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Chair

The Honourable Larry Bagnell

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● (1105)

[*English*]

The Chair (Hon. Larry Bagnell (Yukon, Lib.)): Good morning. Welcome to the 136th meeting of the Standing Committee on Procedure and House Affairs. Today we continue our consideration of the 4th report of the Subcommittee on Private Members' Business, wherein the subcommittee recommended that Bill C-421 be designated non-votable.

We are pleased to be joined by Philippe Dufresne, the House's law clerk and parliamentary counsel.

Thank you for being here today. It's great to have you back again and to have your wise counsel. We look forward to your opening remarks—or your remarks. That's the only reason we're here.

Mr. Philippe Dufresne (Law Clerk and Parliamentary Counsel, House of Commons): Thank you very much, Mr. Chair and members of the committee.

I'm pleased to be here with you today to assist the committee in its work as it considers the votability of Bill C-421. On November 29, 2018, the committee commenced consideration of matters related to private members' business regarding Bill C-421. The committee heard representations from Mr. Mario Beaulieu, the member of Parliament for La Pointe-de-l'Île and sponsor of the bill, and Mr. Marc-André Roche, researcher for the Bloc Québécois.

I understand that the conversation was focused on whether Bill C-421 complies with the Charter of Rights and Freedoms, and following that meeting the committee decided to invite me to appear to discuss some of the legal issues raised.

My remarks today will be focusing on the following topics. I will address the charter questions and the drafting of private members' bills. I will note the confidentiality of the private members' drafting process in my office. I will speak to the non-votability criterion adopted by this committee specifically, and the requirement that the bill does not clearly violate the Constitution. I will discuss some recent case law of the Federal Court of Appeal that may be helpful in identifying the parameters of this criterion. I will, of course, be happy to respond to any questions that the committee members may have about the specific constitutional issues that have been raised to date.

[*Translation*]

The legislative counsel working for my office are responsible for drafting bills for members who are not part of the government. In my opinion, this is an essential service for parliamentary democracy. We are committed to this mandate and we fulfill it with a great deal of enthusiasm. I am extremely proud of the dedicated team who does this work in a professional and impartial manner.

In addition to drafting the bill properly, the legislative counsel assigned to the bill advises the member if they believe that it raises issues related to the Canadian Charter of Rights and Freedoms or to the Constitution of Canada. Depending on the nature of the issue, the counsel may suggest that the member contact the Library of Parliament to obtain further information or they will draft a formal legal opinion for the member. Those exchanges about the bill are confidential and cannot be divulged without the member's consent.

Constitutional issues may be resolved in various ways. For example, the counsel may discuss with the member and suggest an approach to mitigate the risks of violating the charter. The counsel may also suggest drafting a national strategy if the matter in question is rather under provincial jurisdiction, or if the member proceeds by way of a motion instead of a bill. Regardless of any concerns raised, the final decision to proceed with the bill rests with the member.

Confidentiality is extremely important to us. It is mentioned in the 34th report of the Standing Committee on Procedure and House Affairs dated March 16, 2000, in which the committee noted that the work of legislative counsel is covered by parliamentary privilege, which has an even higher legal basis, as it is provided for in our Constitution. The committee quoted the Speaker from March 13, 2000, who stated:

> All staff of the House of Commons working in support of Members in their legislative function are governed by strict confidentiality with regard to persons outside their operational field and, of course, vis-à-vis other Members.

[*English*]

This is fundamental. When we serve you as legislators in providing the legislative drafting services, we do so with strict confidentiality. I will not be discussing today any conversations or advice that could have been given to any member on any specific topic. I am available and here to address the issues generally before you, and specifically, to talk about the criteria around non-votability.

[*Translation*]

As you know, a bill that is added to the order of precedence will be reviewed by the Subcommittee on Private Members' Business to determine its votability. An analyst from the Library of Parliament is assigned to assist the subcommittee when considerations relating to votability are raised. The analyst can provide information and analysis on the issue but cannot provide a legal opinion. The votability criteria are established by the Standing Committee on Procedure and House Affairs. In the most recent version of the criteria established in May 2007, the four criteria are as follows:

> Bills and motions must not concern questions that are outside federal jurisdiction;
>
> Bills and motions must not clearly violate the Constitution Acts, 1867 to 1982, including the *Canadian Charter of Rights and Freedoms*;

We are most interested in that last criterion.

> Bills and motions must not concern questions that are substantially the same as ones already voted on by the House of Commons in the current session of Parliament, or as ones preceding them in the order of precedence;
>
> Bills and motions must not concern questions that are currently on the *Order Paper* or *Notice Paper* as items of government business.

● (1110)

[*English*]

Bills that fail to meet the criterion, with a clear violation of the Constitution Act, will be found to be non-votable.

To determine if a bill is non-votable, the question is not whether any given bills, or in this case Bill C-421 could violate the charter, but rather whether the bill clearly violates the charter, which is a higher standard for intervention. It is one that is more favourable to allowing debates about bills in the House. The process is internal to the House of Commons. As I've stated, it was set out and the criterion was adopted by this committee.

However, a useful comparison can be made to the standard applied by the Minister of Justice for the review of government bills for charter compliance pursuant to section 4.1 of the Department of Justice Act. This section requires the minister to “ascertain whether any of the provisions” of a government bill “are inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms”. It requires the minister to report any such inconsistency to the House.

In a recent decision, Schmidt v. Canada, the Federal Court of Appeal had to determine the interpretation of this criterion of ascertaining whether it's inconsistent. There were two possibilities: Are you going to ask whether it's likely in violation of the charter, or are you going to ask for a higher threshold?

In the decision written by Justice Stratas for the Federal Court of Appeal, the court found that the appropriate standard obliges the Minister of Justice to report when there is no credible argument supporting the constitutionality of a proposed bill, and not when the proposed bill or regulation may likely be unconstitutional.

