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**Subcommittee on Disclosure Forms under the
Conflict of Interest Code for Members of the
House of Commons of the Standing Committee
on Procedure and House Affairs**

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Mr. Scott Reid

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• (1545)

[English]

The Acting Chair (Mr. Gary Goodyear (Cambridge, CPC)): Order.

Colleagues, thank you very much for your confidence in asking me to sit as chair today in the absence of the regular chair. I certainly appreciate that.

Today we are continuing with our discussions on the conflict of interest code, and we have with us again Mr. Walsh.

I think what we'll do, Mr. Walsh, is hand out a document. All members will have the document in front of them.

We're not going to stick to the time if we can't, obviously, but I'm just going to suggest, for organizational purposes, that we spend about 30 minutes on this document.

Mr. Walsh, I'll ask you to introduce your colleague and then perhaps you can lead us through the document, and if we can, we'll see if we can get it wrapped up in 30 minutes.

Thank you.

Mr. Rob Walsh (Law Clerk and Parliamentary Counsel, House of Commons): Mr. Chairman, I have with me Ms. Melanie Mortensen, legal parliamentary counsel, from my office. She was with me on May 10, 2007, when we appeared in front of the subcommittee.

This document basically summarizes the presentation we made on May 10. I don't propose to take up the committee's time going through it in any detail, but suffice it to say, the first part deals with Bill C-2.

I appreciate that members of the committee are only just seeing the document now. We put it together as quickly as we could in the time available since the last meeting.

The first part deals with the Bill C-2 problems. Basically what we're saying there is, as we said on May 10, subsection 6(2), in our view, ought to be removed and subsection 64(2) modified, and section 21 removed and section 30 amended. Section 13 of the members' code, in my view, is sufficient for the purposes of section 21.

Again, the idea behind all of that, as I said last time, was to separate the supervision and the control of discipline of members from that of public office holders, in particular members and parliamentary secretaries, the latter group being subject to the Prime Minister's code, now the Conflict of Interest Act when that comes into effect. Members of Parliament, in my view, should be governed by the members' code, which is attached to the Standing Orders of the House, and that is in keeping with the constitutional separation of the executive, legislative, and judicial branches.

The next part of the paper deals with trusts—in particular, section 99 of the Federal Accountability Act. Again, I don't propose to go through that. It's very straightforward in terms of what it proposes—again, the same idea that members of Parliament, with regard to trusts, should be governed by the members' code as opposed to provisions of the Parliament of Canada Act. However, if the purpose of the trust restrictions is electoral in nature, then perhaps these provisions could be statutory, but in the Canada Elections Act as opposed to the Parliament of Canada Act.

Right now, they're being proposed for the Parliament of Canada Act, and we simply feel that, as statutory provisions, that's the wrong place for them. If they must be statutory with respect to members of Parliament and if the electoral aspect is what the object is here, the mischief being sought to cure, then the Canada Elections Act would be the place for that.

If, on the other hand, that isn't the objective, but simply because trusts present potential conflicts because of the benefits they offer to members, ostensibly, then it should be something dealt with under the members' code.

The third part then deals directly with the conflict of interest code. You may recall that at the previous meeting of the subcommittee Ms. Mortensen took the subcommittee through various provisions of the code that we felt warranted attention. We have simply reiterated those in the pages that follow. In the interest of time, I won't go through them again in any detail, but certainly they're available to the committee and to the staff to review with reference to any eventual report the committee may choose to make.

That would be all I would say at this point by way of a presentation.

The Acting Chair (Mr. Gary Goodyear): Thank you very much.

Colleagues, I do recall that in our last meeting there was some confusion between the members' code and the code of the public officers, that part that's disclosed and that part that's private. So I apologize for that complexity of the code, but we'll see if we can muddle our way through this.

Margie, did you have anything you wanted to say or questions you might want to ask?

Ms. Margaret Young (Committee Researcher): Well, there are some things the committee will want to discuss when we're in camera afterwards. Let's do the other questions first, and then we'll see.

The Acting Chair (Mr. Gary Goodyear): All right.

We're in public, I want to remind members. There are some aspects of this issue that we can't discuss right now. But do any questions pop to mind for our witnesses, please?

Colleagues, maybe we could take one minute before we choose to dismiss the witnesses. I know that this report has just been submitted, and it is rather detailed, so perhaps we could take a minute or two just to read through it and see if there are any questions that pop to mind. Otherwise, I think we can move to the second section of this meeting.

I'll give colleagues a minute or two.

• (1550)

Mr. Rob Walsh: If I may, Mr. Chairman, I misspoke earlier. I said that we propose removing section 21. Actually, we propose amending section 21 by adding a subsection.

The Acting Chair (Mr. Gary Goodyear): You're proposing amending section 21?

Mr. Rob Walsh: Yes; it's on page 4 of the paper in the English version and also in the French version.

