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# **Standing Committee on Access to Information, Privacy and Ethics**

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**EVIDENCE**

**Tuesday, March 8, 2005**

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**Chair**

**Mr. David Chatters**

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## Standing Committee on Access to Information, Privacy and Ethics

Tuesday, March 8, 2005

• (0900)

[English]

**The Vice-Chair (Mr. Derek Lee (Scarborough—Rouge River, Lib.)):** I call the meeting to order, as I see a quorum.

This morning we have with us Mr. Craig Forcese, a law professor at the University of Ottawa. He is going to be providing us with a perspective on the funding mechanisms for officers of Parliament, and particularly the information, privacy, and ethics commissioners, although we're of course looking at the subject more generally.

We're pleased to have you here, Professor Forcese. We understand you have an opening statement, which would be about ten minutes long. After that we'll proceed to questions.

**Professor Craig Forcese (Faculty of Law, University of Ottawa, As an Individual):**

I want to begin by expressing my thanks to the committee for their invitation to present here today on the issue of funding mechanisms for Canada's officers of Parliament. I've been asked to bring to your deliberations the thoughts of an external academic observer, and to that end I should preface my remarks in two ways.

First, my interest in this area is sparked by research and writing that I've been doing for a book entitled *The Laws of Government: The Legal Foundations of Canadian Democracy*, which is currently in press with Irwin Law Inc. In that book, my co-author, Aaron Freeman, and I champion stronger mechanisms for ensuring executive branch accountability to Parliament. For exactly that reason, we focus a fair amount of attention on officers of Parliament.

The first point I must make, therefore, is that from the research conducted in preparing my book, I am predisposed to resist any system, whether it be at the funding level or elsewhere, that undermines officer independence.

My second comment is this. I'm not a scholar in public administration, but rather a lawyer, and one who specializes in administrative law among other things. My remarks therefore centre on legal considerations. In that last regard, I want to propose briefly setting out a legal reason why greater financial independence of officers of Parliament might be desirable. I then suggest three criteria that this committee might wish to contemplate in deciding upon the funding mechanisms that have been proposed by other witnesses who have appeared before you.

I submit that at least five officers of Parliament are obliged to meet court-like standards of independence. These five officers—the

access, privacy, official languages, and ethics commissioners, and the Auditor General—have the powers of a court of record to compel the attendance of witnesses and the giving of evidence. They therefore have the power to punish for contempt in response to acts committed in their presence. Because they possess this power, the Constitution requires that these officers be sufficiently independent of the government. This was exactly the conclusion of the Federal Court in a 2000 case called *Rowat v. Canada* (Information Commissioner).

In *Rowat*, a government official faced a contempt proceeding brought by the Information Commissioner. The government official challenged the commissioner's ability to exercise this contempt power. At issue in Federal Court was whether the Information Commissioner's implicit contempt power under the Access to Information Act triggered the application of paragraph 11(d) of the Canadian Charter of Rights and Freedoms.

The court concluded that paragraph 11(d) applied. Paragraph 11(d) requires that the body administering the contempt proceedings be sufficiently independent. Analogizing to judicial independence, the court held that to meet this test for independence, the commissioner must have security of tenure—in other words, the commissioner must not be subject to dismissal in a discretionary, arbitrary manner; financial security—the commissioner must have the right to a salary established by law and not subject to arbitrary interference; and administrative independence—the commissioner's responsibility to determine how investigations are conducted must not be vulnerable to interference.

The Federal Court concluded that the commissioner met each of these three requirements and that an informed and reasonable person would perceive the commissioner as independent. However, in considering whether the commissioner had sufficient financial and administrative independence, the court looked only at whether the commissioner's salary was insulated from manipulation and whether the Access to Information Act accorded the commissioner control over the administration of his office. The court did not examine the broader issue of whether the mechanism by which the commissioner's office as a whole was funded could undermine the commissioner's independence.

A court asked by a litigant to consider this specific issue might now conclude that the Information Commissioner and the other four officers with contempt powers are insufficiently independent. A recent decision dealing with judicial independence supports this conclusion.

In an Alberta case now before the Supreme Court of Canada, an appeal judge recused herself from deciding a dispute between the government and judicial officials on judicial pay. In that case, the government indicated that if it were obliged to increase the pay of judges, it would strip away funding from other court services. The Alberta Court of Appeal concluded that if a court is perceived to be subject to financial sanction for decisions it makes, public confidence will justifiably be diminished. Discussing the impact of the threatened de-funding of court services, it then noted that judicial adjudicative independence means that individual judges and the institution as a whole are to make decisions free from outside influence and remain secure against interference in their decision-making.

Similarly, where the funding of an officer creates a perception that officers are subject to financial sanction for their decisions, their independence is jeopardized. The Information Commissioner himself raised this concern in 2001 in a discussion of the Rowat case. Since that time, a substantial public record has been developed in this committee, in the press, and in the public statements of several officers, intimating that officer independence is in fact impaired by the present funding mechanism. The next time a Rowat-like case arises in relation to any of these five officers with contempt powers, only a very inattentive litigant would fail to employ this record to mount a constitutional objection to the officer's powers.

In sum, the present funding mechanism may ultimately prompt the court to declare unconstitutional the potent officer investigative powers inserted by Parliament into the laws governing these officials. Given these conclusions, I would like to briefly outline several criteria this committee might wish to consider in deciding which funding models to prefer for at least those five officers who have contempt powers.

First, does the funding model include checks and balances that would prevent an ill-intentioned government from reducing funding to the officer's office in response to a negative finding by that officer? If it does not, the funding mechanism will raise questions about that officer's independence. Let me suggest that the present system fails this test.

Let me also voice a word of caution about a system driven exclusively by a parliamentary committee. There are discussions afoot about modernizing the Access to Information Act. If, as some people propose, the ambit of the act is extended to Parliament itself, then the relationship between the Information Commissioner and Parliament will change. In these circumstances, a system in which the commissioner's budget is determined by a body within the commissioner's mandate—in this respect, Parliament—would raise similar independence concerns as created by the executive's control over funding in the present system.

Second, there has been substantial discussion before this committee of a blue ribbon panel. If an external body determines funding, it should itself enjoy a level of independence. I do not wish

to exaggerate the extent to which constitutional law might require this. Even in relation to judicial independence, the courts have yet to pronounce definitively on the extent to which decisions made by an independent body on the funding of court services must in fact be independent. It seems desirable, however, that an external body would have a number of qualities drawn by analogy from those required of judicial salary commissions.

First, members of the external body should not be appointed solely by one branch of government. In other words, Parliament, as much as the executive, should have a say in membership. Second, this external body should be empowered to hear submissions from officers and other interested parties on funding. And third, the decision of the external body should be binding or close to it.

A third and final consideration is efficiency and economy. Establishing a new external body is obviously not the most economical of the various funding mechanisms on the table. A more cost-effective system that would address concerns about independence is multi-year formula funding, meaning funding pre-established to grow according to an objective benchmark like inflation, the size of government, the number of complaints received by the officer, or other similar measures. Obviously even with this system, some sort of review would have to be conducted to set the starting level budget for officers. Further, periodic update reviews would have to be held to make sure that the formula mechanism is operating appropriately. Here, however, reviews of officer budgets by Parliament, the government, or some blue ribbon panel would be relatively infrequent, minimizing the perception that officers are beholden to any of these groups.

Those are my comments. I thank you for your interest.

● (0910)

**The Vice-Chair (Mr. Derek Lee):** Thank you very much for your written proposal and your opening remarks.

We'll lead off with Mr. Tilson for the official opposition. Seven minutes, Mr. Tilson.

**Mr. David Tilson (Dufferin—Caledon, CPC):** Thank you, Mr. Chairman.

I was interested in your statement towards the end of your comments—which I thank you for providing to us in writing, incidentally—that a multi-year form of funding is a more cost-effective system. Could you elaborate on that a little more? Are you suggesting that year-to-year funding—in other words, a commissioner coming from year to year to whomever—would not be as appropriate as establishing, as you say, a multi-year process?

**Prof. Craig Forcese:** What I'm anticipating or grappling with is the question of an external body like a blue-ribbon panel. Obviously, establishing a new external body has its own costs associated with it. In those circumstances, is there some fashion we can envisage where that blue-ribbon panel might only have to meet periodically or where it would be less relevant because we've dealt with the independence issue in some other manner?

The thought I had was that a multi-year formula that establishes a baseline for funding for officers, so officers aren't in the present position of being obliged to go to Treasury Board each year, distances officers from at least the perception that their activities in a given year might influence the receptivity of government to funding them fully. It grapples with the independence issue and it also grapples with the cost associated with setting up this blue-ribbon panel.

Does it have to be annually? Is it a permanent body? Well, perhaps not. Maybe it has to meet every three years. Maybe we could get away with not having a blue-ribbon panel because we have this process that allows funding to be predetermined over a sufficient period of time that there's no really serious argument that officers are influenced by the funding issue.