The court held that, given the uncertain difficult jurisprudential terrain of constitutional law and the time when the minister is expected to assess proposed legislation, the only responsible reliable report that could be given under the examination provisions is when proposed legislation is so constitutionally deficient it cannot be credibly defended. In other words, the court affirmed that the Minister of Justice only needs to inform the House of inconsistency between a government bill and the charter when no credible argument can be made in support of the measure. The court added that this approach was justified, given the inherent difficulty in predicting the outcome of constitutional law cases before the courts.

The court gave a number of examples. The case law can evolve, the Supreme Court itself can change its previous findings, and a lot of the charter cases will be dependent on the facts that will be led in justification of any violation. It's difficult to predict, and that supported a strict standard. The court also noted that it made sense for the standard applied by the minister to be commensurate to the standard applied by this committee in determining votability.

Leave to appeal has been sought, in this decision, to the Supreme Court of Canada. It may not be the last word on this point, but it is to date, at this time, the last word on the interpretation. As a result, in a similar way, the committee examines proposed legislation to determine whether it clearly violates the charter, not whether it could violate the charter.

In my view, if we apply this standard, if you apply it, a bill would only be deemed non-votable in situations where no credible argument could be made in support of the bill's constitutionality. That is, in my view, a helpful standard because it helps to deal with uncertainties.

Justice Stratas talked about this in his decision, saying that there will be rare cases where it's so obvious and so clear that you can make this determination, but in others the standard will not be met. That's the question before this committee, and I will be happy to assist as best I can in answering any questions you may have. I know there were some specific charter issues that were discussed in the previous hearings, and I'm happy to address those.

[*Translation*]

Thank you.

[*English*]

The Chair: I'm just going to go informally and let people ask questions.

I just want to ask two things quickly, though. You talk about helping members of Parliament. Roughly how many people are you?

Mr. Philippe Dufresne: The total in my office is 36. We have two main mandates. One is legal advice to the House itself, and one is the legislative drafting. The legislative drafting would be about half of my office, including the publication of bills.

● (1115)

The Chair: When you talk about the justice minister's requirement to see if a bill's content doesn't offend the Charter of Rights and Freedoms, they do not do that analysis of private members' bills in advance, do they?

Mr. Philippe Dufresne: They do not. They do that for government bills.

The Chair: Right.

Mr. Graham.

Mr. David de Burgh Graham (Laurentides—Labelle, Lib.): Mr. Dufresne, for clarity, the charter provides that Canadians can communicate with the government in either language. Is that correct?

Mr. Philippe Dufresne: Yes.

Mr. David de Burgh Graham: Bill C-421 specifies that an applicant for citizenship in Quebec must demonstrate a knowledge of French. The only question for me is this: Is demonstrating a knowledge of a language to the government communicating with the government? If it is, then I don't see a credible argument to make this constitutional. I want to hear your thoughts on that.

Mr. Philippe Dufresne: I tried to anticipate some of the dilemma and analysis. I would look at the arguments that could be made in favour of there being a violation and arguments that could be made to say that there is no violation.

To argue that there's a violation of section 20, the argument would be, as you suggest, Mr. Graham, that a person would be forced to speak French with the federal government in establishing that they have an understanding of the French language, and that this would breach section 20 and maybe, arguably, section 16 of the charter in terms of official languages. Another argument could be that it would discourage the use of English by permanent residents in Quebec who wish to obtain citizenship. Those would be some of the types of arguments to say this is breached.

The arguments in support of the provision's constitutionality on those grounds, I think, would be that the bill doesn't prevent a person from communicating with the government. If the government is writing letters to the individual, if the individual is getting invited to the ceremony or is being asked for documentation to demonstrate their knowledge of French, all of that could be done in English, and then of course, demonstrating that the knowledge of French would be dealt with. The argument could be that you need to show that you can understand French, but in your communication with the government, are you able to do that largely in English? That would be the argument.

Mr. David de Burgh Graham: But Mr. Dufresne, there's no standard saying “largely” in a language. You communicate in the language of your choice. The moment at any step in the process here when you're required to speak only one of the official languages, the whole purpose of that section of the charter seems to be broken to me. Is that fair, or am I misinterpreting it?

Mr. Philippe Dufresne: I think this is probably why the Federal Court of Appeal has adopted the standard of, “Does it clearly violate?” You can see the argument. How can you demonstrate your knowledge of French without speaking French? That's the argument on that side of the ledger.

On the other side, you could say that section 20 requires that communication.... When the government invites you and communicates with you, it does it in the language of your choice, which could be English, in this case. The criterion that you have to meet is to demonstrate your knowledge of French. That's part of what you have to show to meet the condition of citizenship, but otherwise, the communications with you by the government before, after and during this are done in the language of your choice. That would be the argument.

At the end of the day, what would a court decide? It's hard to predict. You can have those two arguments. You can have arguments that subsection 16(3) of the charter talks about promoting the use of both French and English in Canada. Is it a relevant consideration that French is the minority language in Canada, but it's the majority language of Quebec? Again, you could have some arguments on those sides.

Assuming there is a violation—the court could say that if you're asked to demonstrate your knowledge of French, you are required to communicate in French, so it's a violation of section 20—then the issue would become whether is it justified by section 1 of the charter. There is case law about the test that has to be met. The test generally requires showing that there is a sufficiently important objective to the legislation, and that it is a reasonable limit. In terms of a reasonable limit, the court will look at whether it minimally impairs the right that is affected.

Case law to date has recognized that the promotion and preservation of French in Quebec is a legitimate objective. The most recent decision of this is the Nguyen case at the Supreme Court of Canada. The first ones were Ford and Devine, talking about the importance there.