The Acting Chair (Mr. Gary Goodyear): Thank you.

Mr. Rob Walsh: The middle paragraph in the paper sets out what we propose with regard to the four statutory provisions: that subsection 6(2) be removed; that the "subject to" provision in subsection 64(2) be removed; that section 21 be amended by adding a subsection indicating that this section does not apply to public office holders who are also members of Parliament when acting in the course of a parliamentary proceeding; and that section 30 be amended to add a subsection that provides that an order should not be made under this section against the public office holder who is a member of Parliament in respect of a parliamentary proceeding.

Again, that's to reflect the fact that ministers and parliamentary secretaries, while they are public office holders and are governed by the conflict of interest act in that capacity, when they come into the role as members of Parliament come under the jurisdiction of the House of Commons in terms of any disciplinary rules or actions. We're just saying that these provisions, which currently govern the minister and parliamentary secretary in both capacities, should be modified to indicate that they don't cover the minister in his or her capacity as a member—that is to say, when engaged in the course of a parliamentary proceeding, which would include a committee proceeding or a proceeding in the House.

So they can debate or vote, or not, according to what the House says they can or cannot vote, as opposed to the statute. The problem there is that if you have a statute and there is a vote or debate, the Ethics Commissioner gets involved under the Prime Minister's code, as it's often called.

If there's some illegality, you have the possibility of going to court, and the court then gets involved in a House proceeding as to whether somebody should or should not have voted or debated. We're just saying that's something that's better left for the House, in its judgment, to deal with. It relates to a proceeding of the House or a proceeding of the committee, and that's where it should be dealt with, in keeping with the separation of the legislative and executive branches of government.

I took Mr. Robertson's suggestion at the last meeting to not get into drafting at this stage but to simply provide a report that addresses the issues substantively. If the committee is so disposed, we can prepare amendments for its consideration when it next convenes.

The Acting Chair (Mr. Gary Goodyear): I do have a question from our analyst, please.

Go ahead, Margaret.

Ms. Margaret Young: Mr. Walsh and Ms. Mortenson, I have a question with regard to your comments on subsection 29(1) of the code. You raised the issue of the question of documents, and in particular, with regard to the meaning of the words "the matter". I am not sure whether this is in your written presentation so much or whether it was transcript from last week.

I am looking at paragraph 29(1)(a), where the Ethics Commissioner suspends. You deal with that on page 11 in the first paragraph in the middle of the page, but in a slightly different way. If members will be bear with me, I think it is worth reading:

29(1) The Ethics Commissioner shall immediately suspend the inquiry into a matter if

a) there are reasonable grounds to believe that the Member has committed an offence under an Act of Parliament, in which case the Ethics Commissioner shall refer the matter to the proper authorities;

You raise the question of what does "the matter" mean. Does it include the documents? What does it include? We agree that it's ambiguous, and we came up with some wording that we'd like to run by you. Possibly you can suggest something better, or if you think this would remove the ambiguity we would be interested in knowing that.

The latter part of that sentence would read, "in which the case the commissioner shall inform the proper authorities of the commissioner's belief". That belief would be that an offence has been committed.

Do you think that would remove the ambiguity?

• (1555)

Mr. Rob Walsh: It's better than what's there now. The only remaining concern, Mr. Chairman, is that whether informing the authorities of his belief includes providing the basis for that belief—i.e., the documents, if any, on which it is based or statements made to the Ethics Commissioner by the member if those are what his belief is based on.

It's an evidentiary issue that concerns us, as opposed to the actual informing of the public authorities. It's handing over documents that can form the basis for other proceedings or other declarations, or whatever statements were obtained from the member under the legal obligation for those to be handed over.

So our concern would be to try to see to it that while the objective of this section is met by giving the authorities notice of a possible offence, it's our view that it isn't necessarily the intent—and I would argue further that it shouldn't be the intent, even if it was—for the Ethics Commissioner to furnish documents and other evidence in his possession to the investigating authorities in connection with that possible offence.

Ms. Margaret Young: Our argument is that in view of the cloak of privilege the Ethics Commissioner works under vis-à-vis the members' code, and in view of the confidentiality provisions that are in the code, we think he would only be under an obligation to release documents when faced with a warrant or a subpoena.

We think that's clear. It is not written, but in all of the context, is that not the best interpretation?

Mr. Rob Walsh: Mr. Chairman, Ms. Mortenson draws to my attention what I take to be the corresponding provision in the Parliament of Canada Act relative to public office holders, in which the language is “The Ethics Commissioner shall notify the relevant authorities”. It doesn't say notify what; it just says “shall notify the relevant authorities”. You could dance on words for the day and night. Lawyers dance on words. That's what they go to court about. And they litigate. I think one should do one's best to be precise and as clear as possible when what you're talking about is something that could have serious and profound implications for a member of Parliament. The credibility of this process in which members are handing over information has to be assured to members of Parliament, as does the idea that the information they're handing over won't get into the possession of third parties to their prejudice.