**Mr. David Tilson:** What do you think a blue-ribbon committee is? Who should be on it?

**Prof. Craig Forcese:** It's a difficult issue. For analogy, you have judicial salary commissions. You would have a member perhaps appointed by the officer, a member perhaps appointed by the executive, and a member perhaps appointed by Parliament, so you'd have fairly balanced representation. As to the identities of these individuals—

**Mr. David Tilson:** Oh, I didn't mean that. We've had presentations made to us on this topic and the British system has been discussed, as I'm sure you're aware. My question was not on names of people but more just on positions of people you think should be sitting on this committee.

**Prof. Craig Forcese:** I would hazard a guess that the best system would be one where you had, in this case, representation roughly analogous to the various branches of government. The officer, Parliament, and the executive each would have a say, a nominating role, as to a given member.

**Mr. David Tilson:** You talk about it in relation to judicial independence, which is always an interesting question, because this government has always looked at what judicial people should receive. Are they independent?

**Prof. Craig Forcese:** In terms of the financing mechanism?

**Mr. David Tilson:** My question, I realize, Mr. Chairman, is a little off topic, but ultimately it seems to me judges decide things, if we're looking at charter rights. Currently, are judges independent?

• (0915)

**Prof. Craig Forcese:** Judicial salary at the federal level is actually set by a fairly robustly independent salary commission under the Judges Act. In terms of broader funding of court services, they are in an awkward position of being like any other department of government, namely they go to Treasury Board. I reviewed, for instance, the court administration service's RPP from 2004-05, and they indicate there is a tension they're grappling with. On the one

hand, they're obliged to go to Treasury Board and elicit funding or get approval for their budget; on the other hand, they have to be cognizant of the independence of the judiciary.

That issue has not been fully resolved, I don't think. There was an effort to consolidate federal court administration a couple of years ago. If you look at that act—I believe in section 2, the purpose section—you'll see it says part of the reason for that consolidation was to achieve greater independence in terms of the administration of the courts. But they're still to some extent obliged to go to Treasury Board.

**Mr. David Tilson:** And there lies the rub, of course: going to Treasury Board. That's why we're into this whole discussion, going to Treasury Board and trying to figure out who's going to watch the watchers, in other words.

We had the Chief Electoral Officer come to the committee, and the Chief Electoral Officer essentially said...and I suppose I could be challenged on his interpretation, but my interpretation was that he just sends his bill in. Also, we get into tenure, which is one of the issues raised in your paper; he or she has an appointment until they reach 65.

Can you comment on those two topics, assuming I'm correct in my first interpretation, that he just sends the bill in?

**Prof. Craig Forcese:** The first issue is the capacity of the Chief Electoral Officer, as you say, to put his bill in. I don't purport to be an expert as to how they're funded, but my understanding is that part of the rationale is the prospect of a snap election. The Chief Electoral Officer always has to be in a position to draw down on the consolidated revenue fund to finance an election in our system.

**Mr. David Tilson:** I understand that.

**Prof. Craig Forcese:** On your second issue, security of tenure, all the officers, to some greater or lesser degree, do have security of tenure. They can only be removed for cause, by joint resolution of—depending on what officer we're talking about—either the House or the Senate or both, so there is a substantial security of tenure.

In fact, to some extent that security of tenure is modeled on, or analogous to, section 99 of the Constitution Act of 1867, which is a security of tenure provided to superior court judges, which again requires—

**Mr. David Tilson:** The reason I asked the question was this. In comparing it to the Ethics Commissioner or the three commissioners this committee is looking at, if we're looking at independence, is that an issue?

**Prof. Craig Forcese:** For officers, I don't believe so. I think the security of tenure issue has already been accommodated by the acts governing each of these officers.

**Mr. David Tilson:** I understand.

With your comment about administrative independence, is there implied interference now? We're talking about going to the Treasury Board, and the Treasury Board taking positions on things, allowing and disallowing things; is there implied interference now?

**Prof. Craig Forcese:** I think there's a perception of interference. As I mentioned in my comments, there is now a fairly substantial record of the Information Commissioner and others who have, in their annual reports and in other venues, indicated they are unable to perform their tasks because of the funding concerns. They've come before you and made similar statements. If I were Mr. Rowat now, five years later, I would certainly raise that record in challenge of the powers of, in that case, the Information Commissioner to hold me liable for contempt, and a court would have to grapple with that. There is now a record. I don't think that record existed in 2000. I believe there would be a much better case, because of the statements the various officers have made themselves, that independence is impaired.

**Mr. David Tilson:** Thank you, Mr. Chairman.

**Mr. Derek Lee:** Monsieur Laframboise, for seven minutes.

[Translation]

**Mr. Mario Laframboise (Argenteuil—Papineau—Mirabel, BQ):** Thank you, Mr. Chairman.

If I understood you well, the judicial independence of officers is directly related to their financial independence. I agree with you.

You're making a very accurate analysis, which is good, but I would like to get a better understanding. In your judgment, the present system is not acceptable. In the case of the ethics commissioner, who reports to the Speaker of the House and therefore to Parliament, you do not think his funding arrangements are acceptable either since he must directly apply to the Speaker of the House.

• (0920)

[English]

**Prof. Craig Forcese:** It's a good point. You're suggesting the Ethics Commissioner could be critiqued from the same angle, namely that the Ethics Commissioner is not sufficiently independent.

What distinguishes the Ethics Commissioner in relation to, say, members of Parliament—as opposed to, say, the Information Commissioner—is that the Ethics Commissioner is clothed in parliamentary privilege. Essentially Parliament has delegated to the Ethics Commissioner its own inherent power to review the performance of its members. So the circumstances are quite different from other circumstances—for instance, where the Information Commissioner is exercising a power given through Parliament to essentially investigate the executive, which is not clothed in parliamentary privilege.

Parliamentary privilege complicates the analysis, so I'd be reluctant to say all these rules on independence extend to a body that is exercising essentially a parliamentary privilege. That would be a difficult conclusion.

The one place where I think there might be an issue with the Ethics Commissioner is that the Ethics Commissioner does have a role in relation to the executive branch. The Ethics Commissioner

does investigate complaints under the public office-holders code for senior members of the executive branch and does have some fairly significant powers in that respect.

If a person being investigated for the breach of the public office-holders code were to complain about the lack of financial independence of the Ethics Commissioner, would that be an issue? I think the answer is probably not, because the funding is through Parliament, and there's not a conflictual relationship—in the sense that the Ethics Commissioner is sufficiently financially independent of the executive in terms of the Ethics Commissioner performing that review role of senior members of the executive.

I'm just speculating here—blue sky.

[Translation]

**Mr. Mario Laframboise:** However, if it's ever proven that he is underfunded in order to prevent him from completing the investigation of complaints, his independence could be jeopardized.

[English]

**Prof. Craig Forcese:** I think that you're right in the sense that there would certainly be criticism over the lack of independence. I'm not sure how that would play out in terms of something like the Rowat court case.

Certainly the Ethics Commissioner's role in relation to MPs is such that the matter would never get to court. For one thing, it has been removed from Federal Court jurisdiction under the Parliament of Canada Act. For another, the Parliament of Canada Act is quite emphatic that parliamentary privilege extends to everything that the Ethics Commissioner does, at least in relation to his or her MP role. So I don't think the matter would end up in court.

But I agree with you that there could be a perceived problem, at least in relation to the Ethics Commissioner's role under the code for public office-holders. I can't really push the analysis more.

[Translation]

**Mr. Mario Laframboise:** I have to stop you here. The problem is some commissioners are looking at the way the ethics commissioner is funded and are thinking this may be a solution. However, you said in your text that if the new act extends the power of the information commissioner, he or she should not report to Parliament. So you don't think the commissioner should submit his budget to the Speaker of the House, as the ethics commissioner does.

[English]

**Prof. Craig Forcese:** The notion of direct parliamentary funding of officers would become a real issue, as I mentioned in the text, if we were to start extending the role of officers such as the Information Commissioner to Parliament itself. You then have a potential conflict.

If we extend the ambit of the Access to Information Act to include Parliament, the access commissioner is now empowered to review the actions of Parliament or members of Parliament in relation to performance under the access act, and Parliament is in charge of funding the officer. You then have a perception that maybe there will be a conflict.

[*Translation*]

**Mr. Mario Laframboise:** We have a dilemma. If we apply the ethics commissioner's model, the legislation will not be amended. If we want another funding formula, we will need to amend the legislation. So we have a dilemma. Should the legislation be amended? I personally think it should so that each of the commissioners is independently funded. However, some look at the ethics commissioner's model and say it could be applied under the present legislation.

Your position on that matter should be clear because of that legislation problem we have.