It's in the second criterion that it's become quite difficult. Is it a minimal impairment of the right? Then the question becomes, have you adopted the measure that's least intrusive to achieve your objective? In the case law about the language of business in Quebec, when the law required only French, it was found to be an unjustifiable limit because it was too extreme. When the law was that you had to have both French and English, the court found that that was a reasonable measure, even if it brought some disadvantage to English-speaking stores.

Those are all the things that courts will look at when faced with a charter challenge. They will look at evidence to ask what is the impact, what could be alternative measures, and are there any ways to allow some flexibility in the bill? For instance, if someone has a learning disability and has difficulty learning French, is that going to be an absolute prohibition, or is that going to be something that's taken into consideration by providing reasonable accommodation? Those would be some of the issues at play in a court looking at this and determining constitutionality.

● (1120)

Mr. David de Burgh Graham: Thank you.

The Chair: Mr. Reid.

Mr. Scott Reid (Lanark—Frontenac—Kingston, CPC): Thank you for your presentation today.

Could I just ask what year the Nguyen case was?

Mr. Philippe Dufresne: The Nguyen case was 2007, if memory serves.

I'll just confirm the date: December 2008.

Mr. Scott Reid: The reference to the least intrusive measure that's available, you're referring to the Oakes test, I assume?

Mr. Philippe Dufresne: That's correct.

Mr. Scott Reid: Effectively, the Oakes test has been applied then to a number of language rights. Nguyen is the most recent, but Ford is another example. What was the third case you mentioned?

Mr. Philippe Dufresne: It was the Devine case.

Mr. Scott Reid: Both of those go back to the 1990s, or even the 1980s.

Mr. Philippe Dufresne: That's right, they were 1984 and 1988.

Mr. Scott Reid: Ford, in particular, was vis-à-vis Bill 101, I think.

Mr. Philippe Dufresne: That's correct.

Mr. Scott Reid: I actually wrote a book on this, but I wrote it in 1993 and a quarter of a century has gone by, and so on.

What is the case on the the ruling from David Stratas? Do you have any idea when we'll find out whether leave to appeal has been granted?

Mr. Philippe Dufresne: The issue there was the proper interpretation to give to the minister's interpretation of her obligation to provide a report to the House. The appellant, Edgar Schmidt, who is a former drafter with the Department of Justice, was arguing that the standard should be a stricter standard and that you would have to really be satisfied that there is a strong argument or credible argument of constitutionality and that would provide further charter protection.

Mr. Scott Reid: It sounds to me as if he was arguing in favour of basically looking at a balance of the probabilities, whereas the standard currently being applied would be sort of a reversed version of beyond a reasonable doubt.

Does that sound like a rough way of describing the two?

Mr. Philippe Dufresne: I would agree with that. I think that's really the issue. Are you going to require that you feel it's more likely than not that this is going to be upheld, or are you going to find that there's no credible argument? It's not exactly the same, but it's the same idea.

Mr. Scott Reid: Forgive me making this editorial observation—you are free to agree or disagree with what I have to say—but balance of the probabilities sounds, when you first hear about it, to be the simpler test. However, I would say that's actually not true. Finding no credible or reasonable argument to be given, no argument that a reasonable person would take seriously—that's the reasonable person test and this is a version of that—is actually I think easier to do because you're surrounded by reasonable people, whereas balance of the probabilities is balance of the probabilities when trying to divine what the nine people on the Supreme Court are going to be ruling. It's actually the balance of the probabilities as to whether it would survive being tested at the Supreme Court.

That is an inherently difficult task. You have people coming onto and leaving the court, some of whom—at this point, the majority of whom—have probably never dealt with a language rights case. There's actually, I would submit, a higher degree of uncertainty about that.

I just throw that out as an observation. Does that sound like...?

Remember, we have a situation in which drafters working for the justice department, for the minister, are trying to provide this kind of feedback on absolutely every single piece of legislation that comes forward. I would think that would actually be a hard standard for them to meet.

● (1125)

Mr. Philippe Dufresne: I think your description is consistent with what the Federal Court of Appeal found. It said that the executive is not limited to proposing measures that are:

> ...certain to be constitutional or likely to be constitutional. Rather, as a constitutional matter, in the words of the Federal Court...it is entitled to put forward proposed legislation that, after a "robust review of the clauses in draft legislation" is "defendable in Court."

The court goes on to ask why that is. One of the reasons is that the charter is a document suffused with balances. It's not unequivocal. There are no unqualified guarantees of rights and freedoms. There's considerable scope for questioning debate, deliberation in Parliament, vis-à-vis that. At the end of the day, there's a role for courts to play.

What's interesting in the decision in Schmidt is that the court goes through, in large measure, highlighting some of the uncertainties in predicting. They talk about the fact that the constitutional authorities are not necessarily good precedents in later cases. Courts now depart more readily from earlier constitutional precedents.

We're talking about some of the decisions from the 1980s. This is more than 20 years later. We've seen the court, and Schmidt talks about certain specific cases—the Carter case on physician-assisted death where the court changed its jurisprudence on constitutional validity in a charter matter.

Mr. Scott Reid: Was Justice Stratas's point there that it would have been impossible to bring forward some aspects of bill—I've forgotten the bill number, the assisted dying act—had we applied the stricter criteria we're trying to...? Is that part of what he was saying?

Mr. Philippe Dufresne: I think it may be that you would have to report on many more bills, because the consequence for the Minister of Justice is that they have to present a report. It doesn't mean the bill doesn't go forward. It's a different consequence here. With this committee, the consequence is that the bill is not votable.

In my sense, the criterion is a similar one. Just to quote one last part of the decision, the court says:

> ...in conclusion, I ask this question: given the nature of constitutional law and litigation and the practical obstacles facing the Department of Justice, what is more likely? That the examination provisions require the Minister to reach a definitive view, settle upon probability assessments and report when she concludes that proposed legislation is "likely" unconstitutional? Or that the examination provisions require the Minister to report whenever there is no credible argument supporting the constitutionality of proposed legislation?
>
> I would suggest the latter. Given the uncertain, difficult jurisprudential terrain of constitutional law and the time when the Minister is expected to assess proposed legislation—

This is the part I read to you in my statement:

> —the only responsible, reliable report that could be given under the examination provisions is when proposed legislation is so constitutionally deficient, it cannot be credibly defended.