If there's an investigation under way regarding a possible criminal offence by the police, they can go to the member and demand documents. They can go any number of places where their investigation may lead them.

As you said earlier, Ms. Young, indeed the police could ask for documents that are in the possession of the Ethics Commissioner, but they would have to face the challenge of whether it's protected and not available to them, and the member could intervene, through counsel, to oppose the handing over of those documents automatically if the law supported that, that being the case. It's important that the handing over of the documents isn't done automatically or routinely and then afterwards it's found that it shouldn't have happened. Afterwards it is often too late, and the damage has been done.

I think the credibility of the Ethics Commissioner's function, his office, demands that members be assured that the information they provide the Ethics Commissioner is provided to the Ethics Commissioner for the purpose of the code and only for the purpose of the code. But this provision, in my view, is meant to indicate that the other commissioner, if he has reason to believe a criminal offence has taken place, is not to be made complicitous in that criminal offence by being required to be silent about it.

Privilege doesn't protect criminal conduct. It never has. So in my view, I take this provision to be one that's meant to enable the Ethics Commissioner to say, in effect, to the investigating police or the appropriate authority, “You might want to look into this matter involving so and so. I think there may be an offence under section so and so.” He may describe generally why he believes that, in general language. The general language or comments of the Ethics Commissioner are not themselves evidence of an offence, but they may be indicative of a possible offence that leads the police to conduct an investigation. I'm just saying that there might not be anything wrong with that, but taking the documents and handing them over, when they themselves could then become the basis for a charge—that's what I have a problem with.

The Acting Chair (Mr. Gary Goodyear): Thank you.

Did you have a follow-up?

Ms. Margaret Young: No, sir.

The Acting Chair (Mr. Gary Goodyear): May I just, for my own clarity, then, ask something?

Mr. Walsh, you're simply suggesting in paragraph 29(1)(a) that there be just slightly different wording around the word “matter”, whereby the Ethics Commissioner would be required to perhaps identify the section of the code?

• (1600)

Mr. Rob Walsh: Not necessarily, Mr. Chairman. Again, I didn't get into drafting because the time didn't permit it, but I would be more comfortable with something like “shall advise the proper authorities of his belief”. Hopefully, the Ethics Commissioner would take it under advisement that it doesn't include handing over documents. The Ethics Commissioner presumably will take his own legal counsel about the propriety of doing that sort of thing.

The Standing Committee on Procedure and House Affairs may have its thoughts about whether that does or does not require the handing over of documents, but I would say “shall advise the proper authorities of his belief”. I think Ms. Young suggested something tantamount to that a moment ago, which, to me, is closer to what I think is intended here.

The Acting Chair (Mr. Gary Goodyear): I believe the committee had discussed at some point adding the words “refer the matter to the proper authorities without violating the confidence, evidence gathering, or the privilege of the code”. It was something to that effect. That sounds extremely wordy. What is your thinking on that kind of wording?

Mr. Rob Walsh: As a drafter—it is something I'm trained in—I would change 29(1)(a) along the lines I just mentioned very briefly. Then, with regard to the language you were setting up, Mr. Chair, I would add by way of a proviso, “Nothing in paragraph (a) authorizes the Ethics Commissioner to breach the confidence—”. So it becomes an override provision, which becomes an interpretive tool relative to the principal message, which is “to inform the proper authorities of his belief”. That message, I think, has to be clear, rather than being burdened by additional language. But you can always add another provision that qualifies that and says “it should be done in a manner that is consistent with confidentiality or the legal privileges of the House and its members”, or that sort of thing.

The Acting Chair (Mr. Gary Goodyear): Thank you. I'm sensing that we're clear on it up here. I just want to make sure that members are okay with that.

Ultimately, what we're suggesting is just a tightening up of the wording, for clarity, as well as the addition of a provision—however the wordsmiths want to write this thing up—that simply suggests that the Ethics Commissioner would not be offering up files and paperwork, but it would just be a reference to the matter, that this is his or her belief.

We'll get the wording, but just so the members are aware of what we're attempting to do, so when we get it back and we read it over, it actually says what we have now just agreed to do.

Okay, that's perfect.

Are you comfortable with that? Are there any other comments on that particular aspect?

If other folks have questions, please bring them forward to me.

Mr. Walsh, on page 10, at the top, under section (ii), "Opinion and Inquiry procedure", I wonder if you can just explain that to me. I've read it over. You're not suggesting a second process, whereby the commissioner would report to a committee first or provide a draft or preliminary review to a committee before tabling in the House?