• (0925)

[*English*]

**Prof. Craig Forcese:** On the issue of legal change and whether you'd be obliged to change the law in order to codify this financial independence, I'd have to give that more thought.

It seems to me that as long as there's a firm practice in place, Treasury Board, or whoever, doesn't seriously query the funding mechanism. In other words, it's very much like the courts at present. My understanding is that when the Supreme Court puts in for funding, for instance, there's not a serious prospect that Treasury Board is going to roll back. I may be wrong on that.

If there were a similar practice in relation to officers, I'm not sure you would require legislative change in that context. It would become part of the practice in relation to the funding of these persons. I think legislative codification might be preferable, because it would then be quite clear on the procedure to be followed. I don't know that it would be mandatory.

[*Translation*]

**Mr. Mario Laframboise:** You seem to reject the idea of a blue-ribbon committee because it would be too costly. You seem to favour a multi-year funding formula that would be known in advance. I find your idea interesting since the formula would consider inflation, the size of government and the number of complaints that are received. Under this funding model, would amendment of the legislation be required to secure this multi-year funding as well as the independence of commissioners?

[*English*]

**Prof. Craig Forcese:** Again, I think it would be preferable to codify in law, if only from the perspective of possible litigation where there is some question as to whether the officer is sufficiently independent. If you could point to the law in that litigation and show there's this mechanism that ensures that the financing is at arm's length and independent, I think it would be helpful in resolving that case.

Even so, I think it is conceivable that you would again have a practice in place. I don't pretend to be an expert on the appropriation process, but there could be a practice where you might appropriate the equivalent of three years of funding in a single year, for instance. I don't know that it would require an affirmative change in the law governing each of the officers. If you're going to have a three-year or multi-year funding mechanism, in year one you appropriate what you believe to be the requirement for those three years. You would have that practice in place.

Again, I don't know enough about how the appropriation process in Parliament works to be able to determine definitively whether that would be copacetic relative to the appropriation process.

[*Translation*]

**The Vice-Chair (Mr. Derek Lee):** Thank you.

Ms. Jennings for seven minutes.

[*English*]

**Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.):** Merci beaucoup. Thank you very much for your presentation.

You've proposed a number of potential mechanisms that you feel might ensure an appearance of independence. My thesis would be that we will never have total independence. It's like the six degrees of separation idea. If we set into place a blue-ribbon panel, there would be a question of whether there's some kind of link somewhere to the individuals who are appointed, whether they've been proposed by Parliament, the executive, or the body itself.

The only way we might achieve an appearance of complete independence—whether it's for the funding mechanism for the entire body, or for the commissioner, the head of the body—would be if we appointed people from outside of the country, who are not citizens, who represent another country, and even then we would find that six degrees of separation. It would literally take another planet.

• (0930)

**Mr. David Tilson:** That's an idea.

**Hon. Marlene Jennings:** Well, we could work on it. We'd have to find life on another planet.

I would come back to the thesis that it's not a bad thing that we don't in fact have complete independence, whether it's for a funding mechanism or on the appointment level, the independence of a commissioner, because it creates a healthy tension, in my view. It also allows for the forum that we have right now where the issue of independence continually, on a regular basis, comes up. It forces those who are in a position of possibly having an influence to have to review their own mechanisms, their own behaviour, and I think that's a healthy thing.

However, I do like the idea of a multi-year funding mechanism. I don't think it is the panacea to ensure complete independence, because at some point that multi-year period comes to an end and a new base has to be established. Therefore, the issue of independence would arise again, possible influence, undue influence, etc. And I think you agree with me on this.

One sees it in our adjudicative bodies. Their funding mechanism is not independent, whether one looks at the Immigration and Refugee Board or the Canada Labour Relations Board. Those are independent bodies. The appointments have been deemed to be independent, and the commissioners or the members of those tribunals are in fact independent. But when they come to the last year of their mandates, we hear—whether it's from the unions, whether it's from the employers, whether it's from advocates on behalf of the individuals who go before the boards—that suddenly these members are no longer independent because they are looking for a renewal.

There's a problem there, I would say, overall. I like the system in the United States for the adjudicative tribunals, where there's an actual class of personnel. There are competitions. Candidates go through the process of selection and are deemed to be qualified and appointed, and then they're basically there unless and until it's proven that they are either no longer qualified or have committed some egregious action that warrants their removal. It's similar to being a judge. They actually call them administrative judges.

I would like to know if you've looked at the U.K. model. A number of the officers who came before us appeared to really like the U.K. model. I'd like to know your evaluation of it as it pertains to creating a certain amount of independence, in terms of the funding overall for the organization, and the appearance of independence when it comes to the funding mechanism.

**Prof. Craig Forcese:** Well, I can answer that quite briefly. I've not studied the U.K. model, other than reading about it in the transcripts of this committee.

On your comment about the perception of independence, I agree that we're not going to arrive at a panacea. We're not going to arrive at the perfect system, nor should we have to. That's not what's obliged by the Constitution. What's required is a reasonable perception of independence.

I think the peril we face right now is that because of all the hue and cry about the present funding mechanism of officers, a reasonable perception has been created that they are not independent under the present system, that they are in fact being punished for their deliberations. Whether that's true or not might actually be beside the point—

**Hon. Marlene Jennings:** It is.

**Prof. Craig Forcese:** —because the perception has been created.

How do we respond to that? I think the response has to be to change the present system. The status quo, in other words, is no longer sustainable, because the next time Mr. Rowat or others like him have an issue with the Information Commissioner or some other officer, there's a peril.

I'm sorry I can't give you more information on the U.K. model.

**Hon. Marlene Jennings:** Would it be asking too much of you to perhaps do a mini look at the U.K. model, other than your reading of the transcripts, and provide a very brief resumé of it in writing? You do have a certain amount of expertise. This committee appreciates it, and I know that I do. I would be very interested in having your considered opinion of this model, because as you will have seen from the transcripts, just about every officer of Parliament came and talked about that model. They appeared to believe that if we implemented that model, it would pretty much take care of all of the problems with the perception of lack of independence in terms of the funding of their agencies. I'm not sure it would in fact do that, so I'd like to have your opinion on it.

I don't have any other questions. Thank you.

• (0935)

**Prof. Craig Forcese:** Sure, I can do that.

**The Vice-Chair (Mr. Derek Lee):** That's seven minutes.

Mr. Broadbent, for seven minutes.

**Hon. Ed Broadbent (Ottawa Centre, NDP):** Mr. Chairman, I want to begin by apologizing especially to our witness, who I proposed appear before the committee, and to committee members. It was for entirely personal reasons that I was unable to get here this morning on time.

I certainly don't want to waste the time of the committee or the witness by going over or raising things that conceivably have been raised in my absence. But what I thought might be a useful approach would be to ask our witness to elaborate, if appropriate, on any area that other members of the committee have asked questions on and on which he would like to elaborate further using my allocation of time. I would welcome that.

Other than that, I will pass, frankly.

**Prof. Craig Forcese:** I don't think so. I am happy to continue responding to questions.

Thanks for the offer.

**The Vice-Chair (Mr. Derek Lee):** Everyone is very deferential this morning.

Okay, then we'll go to the three-minute rounds.

Mr. Bains for three minutes, and then we will go to Mr. Hiebert.

**Mr. Navdeep Bains (Mississauga—Brampton South, Lib.):** Thank you very much. I did appreciate your presentation.

We are basically grappling with two key issues here. One has to do with independence. I'm glad you brought in the cost issue, because I think we sometimes neglect looking at that component. We do have limited resources and we don't want to continually start funding and creating an animal that we just keep spending money on and that seems out of control. So I do have some concerns about that.

However, I do want your opinion and thoughts with respect to the objective benchmarks you talked about for each officer, with each maybe indexed to inflation. Would it be uniform across all officers? Would it be different from officer to officer? Have you put some thought into that? Could you elaborate, please?

**Prof. Craig Forcese:** Well, I think it would have to be different from officer to officer. Officers have different functions and therefore the benchmarks would have to vary.

Take the distinction between the Privacy Commissioner and the Information Commissioner. The Privacy Commissioner now has a much broader mandate because of the Personal Information Protection and Electronic Documents Act, PIPEDA, which now includes private sector privacy. So if you were to tie a funding mechanism, for instance, to complaints the Privacy Commissioner receives under the Privacy Act and not look also at PIPEDA, you'd greatly underfund that officer. You'd have to be cognizant of their varied mandates.

I would also assume that the Auditor General function, which is not complaints driven, as you know, would have to be funded with reference to something other than complaints. I'm not in a position obviously to talk about what that criterion might be, and I would leave it to the Auditor General to talk to you about that, but certainly it should be something tied to the scope of government, given the auditing function. Something tied to the scope of government might seem reasonable. I think Treasury Board actually moved to the possibility of growth in government funding or spending being the indicator. I don't know if that would be adequate or not, but it seems like a reasonable starting point.