One of the questions is this: Is that a test that can ever be met? If you're putting the bar too high, you're never going to report, or you're never going to determine something not to be votable. The court says that one thing is clear. Even in this difficult, uncertain, speculative environment, some proposed legislation may be so deficient that the minister can conclude with confidence that no credible argument could be made to support it. I would suggest it's the same for this committee.

Mr. Scott Reid: Just to be clear, regardless of what report was done, or whether we approve a piece of legislation as votable, it goes through and gets enacted, if it's actually unconstitutional and someone takes it to court, it will eventually be struck down. By definition.... I've actually given a tautological statement. That which is unconstitutional is that which the Supreme Court says is unconstitutional. By definition, this bill, if it's unconstitutional, becomes the law of the land, or is an attempt made by Parliament to make it the law of the land. It will nevertheless not be the law of the land if the court deems it to be unconstitutional.

● (1130)

Mr. Philippe Dufresne: That's correct.

It's interesting. In terms of having the last word on something, and in terms of questions not always being clear, administrative law as a field of law recognizes that, for many legal questions, there may be more than one possible answer.

It has been stated sometimes that the court that gets it right is really the court that has the last word, because you have appeals, and you can overturn it. It's not necessarily that the other one was objectively wrong, but someone has to have a last word on those questions.

Mr. Scott Reid: Right.

That is actually the point. The Supreme Court is.... Simply, the buck has to stop somewhere, and it stops there.

We used to have it stop in London, and at that point we discovered, on all kinds of issues—the Persons Case comes to mind—that in the judgment of what was then the final word, the Supreme Court was incorrect. They decided that frequently.

That's all I have at the moment.

Thank you, Chair.

The Chair: Thank you, Mr. Reid.

Mr. Christopherson.

Mr. David Christopherson (Hamilton Centre, NDP): I hope colleagues will agree that, if nothing else, when you bring in the parliamentary law clerk, it's always fascinating.

Just help me make sure I have the horse in front of the cart. The matter before us right now is not specifically the constitutionality of the bill. That is the second step. The first step is that we as an appellant body have been asked to overrule a judgment that a given bill is not votable because it is obviously unconstitutional.

I moved the motion to bring you in. What I wanted to hear from you was just that. Is it that blatant? If so, it's a slam dunk for us, but I'm hearing something very different from that. I'll get to that in a moment.

Staying with the votability, colleagues, I come to this with a strong bias. I've always had a great deal of difficulty with the notion that the majority of MPs get to decide whether an individual MP's bill gets the right of a vote. This is in the context of how our rights as members of Parliament have been lost over the decades as our parliamentary system has evolved. I always start with the bias that you better have a darn good reason for telling a member of Parliament that they don't have the right to air their issue. The one area where you have some sovereignty around here is the private member's bill, and now you're being told by everybody else that your right has been extinguished, and that this was done by peers, colleagues, so I offer my bias up front.

Having said that, I think it makes good sense that if something is outrageously unconstitutional, if it is obviously a violation of our Charter of Rights, we would not want to give it credibility by allowing a vote on it. The fact that it is unconstitutional means, in my view, that you haven't done your homework as member of Parliament. Rather than just saying your rights have been extinguished, go back and do your homework. Do the job right and figure out a way to bring it forward so that it is at least constitutional. If you can't do that, too bad. That's kind of where I am.

Parenthetically, I want to say that one of the things I am truly going to miss in not being a member of Parliament is having a fascinating discussion with a group of people where one of them says, “Yeah, I wrote a book about that.” This didn't happen in my previous life, and I don't expect it to happen in my future life, but in this life it happens, and it's amazing, especially when it's someone of the credibility of the person I'm talking about.

To get back to the point, for me, that's why it was so important to have you in here. There was some question that, by virtue of your office, your having given a constitutional opinion to the author of the bill would somehow negate our right to have an equally thoughtful opinion. That was a real problem.

I think we seem to be okay with that. We're not asking what advice you gave them. We are saying, “This is now before us. What advice do you give us?” It may be the same. It may be different. That's between you and the member, but anything that would preclude a committee of Parliament from seeking and benefiting from the thinking of the parliamentary law clerk nullifies, to me, what the system is there for. I'm a layperson. I have a grade 9 education. If we're going to talk constitutions, I want my lawyer. Who's my lawyer? The parliamentary law clerk.

Anyway, I think we got past that, and it's all good and fine.

Coming back to the actual issue, help me again with the test. Can a credible argument be made against the constitutionality? Tease that out a bit for me, please.

● (1135)

Mr. Philippe Dufresne: The test is when there is no credible argument supporting the constitutionality.

Mr. David Christopherson: Thank you.

I thought I heard you do that. At least you said, “On the one hand,” and then you said, “On the other hand”. To me, when we're saying something's not votable, it should be so strong that there is no “other hand”, but I heard—as a layperson—what seemed like, at least prima facie, good arguments on both sides.

Are you in agreement with what I'm saying so far?

Mr. Philippe Dufresne: I don't know if they were good, but I did give arguments on both sides.

Voices: Oh, oh!

Mr. David Christopherson: That's subjective. The point was that there are at least two arguments that a good lawyer could make.

Mr. Philippe Dufresne: Right.

Mr. David Christopherson: How many more tests do we need, though? This is my point.

Regardless of how we feel about the issue—set the politics of the issue aside—the question before us as an appellant body is, should this bill be allowed to have a vote? The only way that it should not be is that if it's so in violation of the Constitution that it just makes a mockery should we allow that vote. That doesn't seem to be where we are.

