

Mr. Bill Siksay: But by the same token, wouldn't the counsel for the commission have access to those precedents, to that tradition, to that discussion, and yet they went ahead and made the request anyway?

Mr. Rob Walsh: I think you're going to see lawyers still trying. We know of one. On the website, there's a submission already there, with some parliamentary material attached to it. I think they're anticipating this issue, and I don't want any time taken up with legalistic arguments being made. I suspect they want to get this clear and disposed of and they can proceed without any distractions in this regard.

I think it's good management on their part to do this, and it's good of the House to make that known to the commission before they start their hearings.

The Chair: Okay. Thank you.

Mr. Poilievre.

Mr. Pierre Poilievre: I have a very straightforward question.

If we did nothing at all, we didn't respond to the request, it would be presumed that the commission could not use the testimony in this committee. Correct?

Mr. Rob Walsh: It ought to be presumed, but I would think that if, in matter of record, this letter having been received, and the House does nothing, counsel—

Mr. Pierre Poilievre: Sure. And I'm not proposing we do nothing —

Mr. Rob Walsh: No, I understand.

Mr. Pierre Poilievre: —but there is some concern about whether or not the wording is tough enough. My understanding is that it is assumed that the testimony is not admissible in any other proceeding, even if we do nothing here. I'm not proposing we do nothing, but I'm just saying hypothetically.

Mr. Rob Walsh: That has been made abundantly clear by the Federal Court.

Mr. Pierre Poilievre: Yes.

Mr. Rob Walsh: I fully expect that the judgment will be respected. I think for a matter of record, they would like to see this before—

Mr. Pierre Poilievre: Just to put it to rest. Fair enough.

The Chair: I think the members are comfortable with understanding the motion and the intent and what's going to happen.

Shall I put the question, then?

Mr. Pierre Poilievre: Put the question.

The Chair: Okay.

It's a motion by Mr. Wrzesnewskyj, as circulated. It will be in full in our transcripts.

Mr. Bill Siksay: Chair, I'd like to propose an amendment. I'd like to test the committee's will on the issue that I raise.

The Chair: Do you have something written?

Mr. Bill Siksay: I do.

The Chair: Can I see it so I can rule on whether it's admissible?

Mr. Pierre Poilievre: Mr. Chair, I have a point of order.

The meeting is scheduled to end at 5:30. We are perfectly willing to let the business move through. That would solve the problem right here and now. But a number of our members have meetings we have to proceed to.

The Chair: I understand that.

I'm going to rule the amendment out of order because it's redundant.

Mr. Pierre Poilievre: Okay.

The Chair: But thank you, Mr. Siksay.

There is specific reference to the report here, and its incorporation, by reference, would deal with it.

On the motion as is, as before us, is it the pleasure of the committee to adopt the motion?

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

The Chair: Does the chair have the instruction of the committee to report to the House?

Some hon. members: Agreed.

The Chair: Is there any other pressing business? None?

We are adjourned.

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