**Mr. Navdeep Bains:** Would you have any suggestions in terms of how we would formulate this? Ultimately you want to get all of the stakeholders involved, but again, I am concerned about the whole notion of conflict of interest and independence. If we as parliamentarians sit down again, there is an inherent conflict of interest built into those funding mechanisms or the objective benchmarks we're talking about. Do you have an idea of how we would come to these objectives? Would it be by speaking to the various officers and parliamentarians? But above and beyond that, are there any other stakeholders who need to be involved?

**Prof. Craig Forcese:** I think the most transparent process is probably the best. Certainly, the officers are obviously the key stakeholders, but holding an open hearing in which others have an opportunity to weigh in might also be important to establish that initial level, or at least that initial mechanism. So I would hazard that a transparent process would be best—not necessarily for legal reasons but strictly for the credibility of the process.

**Mr. Navdeep Bains:** Do we have any examples of this type of objective benchmark existing in any other form of government that you know of?

**Prof. Craig Forcese:** Not that I'm aware of. I'd have to give that some thought.

**Mr. Navdeep Bains:** So this is a new suggestion, a new idea, that hasn't been implemented anywhere that you are aware of?

**Prof. Craig Forcese:** Not that I'm aware.

**Mr. Navdeep Bains:** It would be nice to do a case study of how it actually worked out and so forth. If possible, are you able to look into that? We'd appreciate that to see if there's a—

**Prof. Craig Forcese:** I can look for that.

Treasury Board would also have that information. I believe it was once in the models that they proposed, and my understanding is that they fleshed out those models. I think it would be worth asking them as well.

But I'll see if I can find anything.

• (0940)

**The Vice-Chair (Mr. Derek Lee):** Thank you.

Mr. Hiebert, for three minutes.

**Mr. Russ Hiebert (South Surrey—White Rock—Cloverdale, CPC):** Thank you very much.

I appreciate your presentation today, and I have a few questions that will hopefully shed some light for our committee on the decisions we have to make.

I noted that in the case of Bodner in Alberta, the case that you were linking to the Rowat case, you suggested the case would lead a future court to presume that the Rowat case is no longer sufficient, that it's not just independence of salary but independence of total funding that's required.

In the Bodner case in Alberta, there was a direct link between the funding the court was receiving and the court's decision, because the Alberta government essentially said, if you reduce funding, we're going to cut court services. There was an immediate and direct link between the funding and the dependence.

But there's not such a direct link with respect to the commissioners we're dealing with. They get their funding on an annual basis, so it would be more difficult to tie one of their decisions to the funding of their commission. Is it not possible that a future court would not differentiate between these cases based on that reason alone?

**Prof. Craig Forcese:** Yes, I think that's a valid point, that it's not a perfect analogy, and to a certain extent it's an extrapolation.

Let me share with you a passage from one of the key cases in judicial independence, a Supreme Court case from 1985 called *Valente, Justice Le Dain*. I'll just read this passage, if you'll bear with me. He said:

Coming now to other elements which I regard as desirable supports for judicial independence, I count among them independence in budgeting and in expenditure of an approved budget, and independence in administration, covering not only the operation of the courts but also the appointment and supervision of the supporting staff. Budget independence does not mean that judges should be allowed to fix their own salaries; it means simply that the budget should not be part of any departmental budget but should be separately presented and dealt with. I do not, of course, preclude its presentation by a responsible minister, but he should do this as a conduit....

There's language in here that suggests...and it's not just judicial salaries that have to be preserved from political manipulation or the perception thereof, but also the broader budget.

But I agree with you that the case I cite is by analogy. It's on point, it requires some extrapolation.

**Mr. Russ Hiebert:** In regard to the quote you just mentioned, I was caught by the phrase, “a cabinet minister...as a conduit”. That was not precluded in the *Valente* case is what you were saying. That's actually the current funding, from what I understand from the commissioners we've heard from. Not all of them, but many of them have a cabinet minister who functions as a conduit.

Moving on to my next question, you state on page 5 that the present system of funding for these five offices fails the test of independence. Which funding model are you referring to? The five officers do have slightly different funding models. Or are you saying that any funding model that requires them to go to the Treasury Board fails the test?

**Prof. Craig Forcese:** I think I would probably argue the latter. I think this is probably most acutely the case for the Auditor General and the Information Commissioner, because they've been quite emphatic.... I think they've actually described it as annual lobbying, going to the Treasury Board hat in hand and trying to extract expenditure from Treasury Board.

Again, thinking ahead to a possible case, for those officers certainly it would be fairly easy to adduce evidence from the officers' own statements that maybe independence is in fact impaired. That's what I'm referring to as the present mechanism. I'm thinking here specifically of those officers who have complained most vociferously about it.

**Mr. Russ Hiebert:** How much time do I have?

**The Vice-Chair (Mr. Derek Lee):** We're at three and a half minutes, so.... You've done a great job with the three minutes you did have.

Mr. Powers for three minutes, and then Mr. Lukiwski.

**Mr. Russ Powers (Ancaster—Dundas—Flamborough—Westdale, Lib.):** Thank you, Professor.

I think we're in this element of independence vis-à-vis accountability. I think that balance is one of the biggest challenges we have.

I'd like you to take my time to comment on the statement in your remarks you provided us that you champion stronger mechanisms for ensuring executive branch accountability to Parliament.

Could you take the time and expand on that point?

**Prof. Craig Forcese:** Sure. Officers, in my view, present an important opportunity and enhance the capacity of Parliament to exercise accountability in relation to the executive. I don't think I'm saying anything that anyone in this room wouldn't acknowledge, namely that 308 parliamentarians, the 308 members of Parliament, are ill equipped to review and scrutinize the activities of thousands and thousands of unelected persons. Officers are one mechanism that Parliament has agreed upon as a means of bolstering their capacity to do that.

So if you view officers as essentially the executive branch of the legislative branch, in other words the executive arm of the legislature, then it is a vital accountability mechanism, and as a vital accountability mechanism, from a political optic or from a public policy optic, it's important that this mechanism itself be sufficiently independent and robust; and to the extent that this vital accountability mechanism might be de-funded for engaging in the accountability exercises that Parliament wishes it to engage in, then obviously it undermines the whole purpose of officers.

Does that address your concern?

• (0945)

**Mr. Russ Powers:** That's fine. I just needed some clarity. Thank you.

**The Vice-Chair (Mr. Derek Lee):** Thank you, Mr. Powers.

Mr. Lukiwski, for three minutes.

**Mr. Tom Lukiwski (Regina—Lumsden—Lake Centre, CPC):** Thank you very much.

Thank you, Professor, for your presentation. I would like to preface my remarks by saying that many of my questions have previously been answered through other questions of other committee members.

I have a very general question to you, and I recognize this may be a bit of an unfair question, given the time limitations. We have three minutes.

You've given several observations as to what's wrong with the system. We have heard, and I believe it to be true, that no matter what we do, it will be a somewhat imperfect solution at best. I'm wondering if you have any recommendations. You pointed out some problems with the current system. You indicated that there are various models that others have suggested and we may want to consider. I'm wondering what your personal thoughts are. If you had to do it yourself, given all these parameters, that there's no such thing as a perfect solution, what is a recommendation that you might ultimately give this committee?

**Prof. Craig Forcese:** The bottom line, not having weighed all the pros and cons, is that I'm most attracted, at the knee-jerk level, to the multi-year funding mechanism. It provides a sustainable funding mechanism over a fixed period of time, and so long as you establish an initial benchmark that's adequate and then some gross-up from that benchmark that's reasonable, tied to complaints or some other indicator, I think this removes much of the perception that budgets are being monkeyed around with. It also is, it seems to me at first blush, the most cost-effective, because even if it were set by a blue-ribbon committee, an external body, that blue-ribbon committee would have to convene once every  $x$  number of years and not be there every year scrutinizing the same sort of consideration.

Again, not having reviewed all the various models to the extent that Treasury Board seems to have, this is the one that seems most attractive to me, looking at it from the optic of preserving independence and also being cost-effective.

**Mr. Tom Lukiwski:** Mr. Chair, seeing Mr. Broadbent raised his arm, if I have any time left, I'd relinquish it to Mr. Broadbent.

**The Vice-Chair (Mr. Derek Lee):** You can certainly cede your minute to Mr. Broadbent unless Mr. Broadbent wants to wait for his round. Do you have a one-minute question, Mr. Broadbent?

**Hon. Ed Broadbent:** The one-minute question is this. There are two variants of the independent funding or long-term funding that I'm aware of, anyway. One is just to have a commitment, a ministerial or budgetary commitment. That's one. The other is to have it legislated, to amend an act so that it provides a certain amount of funding over a number of years. The International Centre for Human Rights and Democratic Development, for example, in Montreal, when it was established, had legislated five-year funding, which meant that the government couldn't change it annually simply by the budgetary process. It would have to amend the act.