Now, I've entered into a dialogue with colleagues. I'm only the second speaker—sorry, third—and I enjoy these discussions. I'm looking forward to feedback as we go through, but I have to say, Chair, that this is where I thought we might end up.

Regardless of how I feel about the bill, as a member acting in an appellant body manner, I'm now finding it very difficult to justify saying to a colleague, “Your private member's bill does not deserve to be voted on.” Because why...? The only thing I can think of is that we either start getting into the constitutionality, in which case it seems that there's at least a valid argument and debate to be had, on both sides. Second, of course, is that if it does get past this body and goes on to the House, the House can use a different standard, that is, whether they like the bill or not and whether they agree that it ought to be the law of the land. That's not what we're doing right here and right now.

Somebody please correct me if I'm wrong, but where we are right now is hearing from a subcommittee that has said, “We believe this is not votable because it's not constitutional”. The member has appealed that decision to us. It is our decision to make before it goes to the House. I haven't heard a good argument that backs up the subcommittee argument that it's unconstitutional, because the parliamentary law clerk has at least offered up that there can be at least a credible argument on both sides, as a starting point, recognizing that at the end of the day it's the Supreme Court that will make a final determination on its constitutionality. Even that may not be the end of the day. A further Supreme Court in the future could do something, but for our purposes here, this is where we are in that process.

Right now, colleagues, I am strongly inclined to vote against the recommendation of the subcommittee and vote in favour of this, allowing it to go forward. Having said that, I'm going to listen intently. This is a serious matter. If people see it differently than I do, I can be persuaded. That's my thinking so far.

I thank you for the floor, Chair.

● (1140)

The Chair: Thank you.

By extrapolation, if the member appeals to the House, then you would have the same argument, making—

Mr. David Christopherson: Sorry, but on a process that appeals to the House, does it go to the House for a question of votability, or do we just pass it on and they vote?

The Chair: If it's turned down here, he can appeal to the House.

Mr. David Christopherson: If it's supported here, it goes to the House. Is that right? It goes to the House as a bill...? I'm seeing the clerk say yes.

Thank you.

Mr. David de Burgh Graham: We had one appeal once before that went to the House, when Ms. Malcolmson had her appeal. That went to a secret ballot by all members.

Mr. David Christopherson: Right. Yes, she lost it.

The Chair: Madam Lapointe.

[*Translation*]

Ms. Linda Lapointe (Rivière-des-Mille-Îles, Lib.): Thank you very much, Mr. Chair.

I have listened carefully to your arguments, both positive and negative. I have listened carefully and I fully understand, coming from Quebec.

You referred to subsection 16(1), but also to paragraph 20(1)(a) of the Constitution Act, 1982, which states that “there is a significant demand for communications” in English or French. An application for Canadian citizenship is more than significant, it is very significant because the goal is to make you a true Canadian citizen.

Let me take you back to my riding of Rivière-des-Mille-Îles, which is north of Montreal, where there are exclusively English-speaking permanent residents with links to people from the United States.

Many of my fellow constituents who became Canadian citizens told me that it was very difficult to pass the exam and that it required a lot of preparation. If a person has to choose between French and English when they are not fluent in French, it is difficult for them. They all told me that it was already difficult to pass the exam in either of the two languages.

If anglophones in Quebec are not allowed to take their citizenship test in English, will they have to go outside Quebec to do so? Is that the other possibility?

Let's say that I am a permanent francophone resident living outside Quebec, but not in New Brunswick, the only bilingual province. I am elsewhere and the same thing, only in reverse, happens to me. Will I have to take my exam in English when we know that the exam is very difficult and requires a lot of preparation?

You used the words “clearly, likely, could”, but I don't know where the line is drawn. Let me go back to what paragraph 20(1)(a) of the Constitution Act, 1982, says: “there is a significant demand for communications” in English or French. In my opinion, an application to become a Canadian citizen is one of the most significant communications with the federal government.

Mr. Philippe Dufresne: As I said with regard to the test, is there a credible argument to defend its validity? So we're really talking about something clear.

With respect to section 20, the issue is whether individuals are prevented from communicating with the government in the language of their choice.

You said that people would be forced to take the citizenship test in English. That would be something to explore. Would the bill you are studying have that effect? According to the bill, people will have to demonstrate that they have “adequate knowledge of French”. Is that separate from the exam?

When other questions are asked, such as about the knowledge of Canada, is the person being forced to take the test in French or are those two completely different things? That would be something important to look at. If the person is actually forced to answer all the other questions of the citizenship process in French, it becomes more difficult to defend, and perhaps it is easier to refer to section 1. However, if people can take their citizenship test in English but, in one part of the process, they must demonstrate that they have an adequate knowledge of French, in terms of a potential violation, it is probably a little less intrusive. It is one of the many facts to be considered.

The Supreme Court, in Schmidt, noted that some constitutional disputes depend on evidence brought before the court.

In practice, how does that work? The charter sets out human rights principles, and the case law says that legislation must be interpreted in a manner consistent with the charter.

In fact, the Solski case in Quebec has set a precedent for the right to education in the minority language. The question was whether the education act violated the charter. The Supreme Court said that the section could be salvaged if it were interpreted more broadly. Allowing a person to study in the minority language in a qualitative way is acceptable, as it it is in keeping with the spirit of the charter. However, if we adopt a stricter approach and evaluate only the quantity, not the quality, of education, it is too stringent and it violates the charter.

That would be the kind of question to ask here. How is this interpreted? Are we really saying that all communications with the government and departments must be in French or are we saying that they can be in the language of one's choice but that, during this process, people must demonstrate that they have an adequate knowledge of French? This could certainly influence the outcome.

● (1145)

Ms. Linda Lapointe: Thank you.

[*English*]

Mr. Philippe Dufresne: If I may, I want to go back to one comment you made, Mr. Christopherson. Not to be too technical about it, but I do take the confidentiality of the work of my office so seriously that I want to mention it.