Mr. Rob Walsh: No. I think we're just dealing with a situation here, Mr. Chairman, regarding an opinion, in the possession of a member, received from the Ethics Commissioner. The usual practice, I think, and the requirement of the code as well, is that these opinions are given confidentially to the member privately by the Ethics Commissioner. But the member might come with that opinion to the committee and say, in effect, "Here, look at this; this is what the Ethics Commissioner is telling me." And it may not be the whole opinion.

So this is really what we're talking about. The Ethics Commissioner should be at liberty, in view of this confidentiality, that in those circumstances he can then deliver to the committee the original and entire opinion, so there can't be any doubt that what the committee has before it is the entire original opinion and not excerpts or selections from it. That's all he needs to deal with.

The Acting Chair (Mr. Gary Goodyear): I find that quite reasonable.

Madam Redman, please.

Hon. Karen Redman (Kitchener Centre, Lib.): I'm going to give you a caveat at the front. I'm just subbing, and I've just gotten this stuff. If everybody knows my next question, then just all smile knowingly and we'll skip my question.

What would the committee then do with it? Is there some process that the committee then decides they have been misled or that—?

Mr. Rob Walsh: No, Mr. Chairman, the issue is not whether the committee's been misled by the member or whatever. Presumably, the member's coming to the committee with a grievance, if you like, or a disagreement with the Ethics Commissioner on the matter to which the opinion relates. Presumably, the member, in that context, might be coming to this committee, the Standing Committee on Procedure and House Affairs, which is charged with giving general

direction to the Ethics Commissioner, in the hope that he or she might persuade the standing committee to give a direction to the Ethics Commissioner on the particular matter so that the view the Ethics Commissioner is taking in his opinion would not be the view that would apply.

I'm just speculating that might be the process, and it's important that the committee see what the opinion is.

• (1605)

Hon. Karen Redman: Again, is this triggered by a complaint?

Mr. Rob Walsh: In the scenario I'm describing it would be. We had a situation where members were not happy with a report. Now, opinions might also, similarly, be ones they disagree with, as a policy matter, and they may think that the committee should consider that and address it, and the committee may well wish to do so and give a direction to the Ethics Commissioner on the matter the opinion covers. It may not, but it may, and that's what that's designed to address.

The Acting Chair (Mr. Gary Goodyear): Thank you.

Are there further questions or comments? Is everybody happy?

I just want to make sure everybody's good, because I sure wouldn't want to dismiss our witnesses. With such valuable folks at the end here, I don't want to—

Mr. Walsh, do you have something further?

Mr. Rob Walsh: Well, Mr. Chairman, you're very flattering, but the reason I asked to speak again was, in terms of being of further assistance to the subcommittee, I'm not sure what the plan is from this point forward, but there was some talk at the last meeting that at some point there might be some drafted amendments prepared to present to the subcommittee for its consideration.

Would you be doing this exercise when you return after the break, with the benefit of the report from the researchers, or were you hoping for that before then?

The Acting Chair (Mr. Gary Goodyear): No, I don't think we could possibly get the draft report up before we return to our constituencies. Today's Thursday.

Mr. Rob Walsh: No, no, I meant a week Thursday, when you come back on May 28 or May 29.

The Acting Chair (Mr. Gary Goodyear): Oh. The answer to that is yes.

Mr. Rob Walsh: So we'll offer to Library of Parliament staff drafts of proposed amendments that would reflect these comments.

The Acting Chair (Mr. Gary Goodyear): Yes, that would be very helpful.

Mr. Rob Walsh: Whether or not the committee adopts them is another matter. You'll be meeting again on May 29, I guess it is, to look at this matter. Is that what you expect?

The Acting Chair (Mr. Gary Goodyear): That's exactly correct.

We do have other meetings scheduled. I'm not sure of the exact date. The Thursday is what we're hoping to do.

We would want that before that meeting. May 31 is the meeting, so we'd want the report from Mr. Walsh by May 27 or May 28.

Is that possible?

Mr. Rob Walsh: Mr. Chairman, I'll provide to the Library of Parliament researchers what we would propose as amendments, and perhaps they can then incorporate them into their report.

Is that the way you would prefer to go?

Ms. Margaret Young: We have already moved on to drafting, including some of the suggested amendments, but we can take everything under advisement. So, yes, give them to us.

The Acting Chair (Mr. Gary Goodyear): Exactly. I think that's reasonable.

We would like your report of any amendments you wish to make.

The committee has done quite a bit of work already, in going through this, and we would certainly be interested and would take

anything you have under advisement, and we'll get that into the draft report on those areas.

Are there any other questions for the witnesses?

I do want to thank both of you, again, for coming. It's certainly been good of you to come by. Even though it seems like a short time, it's been a very valuable time, so I appreciate that, as do the members.

Colleagues, we'll just suspend the meeting for one minute while we go in camera, so we can discuss the rest of this document. Thank you.

The meeting is suspended.

[Proceedings continue in camera]

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