Would you comment on those two options?

**Prof. Craig Forcese:** Was that just for the first five years or it is every five years thereafter?

**Hon. Ed Broadbent:** Well, there was a change in government, and then the change in government resulted in the change. It was not clear. There was debate as to whether it was intended to be renewed for five-year funding or not.

**Prof. Craig Forcese:** I think this gets to the issue that Mr. Laframboise was raising, namely, to what extent a multi-year funding package would require a legislative change versus just an affirmative practice that everyone sort of agreed to. I think you've raised the possibility of both options. The question is, what's preferable?

Well, from the optics, say, of how I've approached the issue—namely, independence—the more clearly independent the body is, the less likely it is that you'd have a problem if it were ever challenged. The fact that it's codified in legislation means that if you're ever in a Rowat-like case, you point to the legislation—as the courts usually do, incidentally—in deciding these independence issues. They don't necessarily look at practice; they look at the legislation. They say, oh well, there's legislation that gives security tenure. So if you could point to an aspect of the legislation that said, look, there's a five-year funding package in place, so we don't have to worry about this past complaint that officers had about funding being politicized, I think that would be helpful from the perspective of litigation perhaps.

As to whether it's desirable from a logistics or efficiency point of view, I can't answer that. But it seems to me that both opportunities are open.

Thank you.

• (0950)

**Hon. Ed Broadbent:** I'll come back later.

**The Vice-Chair (Mr. Derek Lee):** We have you on the list.

**Hon. Ed Broadbent:** By the way, I want to thank my colleague for that.

**The Vice-Chair (Mr. Derek Lee):** I'll go to Mr. Epp, and if there's nobody on my right, I'll go to Mr. Laframboise next.

Mr. Epp, you can be first, for three minutes.

**Mr. Ken Epp (Edmonton—Sherwood Park, CPC):** Thank you very much.

I want to pursue the area of expertise that you have in the law area. We know that the funding of the courts and the judicial salaries are really two different issues. However, presumably both of them affect the independence of the judges: if the judges make rulings that are not to the government's liking and the government then punishes them by actually reducing their salaries, even though all of the other funding mechanisms stay in place, that can be perceived as affecting their independence.

I would like your response to this question, because I'm frustrated as a member of Parliament, and there is a big outcry from my constituents about the MPs getting a salary increase, similar to the judges', that was in the range of 10%. When it was announced that the MPs would be de-linked from the judges, then there was considerable outcry: well, who are these judges to give themselves a 10% raise? We know that doesn't happen, but that's the perception out there. So how much influence do you think the actual salaries have on the independence of, say, an officer of the court or the judges?

**Prof. Craig Forcese:** For the officers, for the most part—and I have to confirm that this isn't the case for each officer, but certainly

for some of the officers—their salaries are actually tied to judicial salaries, so presumably they're going to get that 11% hike.

The broader question is how important salaries are in terms of independence. We had this pronouncement from on high in 1997 in the P.E.I. reference case from the Supreme Court, in which the Supreme Court was quite emphatic that salaries meant quite a bit in terms of the independence of the court, both in terms of maintaining the perception of impartiality if the court was.... If the salaries were to abate and be too low, then a reasonable person might believe that perhaps the court would be more receptive to nefarious goings, etc.

We could quibble over that, but I think on judicial salaries the law is fairly strong now because of the Supreme Court's pronouncement in the P.E.I. reference. As a consequence, we do have these independent salary commissions at the federal level under the Judges Act, which are in their own respect quite independent bodies. They do have, to a certain extent, their own security of tenure.

I think the issue that remains to be decided is the one you allude to, namely, to what extent we can extrapolate from the court's clear pronouncements on preserving independence in relation to judicial salaries to also this question of funding of court services more generally. At the federal level in relation to the Federal Court, the Tax Court, and the Supreme Court of course, that funding of court services is by the federal government. There is this tension that I was alluding to earlier, in the Court Administration Service Act and also in the statements of the court administrator to Treasury Board, about the fact that they have to come to Treasury Board to seek funding and, at the same time, try to preserve independence.

I'm not sure we've arrived at the final word on how that process is developing. As I mentioned, this Alberta case is currently at the Supreme Court, not alone but with several other cases from several of the provinces. I'm not entirely sure to what extent that issue will be litigated or has been litigated and to what extent the court will weigh in on it, but there is a possibility we'll see another pronouncement from the court.

• (0955)

**Mr. Ken Epp:** Thank you.

Thank you, Mr. Chairman.

**The Vice-Chair (Mr. Derek Lee):** Thank you. That's three minutes.

Monsieur Laframboise, then back to Mr. Broadbent.

[*Translation*]

**Mr. Mario Laframboise:** Thank you, Mr. Chairman.

I hope our committee will be the first to suggest a model. So we should submit a report. This is why we asked you to appear before the committee. I think it's urgent that we suggest a new funding model for commissioners. In the Rowat case, had the new developments been known, lawyers would probably have succeeded in casting a doubt on the financial independence of the commissioner. What would have happened then?

[English]

**Prof. Craig Forcese:** That's an interesting question—what would be the impact of an affirmative finding by the court that the Information Commissioner is not sufficiently independent to meet section 11(d) of the charter? It's a good question, and Mr. Rowat was seeking a declaration from the court that section 36 of the Access to Information Act in its entirety was of no force and effect, that it was unconstitutional.

Section 36 of the Access to Information Act includes not only the power to compel witnesses and evidence but also several other fairly potent investigatory powers that the commissioner has. Whether the court would actually have awarded that remedy had Rowat been successful is an open question. I think in that circumstance the least sweeping court order that would still have accommodated the concern about independence would have been the court saying that the Information Commissioner is not sufficiently independent and therefore the Information Commissioner doesn't have the powers of contempt equivalent to a superior court of record. That would be the narrowest possible outcome. The broadest outcome in that case would have been to give Rowat what he asked for and strike down all of section 36, which would have basically robbed the Information Commissioner of all the commissioner's affirmative investigatory powers.

When I'm talking about independence in paragraph 11(d), it's not as if the court would say that the Information Commissioner can no longer exist, but we'd be talking about removing some of those key powers that Parliament, in its wisdom, has felt the Information Commissioner and other commissioners should have.

[Translation]

**Mr. Mario Laframboise:** This means some witnesses would have refused to appear, some investigations wouldn't have been done and we would have had some challenges.

[English]

**Prof. Craig Forcese:** Possibly, yes.

**The Vice-Chair (Mr. Derek Lee):** Thank you.

Mr. Broadbent, and then Mr. Hiebert.

**Hon. Ed Broadbent:** Mr. Chair, I would like to go back to pursue the legislated option as opposed to that of simply a line amount in a budget that would provide longer-term funding. If I could in this context just share a bit of personal experience to show how the legislative option, which I am now going to argue for—say, five-year locked-in funding that could provide for regular but limited increases even, cost-of-living increases or whatever.... My thinking about it, anyway, at this point is that it seems to me the preferred option. I'll tell you why, based on my own experience.

When I was the head of an institution established by Parliament—the International Centre for Human Rights and Democratic Development, as I said—our original budget was legislated and had five-year locked-in increases provided for each year. It was a new institution—this is important—so it made some particular sense to have annual increases as your capacity to use them increased. But you could apply it in principle to the officers we're talking about—not that they need to expand their size necessarily in the same way, but because there would be, say, cost-of-living increases. I'm

basically coming to the question of making internal decisions that are explicitly related to your mandate without apprehension that you're going to upset the government in some way and that then the government will take a negative view of your budget.

This began to have a role. When we lost our legislated independence, this began—I don't want to exaggerate the point—to affect internal discussions about our program activity. I want to say immediately and be very clear—because two different prime ministers from two different parties and two different foreign ministers from two different parties were involved—they never at any time attempted to influence our action. But because we were involved in international human rights activities, we interpreted our mandate as being to criticize the government from time to time when the Government of Canada's activities seemed to impinge upon these rights. We didn't see it as our principal role at all to be a critic of government; we were promoting the development of human rights internationally.

But I want to share this with my colleagues. When the independent legislated funding disappeared and we had to go to CIDA each year—that's what happened afterwards, we had to go to CIDA each year to do our lobbying for money—it generated internal discussions among my staff about marginal cases. Do we pursue this option or don't we? Are we likely, even if we've had no demonstrated capacity at the ministerial level for interference, to upset CIDA? We did upset CIDA a number of times, and we ought to have upset CIDA, because we were given by Parliament a clearly independent mandate.

It seems to me that this is quite analogous. It did affect—I'm not going to go beyond that—serious discussion internally about certain projects, as I would think it would affect internal discussions from time to time for the officers of Parliament we're talking about, not because they presumed bad faith from the government, but because they simply presumed rivalry and competing priorities and obligations. I think that's what we're looking at.