I understood your remarks to say that we did give legal advice to the member in this case, and I want to say I'm not here confirming whether we gave any advice, let alone what the advice would be. That is all confidential. I was speaking very generally to say that as a rule we can give advice—sometimes we do and sometimes we don't—but I'm not here confirming even the fact of advice being given, because that is part of the strict confidentiality.

Mr. David Christopherson: I see the importance put on individual members. That's why this matters, whether someone gets a vote or not.

Thank you.

The Chair: Mr. Graham, you're up.

Mr. David de Burgh Graham: Thank you.

Chris, do you want to go first?

No? Okay.

[*Translation*]

We are talking about credible arguments. However, let me point out that there is a difference between a credible argument and one that seems credible. We could talk at length about arguments that seem credible. For example, an argument against climate change may seem credible, even though there is no credible argument against climate change. We might say that we cannot act on an argument that seems credible, so we are no longer moving forward. I just wanted to share these thoughts with you.

When people demonstrate an adequate knowledge, as the bill says, they must do so by communicating. By definition, they are communicating: they are in front of an officer who administers a test to check their ability to speak in one of the two languages in particular.

I have a hard time understanding how this would not apply to communications with the government. Nowhere in the bill does it say that we should normally, or most of the time, speak in a particular language; it says that we must be able to communicate in that language.

Let's take the example of someone who would like to drive from here to Rio de Janeiro. The person would face a slight problem, called the Darién Gap, between Panama and Colombia. There is no road across it. That region is more than 110 kilometres long, and no roads cross it. So we can't drive to South America. It's therefore like saying that, because we can cover 99% of the route, we can cross America by car.

That is not a very compelling argument. Yes, an argument seems credible with respect to the constitutionality of the bill, but I see no credible argument that makes it constitutional.

I would like to hear your comments on that.

Mr. Philippe Dufresne: Mr. Graham, all I can say on the matter is that this is really your decision. It is up to you and the committee to assess it. For my part, I try to indicate as best I can what the test is. It's a tough test. I have tried to identify some problems related to the Charter of Rights and Freedoms. For example, does this bill violate section 20?

Even if that were the case, you would also have to check whether this is justified under section 1. There are other considerations as well, including minimal or no impairment, and even how important the objective is. To be consistent, it is important to acknowledge that, even if the court recognized in Nguyen that the objective was sufficiently important, this would likely no longer be the case now. Those are the factors at play, but it is really up to you to decide.

● (1150)

Mr. David de Burgh Graham: What if the same bill reversed were to say that, in Alberta alone, you have to demonstrate a knowledge of English in order to apply? There is a francophone community in Alberta.

If there were a requirement to take the test in English or to demonstrate knowledge of English in Alberta, would we be having this discussion? Instead,would we be saying that this is not good and that it is a blatant attack on the French language? It's the same thing. Would we be having the same discussion?

Mr. Philippe Dufresne: All I can say is that, in terms of the constitutionality issues, it would be the same discussion in that we would be asking ourselves whether this violates section 20. If so, we would then ask ourselves whether it is justified, whether the legislative objective in this province and in this context is sufficiently important to require knowledge of English in such circumstances and whether it is a minimal impairment.

That being said, for you, members of the committee, the issue would not be to decide whether it is constitutional or not, but to establish whether it is clearly a violation of the charter and whether there is a lack of credible arguments to defend the bill.

Mr. David de Burgh Graham: Let me point out to my colleagues that there is no credible argument, but there is one that seems credible.

I will yield my place.

Thank you, Mr. Dufresne.

[*English*]

The Chair: Is there something, though, in the jurisprudence that because it's a minority language, it's a different situation, because French is a minority?

Mr. David de Burgh Graham: But it's the majority language in Quebec.

Mr. Philippe Dufresne: That's where the court in the Quebec case is dealing with the promotion of language. That's the element, with regard to section 1 of the charter, that has to be justified. The court will look at the purpose of the bill. Is it a sufficiently important objective that's being sought and that's infringing a provision of the charter?

In those cases in Quebec, so far, the courts have said it is a sufficiently important objective to promote French in Quebec as a minority language in Canada.

That depends on the facts of the circumstances, and the onus is on the government, in defending the legislation, to establish that for the court.

The Chair: Mr. Christopherson.

Mr. David Christopherson: Thanks, Mr. Chair.

I listened very carefully to Madame Lapointe and Mr. Graham, but what I heard were arguments against the bill. Fair enough. Let me be further transparent. I'm not a judge, so I don't have to worry about some of those standards.

Somebody is going to have a heck of a time convincing me to vote for that bill for the obvious reason that I think Mr. Graham touched most closely, which is, "What? Are you kidding me?" That's me, the MP from Hamilton Centre, my first blush. I'm like, "Whoa, I don't like this at all." If I have an opportunity, unless somebody convinces me otherwise, I'm going to vote against it. That is very separate from whether or not my colleague, a fellow MP, has the right to have his private member's bill put to the test of the House.

For those of you who served on local councils, perhaps you would be reminded, like I am, of zoning issues, where you have, say, a small business that is being opened on a corner. It's a good commercial location, but it's abutting a residential area. You can tell that I represented downtown. The zoning allows for use as, let's say, a pizza parlour, but it's short two parking spots. You could go to the committee of adjustment. Its sole focus is whether or not those two spots should be enough to deny them what otherwise they have as of right. Nine times out of 10, residents come in—and constituents, understandably—and they argue against the pizza parlour being there. Really, the only question in front of the committee of adjustment is whether the lack of the two parking spots that are a requirement justifies negating the rest of the right of that property owner to have their as-of-right zoning applied.

I feel the same way here. We keep wanting to get into the issue and whether we like it or not.