I'm taking a minute on this because it has come up. We haven't had this discussion as a committee before about legislated or other kinds of long-range funding. You raise it, and it does seem to me that legislated long-range funding provides additional security. And it does not, I repeat, have to entail great increases every year either; it could involve very limited increases. It would just give that added independence to these officers if the government of the day, to effect their budget, in fact had to go back to amend an act of Parliament. That gives a much greater degree of autonomy, and it did indeed give a high degree of autonomy to the International Centre for Human Rights and Democratic Development.

My successor, Warren Allmand—whom many of you know, and who came from a different political party—also happened to pursue that position, and as colleagues who knew him will know, he always exercised a great sense of independence.

The point I want to make is that the internal decision-making of the staff starts to shift when they no longer have the feeling of complete independence. I've made the case for my colleagues here. I don't know if you want to comment on it, Professor Forcese, or not.

•(1000)

**Prof. Craig Forcese:** Let me just make three follow-up comments on that.

The first is this. You talked about the mandate of Rights and Democracy, as it's now called, about its having a sort of quasi-independent role. I would say that quasi-independent role is actually an independent role in the case of officers. They have an affirmative mandate to be the arm of Parliament. So to the extent that their internal deliberations are influenced, as you've described at Rights and Democracy, by the prospect of not getting funding, the consequence is that much more grave, in my view.

The second point is this. You talked about the necessity for ratcheting up funding every year when you were starting up Rights and Democracy. I have to say that I look with some concern on reports from the Information Commissioner about the accelerating rate of complaints and the number of access requests that are met and the fact that there is now a nine-month backlog in complaints. As a user of the Access to Information Act who is still waiting for a response I filed for in July, I am quite concerned to hear that. The idea that these important agencies are not being funded properly is of real concern.

The last point I would make is that there is a Supreme Court case in which the Auditor General tried to sue the government on some matter that was contentious between them in the late 1980s. The Supreme Court came back saying, if you have a beef with the executive branch in its compliance with the Auditor General Act, go to Parliament. You're simply an arm of Parliament. If you have a complaint, go to Parliament. It is for Parliament to decide to resolve this dispute, not for the courts.

Keep in mind that these officers of Parliament are looking to you ultimately, as parliamentarians, if they have a serious dispute, to resolve it. They don't have standing in court to complain about the executive.

**The Vice-Chair (Mr. Derek Lee):** Thank you.

That was six and a half minutes, just so we all know.

Mr. Hiebert, and then Ms. Jennings.

**Mr. Russ Hiebert:** I have one further question along the lines of what we were discussing a few minutes ago. In the section of your paper describing the proposals you put forward, you make the case that the reason members of Parliament should not be involved in the funding of these commissions is that the Access to Information Act may be extended to Parliament itself. If the Access to Information Act were not amended, this would obviously not be a concern. Is that correct?

**Prof. Craig Forcese:** That is correct.

•(1005)

**Mr. Russ Hiebert:** I don't see any reason why, even if it were amended, it would not preclude parliamentarians from being on a committee that would fund the other commissions.

**Prof. Craig Forcese:** That's a fair comment. The comment about the access commissioner and the parliamentary role in funding is very much speculative, because I'm not sure there is consensus that the act should actually be extended to Parliament. We're certainly not

there yet. I just raise it as a thought to have in mind, because it would be unfortunate if the act were amended and a couple of years from now we were in the same position, except discussing the independence of the access commissioner vis-à-vis Parliament.

It's just a thought to keep in mind.

**Mr. Russ Hiebert:** It's not something that's looming, that would preclude this committee from bringing forward those kinds of suggestions at this time. From the information we've received as a committee, I'm partial to the funding model that has been referred to as the British model or the U.K. model, the model that allows parliamentarians from a variety of different settings, or different officers of Parliament—members of Parliament who have officers' positions—to be responsible for the long-term funding of all these different commissions.

I thank you for your comments and for allowing us to consider that option.

That's all I have.

**The Vice-Chair (Mr. Derek Lee):** Thank you.

Ms. Jennings, and then Mr. Tilson.

**Hon. Marlene Jennings:** I want to thank my colleague Mr. Broadbent for raising the issue of Rights and Democracy. I think it's a very important one. Colleagues around the table may not know this, but once that legislated five-year secured funding for the International Centre for Human Rights and Democratic Development, of which you were the first president, came to an end, not only did the funding become an issue, but the budgets were cut severely. It is again today a major issue. Since I was first elected in 1997, I have advocated on behalf of the Rights and Democracy centre to see the funding secure, to see multi-year funding restored, and have been unsuccessful. I would urge the members here to join their voices.

I want to come back to the issue of multi-year funding and the fact that you feel that if it were legislated it would provide some security and would better protect the appearance of independence. I'm like-minded. I do in fact think there should be some kind of guaranteed secure funding mechanism. Legislated would be my preference. I do, however, have another concern, which is the governance of these officers of Parliament and the need to then strengthen the ability of parliamentary committees to effectively exercise that governance and hold those officers accountable to Parliament.

I sat on the public accounts committee for a number of years. I was vice-chair of that committee for a number of years, and I have to say that I do not believe our committee, with all good intentions—and everybody on the committee was intelligent—had the tools and the resources necessary to exercise adequate and effective oversight over, for instance, the Auditor General. I've sat on other committees that other officers of Parliament reported to, and I found this to be my experience.

My concern is that we already have a problem in the sense that our own committees, in my view, do not have the proper resources to exercise effective oversight and governance of our officers of Parliament. If we move to a legislated multi-year funding, then that independence and lack of effective oversight is that much more heightened. How do we deal with that?

•(1010)

**Prof. Craig Forcese:** You raise a number of issues. When you were speaking I was actually thinking of the Radwanski affair. I believe Mr. Lee was part of a report talking about the Radwanski affair and the question of accountability of officers of Parliament.

Officers of Parliament are agents of Parliament—that's a simile for officers of Parliament. How do you best preserve accountability? Ultimately, the first place accountability arises is at the front door; it's selecting good people and making sure the person is actually vetted properly before they're appointed an officer of Parliament, because once they are an officer they do have certain protections. So I think there should be a greater involvement by parliamentary committees in the vetting process itself rather than pro forma approval, which has happened in the past.

The resource issue is an important one, as everyone knows, for all parliamentary committees, not just in considering questions of Governor in Council appointments. With officers Parliament does have to approve the appointment process, which is unusual for a Governor in Council appointment, so there should be more emphatic involvement there. Ultimately, the true accountability mechanism is the power to dismiss, which the government preserves and Parliament preserves, which has never been exercised for any officer of Parliament. Now, it's arguable with Mr. Radwanski whether there would have been a resolution from Parliament calling for Mr. Radwanski's dismissal had he not resigned, but there are accountability mechanisms. I'm not sure that the accountability mechanism necessarily has to be in the form of funding and holding the axe over the head of the officer in terms of funding; there are other mechanisms. That would be my reaction.

**Hon. Marlene Jennings:** I actually support—hesitantly—legislated multi-year funding for the officers of Parliament.

If parliamentary committees had the proper resources to exercise effective governance over our officers of Parliament, the Radwanski case might never have got to the point it did, because there would have been effective accountability year after year. There would have been a better chance for the systemic problems that were being created within that agency to come to light. In fact, it got to the point where it rotted through before it flew to the surface. I think part of the reason is precisely because our committees are not able to exercise effective oversight of our officers of Parliament, due in part to lack of resources. There are a number of other reasons that I believe contribute to it. The composition of committees changes rapidly....

The chair is telling me my time is up.

**The Vice-Chair (Mr. Derek Lee):** You took six and a half minutes, yes. But we're all better off for the six minutes.

**Hon. Marlene Jennings:** It only makes up for the extra time you've given to other members.

**The Vice-Chair (Mr. Derek Lee):** Probably.

**Hon. Marlene Jennings:** So it balances out.

**The Vice-Chair (Mr. Derek Lee):** I can see them all smiling in agreement.

Mr. Tilson is next for three minutes.

**Mr. David Tilson:** Thank you for bringing this alternative for us to consider—the multi-year funding principle. I have a couple of simple questions about it.

I assume that when you process the multi-year funding—I assume you've thought all this out—there will be increases in each of the five years, or over that five-year period of time. But it seems to me it is possible for a government, for whatever reason, to say it might be appropriate that there be a decrease in funding because of a downturn in the economy, for example; it might be necessary to have cutbacks. We've been talking about this unfortunate affair that happened with one of the commissioners. There might necessarily be a cutback in how that commissioner was expending.

I had an opportunity with the Ontario legislature to be on a committee that reviewed the Information Act, and we discovered that there were people taking advantage of the process. Some fellow came and said he was a self-proclaimed anarchist. He wanted to know how many rolls of toilet tissue the Toronto police department used in a year. The committee then started talking about whether there should be restrictions on what a commissioner did. In that particular case it was the Information Commissioner. Do we allow people to ask anything they want?

It just seems to me it might not be appropriate to give automatic increases over whatever period of time one chooses—say, five years.

•(1015)

**Prof. Craig Forcese:** I think the idea is to establish a baseline and then have some formula for determining either increases or decreases. For example, if you tied the Information Commissioner's funding to a baseline and then had some additional funding dependent on the number of complaints they received, those complaints could go up or down. It seems unlikely that they would go down; in most instances we're talking about their going up. Nevertheless, the formula wouldn't necessarily be ratcheting up the funding every year.

**Mr. David Tilson:** Quite the contrary, Professor. You could have a need—we'll pick on the Information Commissioner—to provide more services, but for whatever reason the economy just couldn't sustain that need. It might be that every ministry in the government—I'm just trying to think of a turn of economic events—including commissioners, would have to cut back on things because we just couldn't afford it. Just as with household expenses, we all have to cut back if we're having tough times.

**Prof. Craig Forcese:** You'd have to decide, if you were to legislate this, to what extent funding should be entirely dependent on the function of the officer and independent of any external event, like a downturn in the economy. As you're suggesting, perhaps there should be some kind of escape provision that allows for across-government cuts in anticipation of a downturn in the economy. You could build into the mechanism some recognition of extraordinary events.

**Mr. David Tilson:** Thank you.

**The Vice-Chair (Mr. Derek Lee):** Mr. Broadbent.

**Hon. Ed Broadbent:** Just to pick up on that, I think our colleague has introduced a very important point that would have to be taken into account if you want to provide long-range legislated independence.

Your last comment was a point that I was going to make. You could build that into the legislation that sets it up, that would allow for special action under special circumstances.

But I also recall the Auditor General coming before us and informing us of a recent budget cut that applied across the board. It didn't affect her office, but she made the decision that it would apply to the Auditor General's office as well. I think the point is important, that if you provide locked-in funding, one option is to build into that legislation the possibility under certain circumstances to reduce the budget. The other option is the kind of model set by the Auditor General herself.

I can see certain circumstances where you could have a number of cuts in agencies or across-the-board cuts in government programming, but you might not want to apply it to the officers of Parliament because of their particular mandate. But it's certainly one question that I think as a committee we will have to take into account when we make our final recommendations on this.

That's all, Mr. Chair. It was just a comment.

**The Vice-Chair (Mr. Derek Lee):** Thank you.

The chair has a couple of questions, seeing no others—I certainly will recognize others.

Let me put the question. It's in relation to this concept of independence that you've urged upon us. There seems to be an inference on your part, an assumption on your part, that just because someone is out there appointed to do a job, he or she should have a conceptual independence from everything else. My perception is different. The officers of Parliament are hired and put in place by Parliament, so they're certainly not independent from Parliament.

The case you make for the judiciary is real. There's a constitutional independence. That's quite different from an officer of Parliament. I would agree that the decisions of officers of Parliament have to be impartial, but I'm not so sure that means total independence. There's a difference between being impartial and being able to write your own cheque for your administrative purposes.

So could you explain why you're using the term “independence”: independence from what, and for each of the officers that we're looking for—ethics, privacy, and information—realizing, of course, that there are other officers who may have other relative independences to negotiate? I would urge upon you the concept of impartiality and quasi-judicial decision-making as opposed to general independence.

• (1020)

**Prof. Craig Forcese:** Impartiality tends to go to the specifics of the decision-maker in question. By “independence”, I mean structural independence, independence structurally from a given branch of government.

On what basis do I claim that independence is required of officers? Well, I think you're right; in most instances, in most of their functions, they're not exercising a function that would attract a constitutional requirement of independence. But as the Rowat case illustrates, in certain limited circumstances—that is, when they're exercising a contempt power—that does trigger a constitutional

charter obligation under paragraph 11(d) to be independent, and that was the holding of the Rowat case.

Your colleague asked about the potential implications of a court ultimately finding that they weren't independent in that particular aspect of their job. The consequences would be relatively narrow in the sense that, at best, the court would strike out section 36 or, if it were a little bit more nuanced, strike out the contempt power that they have implicitly by virtue of being analogized to a court of record. Nevertheless, I think there is some case law authority suggesting that independence is a requirement, at least in those narrow functions.

In terms of your second point, that these are officers of Parliament and they're ultimately accountable to Parliament is true, although Parliament has chosen in its wisdom to build in substantial structural independence in such things as security of tenure. Parliament at its whim cannot dismiss an officer of Parliament. There needs to be cause, and you need that resolution. So there's a cause requirement and there's a procedural requirement. So there is already some structural independence that's explicit in the acts that govern all of these officers.

**The Vice-Chair (Mr. Derek Lee):** Thank you.

Mr. Epp, and then Mr. Broadbent has another intervention.

**Mr. Ken Epp:** Thank you.

I'm going to challenge you now. You've come up with this idea of legislated long-term funding. I think there are two flaws in that, and I want you to answer to these. One flaw is that there is a total lack of independence demonstrated at the time of that original legislation because that is a time when Parliament collectively can really put the screws to the officer who's involved.

You're suggesting maybe a cost of living type of increase or to tie the increase from year to year to a specific index or whatever. I don't know exactly how that would be done. That presumes that the legislative body of the day can accurately predict what are going to be the needs of this officer for the next five years, or however long the term is.

I think that type of omniscience is really a stretch, especially because the role of the officers can change substantially. I think, for example, of the Information Commissioner. The volume of work cannot possibly have been anticipated five years ago by legislators at that time. If the volume goes up, then you need increases beyond just cost of living, because you're going to need more staff, more facilities, and so on.

Even though on the surface this long-term funding thing sounds like a really good idea, I think it is fraught with flaws of inadequacy because of the inability to actually predict. If you're going to have a mechanism so that it can be reviewed, then you're right back to square one, because if the officer has something that the Parliament of the day likes, then they'll approve the funding, but if this officer wants to do things that make us all feel uncomfortable, we'll vote against it, and the independence is gone.

I'd like to hear your comments.

**Prof. Craig Forcese:** On the first point, the lack of independence at the time the mechanism is established, the point made by Ms. Jennings is that you can never have a perfect system in place. You're always going to find some point at which, if you wanted to, you could drill down and find some lack of independence. It's a question of reasonable apprehension of independence. At the time a mechanism is put in place, you could have all sorts of monkeying about. But we're not aiming for perfect here. We're trying to avoid the sort of circumstance where in a given year some decision comes out from the Information Commissioner that the government is very unhappy about and the next year they get punished. That's my response to your first comment.

The second is the annual gross-up in a long-term scheme. I'm actually not advocating cost of living. I don't think cost of living has anything to do with the costs that might be incurred by an officer of Parliament. I think it's a different criterion. I think the criteria that should be selected should be tied to their functions so that there is some effort to predict the sort of workload they might have.

Off the top of my head, for the Information Commissioner, the number of complaints seems like a reasonable proxy as to the amount of workload in that office. For the Privacy Commissioner it's the number of complaints potentially, but you have to accommodate the fact that complaints are now being received under the PIPEDA from the private sector. Also, both of these officers have a promotional function as well. You have to tie the increases to their functions, not to some external indicator that has nothing to do with their functions.

Is it going to be a perfect mechanism? Probably not. But the effort should be made to arrive at something that's an approximation. Perhaps you could have some supplementary estimates process put in place if that criterion turns out not to be totally effective. The idea again is to make it as arm's-length as possible, but not necessarily shoot for perfection.

•(1025)

**Mr. Ken Epp:** I know my time is up, but can I ask a supplementary question?

**The Vice-Chair (Mr. Derek Lee):** Sure, Mr. Epp. Go ahead.

**Mr. Ken Epp:** If you had this system of supplementary estimates to top it up, is not the independence totally shot to pieces there?

**Prof. Craig Forcese:** If your measure is a perfect system, yes. If your measure is a reasonable apprehension, potentially not. It depends on how the supplementary estimates system would work. It's one thing to say that if your funding is inadequate you can come under this multi-year system with its criteria, and you can come to us and we can gross up; here are some criteria that we consider in deciding whether to gross up. I think that one would be okay.

I think a more problematic system might be that we can roll back under the multi-year approach at our discretion for no good reason. That, I think, would raise more concerns.

The devil is in the details, so coming up with a system off the top of my head that would account for these speculative independence issues is tough. But my gut reaction is that so long as there are some clear guidelines on the supplementary estimates and the guidelines

are about grossing up and not grossing down, you should be okay. Again, it's about perception, not necessarily 100% perfection.

**Mr. Ken Epp:** But grossing up and grossing down is simply fulfilling a constitutional mandate of Parliament to manage the financial affairs for the taxpayer.