Mr. Chair, I would ask you to please be specific and clear. Unless I have this wrong, that's not what's in front of us. What's in front of us right now is us in our capacity as an appellant body to a subcommittee that has recommended that this is not votable. So far, I'm not hearing arguments that justify the banning of a colleague's right to bring a bill before the House of Commons.

Remember colleagues, the day we stop allowing members of Parliament to bring a bill to the House.... This is some dangerous water that we're wading into. It doesn't seem like it in our peaceful kingdom, but when you get a chance to get out in the world and see what can happen, or get a little experience around here or at the provincial level and see the kinds of things that can happen, you will see that these things matter. It's really important that we get them right when there isn't a crisis because when there's a crisis, the politics of the day will take over.

I say that because, colleagues, I am listening carefully. However, I'm still not hearing a good argument yet on why we should deny our colleague the right to have his day in court. In this case, that means his right to put forward his private member's bill that he believes is incredibly important to his riding and, in this case, his province. We should move very, very cautiously when we start denying each other that right.

I'm still listening, Mr. Chair.

● (1155)

The Chair: Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): Thank you.

We were implored by the member from the Bloc to look at this from a legal standpoint, and I appreciate what Mr. Christopherson is discussing. I look at us—and I think this was mentioned by Mr. Christopherson—as the appeal court in this. Someone is bringing forward an appeal. The way an appeal works is that you have had a trial, the evidence has been presented and the decision has been made. The onus is then on the appellant to come forward and bring some evidence that the trial court was wrong.

I'll be honest that I haven't heard that, especially from the honourable member who brought his appeal forward to us, in that there was no good legal argument. I even asked, "Have you spoken to constitutional scholars about it?" and he said, "Yes, three of them," but he wouldn't provide their names. There was no briefing. There was no background. There was no information.

I respect Mr. Dufresne and his experience and expertise and what he brings to the table. We have an argument that it could go either way.

As an appeal court would, I give deference to the original decision-makers. It's not a committee that the government has majority on. I give deference to those decision-makers who have made the decision, and I haven't heard anything to really change my mind.

I appreciate the passion and vigour with which Mr. Christopherson is arguing, but nothing was brought forward by the member to really go against what the committee had decided. I even asked him, in terms of bringing an argument.... In the argument he brought forward, he cited one case. That isn't a problem if you have one great case—that's perfectly fine—but it was based on a different section of the charter than the sections of the charter he was arguing about.

Even looking at this from a legal standpoint, I am not convinced that the original committee was wrong. That's what we have to decide at the end of the day: Were they wrong? Again, with respect to Mr. Dufresne, it's not his role and he didn't come here to say someone's right and someone's wrong. He walked a very fine line, and I commend him for doing that.

Mr. Dufresne can correct me—not that he ever has to. I'm a lawyer and would never advise my clients to waive their confidentiality, their solicitor-client privilege, but if they couldn't afford the legal advice, which is something they said, we've been told that the confidentiality could be waived with regard to the legal advice that may or may not have been provided by the parliamentary clerks, and that wasn't done. That was another opportunity for the members to come forward and say, "Here's some evidence that the original committee was wrong." At the end of the—

● (1200)

Mr. Scott Reid: Are you suggesting that the member ought to give up some of his privilege in order to satisfy you, or...?

Mr. Chris Bittle: No. As I said, just a second ago—but I have the floor—

Mr. David Christopherson: Be quiet so I can hear him.

Mr. Scott Reid: Are you suggesting duplicity here on Mr. Dufresne's part? I'm just not sure what accusation you're making or what you are insinuating.

The Chair: Go ahead, Mr. Bittle.

Mr. Chris Bittle: As I just said, Mr. Reid—and I'm sure you were paying full attention to that—as a lawyer, I respect solicitor-client privilege, but if the honourable member says they have no expertise and there is nothing they can bring forward.... It's something they could have provided. It's not something I'm suggesting he should have provided, but it's their job, his job, to present us with evidence that the original committee was wrong. It's something he didn't do. At the end of the day, that was an avenue that was open to him. He didn't choose it. He shouldn't have to. I respect solicitor-client privilege, as I mentioned in the same paragraph.

You're still listening at the same level that you were before. I appreciate that, Mr. Reid.

At the end of the day, I'm not convinced, and I respect and give deference to the original committee. Thank you.

The Chair: Ms. Sahota.

Ms. Ruby Sahota (Brampton North, Lib.): The credible argument.... I'm going back to what David said originally about how you demonstrate knowledge of a language without being forced to speak it or communicate in it. I don't think there is another credible argument. How else would you do it? Is being forced to demonstrate knowledge of a language not a violation of the charter at that point? You're being forced to speak it. Doesn't everyone have the right to choose?

What's the argument? Can you walk me through the other credible argument on the other side?

Mr. Philippe Dufresne: I indicated that the argument would be that the person can communicate with the federal government in the language of his or her choice. It would only be the part of demonstrating proficiency in the language that might require speaking French or providing some kind of evidence to satisfy the department that the person has an understanding of French. The debate would become—

Ms. Ruby Sahota: But it's not a could. They would have to.

Mr. Philippe Dufresne: They would have to demonstrate that they have an understanding of French.

What I was adding afterwards is that if it were found to be a violation of section 20 the issue would become whether this can be justified under section 1 of the charter, and there would be issues there.

Ms. Ruby Sahota: I think we're pretty much at a point where it would violate but section 1 could pass in this case. The bill itself would violate the charter—

Mr. David Christopherson: Should the House be able to vote on it, though?

Ms. Ruby Sahota: The House should only be able to vote if it's not a violation of the charter in the bill. This bill is essentially a violation of the charter.

Mr. David Christopherson: Who said that? Who made that proclamation?

Ms. Ruby Sahota: I'm making it. I feel it is. I guess it could pass the charter test if the court feels it's a justifiable limit.

Mr. David de Burgh Graham: I thought this would be quick.

Ms. Ruby Sahota: I'm done. I'm just pondering.