**Prof. Craig Forcese:** Yes, although Parliament is free to introduce, in its wisdom, a mechanism that would essentially make it a multi-year process. In other words, I don't know that Parliament is surrendering its function in relation to the purse strings of the nation by establishing this system for officers. It can do that at its discretion, as it apparently did in relation to the International Centre for Human Rights and Democratic Development, at least for those initial five years.

**Mr. Ken Epp:** Okay. Thank you, sir.

**The Vice-Chair (Mr. Derek Lee):** Mr. Broadbent, then Ms. Jennings. That will probably wrap us up.

**Hon. Ed Broadbent:** To continue the discussion about this multi-year funding and the point my colleague raises, I was the one who introduced the possibility—and I said “possibility”—of linking a three-year or five-year legislated budget with the possibility of a cost of living increase. First, it wouldn't be wedded to this; I would want to err on the side of fiscal responsibility and maybe not include that, but just make your best guess over five years for a government, whoever the government of the day is, of a reasonable amount for running this institution over five years. I think it is very important, the more I think about it, to have a legislated independence to deal with, in part, the example my Conservative colleague raises.

Though the legislated mandate of the centre I was president of ran out while I was there, it was my successor—fortunately, from my point of view—who experienced the cutbacks. I didn't, but we had to take into account, for example.... We knew how much money we were going to have, so we could have expanded ad infinitum on a global basis, meeting human rights demands, analogous to, say, requests for the Information Commissioner, or whatever. It's up to that institution to say no, Parliament has given us so much for each of these five years, and no matter how much public demand is out there, we can't meet it, because Parliament has put the ceiling on—has given us the independence, but has put on a ceiling. So it's up to the internal management of that institution to say, no matter how much demand is out there, sorry, Parliament has decided there are limits.

So I think a parliamentary responsibility over the budgetary process is still maintained. If push came to shove, you could amend the legislation, of course, or build in a mechanism, as has already been mentioned. But the principle of legislated independence for these kinds of officers really merits special consideration by us.

•(1030)

**The Vice-Chair (Mr. Derek Lee):** Thank you.

Ms. Jennings.

**Hon. Marlene Jennings:** Thank you, Mr. Chair.

This is one I forgot to ask you. You had mentioned the case of the Auditor General versus the Government of Canada in the 1980s. Would you provide this committee with the exact reference of that case?

My second point is that I find quite intriguing your suggestion or recommendation that actual funding, regardless of what form it takes, should be tied to the actual functions exercised, and not to some external indicator—like cost of living, for instance—that has absolutely nothing to do with the functions.

I find it intriguing because one of my colleagues raised the issue of MPs' salaries and the fact that we had adopted legislation some time ago, Mr. Epp, that would tie our salaries to those of judges in order to allow a certain amount of distance over increases in our salaries in the future. The government, in its wisdom—and I use that sarcastically—decided to untie, and to attach an external indicator, the Conference Board of Canada's indicator or whatever, that had absolutely nothing to do with the functions of a member of Parliament, a parliamentarian.

While that doesn't have a direct link to the subject we're discussing, it does have an indirect link, because we're talking about the issue of tying funding to actual function. I'd like a little more comment on your part as to why it's important that funding—or salaries, or whatever—should be linked to actual functions exercised by the body or the individual, rather than to some external indicator that has absolutely nothing to do with the actual functions being exercised.

**Prof. Craig Forcece:** On the issue of judicial salaries, as you know, the independent salary commission boards are supposed to arrive at the hike-up for judicial salaries. Not having necessarily been party to those discussions or done much reading or writing on it, I would imagine that part of the impetus for salary increases is tied to the profession—judges are ultimately lawyers, and lawyers are making  $x$  number of dollars, and if you're going to attract members of the legal profession to the judicial branch, you need to have some recognition of that fact in the judicial salaries. That's part of it, I assume, in terms of the amount they arrive at.

As to who's doing the arriving at—in other words, the fact that we have these commissions doing it—that's all part of judicial independence as mandated by the P.E.I. reference case.

You also raised the salaries of officers. As I mentioned earlier, the salaries of officers in most cases are tied, not necessarily to Supreme Court justices, but in some instances to Federal Court justices. I guess we could ask the question of whether increases in salary for officers should be tied to these increases that might be motivated by concerns about the legal profession. On the other hand, the fact that they're linked, I think, accommodates the concern that if they weren't linked you would have an independence concern. The fact that they're linked to an independent body means that you don't have a salary concern in relation to officers.

On the issue of whether MPs should be linked to these commissions, I'm not going to weigh in on that.

**Hon. Marlene Jennings:** You're not going to touch that one, right?

I don't have any further questions.

**The Vice-Chair (Mr. Derek Lee):** I just have one follow-up. It's hypothetical, and I'd like your comment on it.

There are conceptually two functions here in terms of budgeting. One is the budget making, spending, and planning function, and then there's the budget approval or voting process. I'd point out that even Parliament makes a submission to Treasury Board. In your view, does that mean that Parliament is not independent? I don't see MPs bristling under that arrangement, where Parliament makes a submission to Treasury Board and we outline our spending plans, because the government, at the end of the day, has to manage the process of managing the fisc.

So if that's the way things are, if some body has to oversee budget planning and Parliament itself takes care of the budget approval by the vote, would you accept that if Parliament developed its own budget planning mechanism that could be used by officers of Parliament so that they wouldn't have to go to Treasury Board, so that they'd actually come to a new Treasury Board-like mechanism in the parliamentary administration, it would accomplish some of the goals we're aiming at here?

• (1035)

**Prof. Craig Forcece:** I think so. It would take it out of the hands of Treasury Board.

Right now the concerned voice of the officers is that Parliament has given us this mandate, and this mandate requires us to go out and scrutinize the activities of the executive; but every year we . There's some of that parlance in the press.

If you were to put it in the hands of Parliament, subject to the speculative comments I made about the Information Commissioner potentially having a mandate in relation to Parliament, then it's no longer in the hands of the Treasury Board. That, ultimately, is what we're aiming for.

On your comment about the fact that Parliament—the Commons and the Senate—has to go to Treasury Board itself in the estimates process, I always thought that was kind of weird, to be honest. On the other hand, it seems consistent with the constitutional requirement that spending be authorized by the government itself. The government is the one that introduces the increases in spending. The notion that Parliament controls the purse strings and the government is the one that essentially announces spending has always been a little bit of a quandary for me.

But as to whether Parliament is independent or not as a consequence, well, Parliament is not legally obliged to be independent. Paragraph 11(d) doesn't attach to Parliament. We can have a discussion as to whether it would if Parliament were exercising its contempt powers, but for the most part, it's not required to be independent.

**The Vice-Chair (Mr. Derek Lee):** Thank you.

I guess we've completed this aspect of our meeting. On behalf of all the colleagues here, I want to thank you, Mr. Forcece, for coming and providing us with the benefit of your views.

We can leave this part of the meeting, and I think we have a procedural item we're going to deal with now.

Thank you very much.

Mr. Powers.

**Mr. Russ Powers:** Mr. Forcese, what's the name of your book? You've given us all the references.

**Prof. Craig Forcese:** Unless our editor pulls the plug on the title, right now it's called *The Laws of Government: The Legal Foundations of Canadian Democracy*. It's supposed to be out in May, we're hoping.

**Hon. Marlene Jennings:** And how much does it cost?

**Voices:** Oh, oh!

**Prof. Craig Forcese:** No idea, no idea.

**Hon. Marlene Jennings:** You're doing a bit of advertising, so....

**Prof. Craig Forcese:** We have to go to Treasury Board.

**Hon. Marlene Jennings:** I mean, we won't accuse you of flogging your book, but what the hey.

**Prof. Craig Forcese:** This is the manuscript right here.

**The Vice-Chair (Mr. Derek Lee):** The pricing of the book will need Treasury Board approval, I understand.

I just need an indication from colleagues as to whether or not we should go in camera. If we go in camera, we won't have to burden the public record with procedural discussions.

Okay. We'll adjourn the public meeting. We'll take a couple of minutes to wind down the administration and then we'll go in camera.

Go ahead, Mr. Lukiwski.

**Mr. Tom Lukiwski:** I think this needs to be on the record. This is regarding the next meeting of this committee, which is now scheduled for Thursday, I believe.

I know that a number of us will not be here on Thursday. We'll be going to the memorial service in Alberta for the slain RCMP officers. Out of our committee, and I can only speak from this side, three of us will not be here on Thursday. I'm wondering whether it would be best to adjourn this Thursday's meeting.

**The Vice-Chair (Mr. Derek Lee):** Thank you for raising that.

I think we should review with the clerk the witness lineup for Thursday.

It's drafting instructions? Thank you.

Well, if there isn't any debate or dispute, I'm prepared to cancel the Thursday meeting.

Is that agreed?

**Some hon. members:** Agreed.

**The Vice-Chair (Mr. Derek Lee):** Okay.

We'll now adjourn the public meeting and go in camera.

*[Proceedings continue in camera]*

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