The Chair: Before we go to Mr. Christopherson, do people know what the bill says? The French they have to have is not just the language but it's the language in relation to an adequate knowledge of Canada and the responsibilities and privileges of citizenship as demonstrated in French. They have to be able to demonstrate all that in French.

We'll have Mr. Christopherson, and then Mr. Reid.

Mr. David Christopherson: Thanks, Chair. I'll be brief.

Again, I reiterate. I don't like the bill. I can't think of an argument. I'll be open-minded, because it's important, it's our Constitution, but it's an uphill climb for somebody to convince me to vote for that bill for all the good reasons my colleagues have made. That's not the issue. What is in front of us is not whether we like it or not or would vote against it or not or whether we believe it's constitutional or not.

The question before us is just this. Forget the substance of the bill. I guess you can't completely set it aside, fair enough, but the matter that's before us, the decision, the instant case before us is, should this bill be allowed to go to the floor of the House of Commons for a debate and a vote?

The reason I asked for the floor, Chair, was that I heard Mr. Bittle and, in fact, it was at the last meeting that I agreed with Mr. Bittle that this turned on the question of whether this is constitutional or not. If it's clearly not constitutional, slam dunk, we support the subcommittee, case closed, next.

But, Mr. Bittle, I have to tell you that I'm very disappointed that you would use the argument based on that at the last meeting and you would now use the argument that the members themselves didn't offer up the legal argument or the legal case that the parliamentary law clerk just did, which by the way, was the sole purpose for us coming together. I find that intellectually dishonest.

There is not a requirement for us to hear from colleagues the definitive legal case, and that's the end of it. If you weren't smart enough to bring it to the table, well too bad. We as a committee decided that our next step was to ask for some legal advice, so at that point, if it's legal advice that carries water, whether it came from our parliamentary law clerk at our request or whether it came from the members when they were here is not the point. I just have a real problem with that.

Again, so far, everybody who has taken the floor is arguing the merits of the bill. I'm still not hearing a strong argument as to why we should extinguish the member's right to have a vote when the only thing that would preclude it is if it's clearly unconstitutional. I'm not hearing clearly from anybody that it's unconstitutional. That is debatable.

Some may think it's a weak debate against a strong debate, but is it so outrageous that it would never have a credible argument in front of the Supreme Court? I'm not hearing that. To me, that should be the test when we are going to extinguish a member of Parliament's right, especially a sacred one, especially when there's so damn few of them.

I still remain unconvinced, and I'm still listening.

● (1205)

The Chair: Okay, just before we go to Mr. Reid, I'll just reiterate what Mr. Christopherson just said.

The decision we're making is whether the criterion that bills and motions must not clearly violate the Constitution Act of 1982, including the Canadian Charter of Rights and Freedoms.... It's not just whether you can vote, but whether it violates the Constitution.

Mr. Reid.

Mr. Scott Reid: To be clear, it's “must not clearly violate” as opposed to “clearly must not violate”, which would be utterly different. Lawyers put a lot of emphasis on that kind of thing, and so do courts, actually.

Voices: Oh, oh!

Mr. Scott Reid: I want to say the same thing that Mr. Christopherson said in his very first remarks. If this comes to the House of Commons, I would be voting against it. It's not a policy that I could support. Having said that, I do want to respond to the question about deference.

A suggestion was made that we ought to defer to the subcommittee. I just disagree. This is a language issue, perhaps, between Mr. Bittle and me, as opposed to a substantive difference maybe, but by definition you don't defer to a body that is subordinate to you.

When the courts deal with an item that has been dealt with on appeal from a lower court, they adopt a language of respect. They respectfully disagree. They go to great lengths in their language to demonstrate that they are respectful of the thoughtfulness of the body with whose decision they are disagreeing. Nonetheless, they disagree.

The body we defer to is the House of Commons. We are the subordinate body of the House of Commons. By taking away the right of the House of Commons to consider this potential piece of legislation, we are actually being the opposite of deferential, and there is no court of appeal for our decision. Effectively, we kill it before the House can hear it.

I know there is a way. If the sponsor can get a signature from a member of the majority of the parties in the House—he himself does not represent a recognized party, so this is a doubly hard task for the member—then he can have it go to the House, where we decide by secret ballot whether it lives or dies.

That is a tough criterion to meet, particularly since it seems that the real point of all of this is to get the governing party, the Liberals, off the hook of having to vote on something that splits them on a regional basis. I would maintain that it is not our business to make life politically easier for one of the parties—

An hon. member: Hear, hear!

Mr. Scott Reid: —and to get them off of the hook on something that's awkward, where the Quebec members and the members outside of Quebec will be driven to vote on different sides of the same issue, an issue that is inherently awkward, and we have members of all three of the parties here, both from Quebec and outside of Quebec.

There is a simple solution to this. I invite the Liberals to think about this. Allow a free vote of your members in the House of Commons and, presto, you've resolved the matter very tidily. Killing this is not the right way to do it.

A final note regarding deference is that this is a matter where what we're trying to do is to not go outside our legitimate authority. Surely the decision as to whether or not something would clearly violate the Charter of Rights as determined by the courts—which means the Supreme Court in the end—is not something where we ought to be prejudging the Supreme Court and anticipating what they might do by saying, “No, you guys, you don't even get the chance to do this because we've decided that we know what you will say yes and no to.”

Now, if something is really clearly unconstitutional, if there is a reason that a reasonable person would accept where we would say that we can reasonably be certain that the Supreme Court would never accept this, then we're not wasting the court's time or, for that matter, the House's time, but no argument to that effect has been presented. It's been only arguments that are like the arguments I would give in the House of Commons if I were presenting a speech as to why I'm voting against this bill and urging my colleagues to do the same thing. On that basis, I simply disagree with Mr. Bittle and a number of the other Liberal speakers.

The final thing I want to say about this is that what's important here is not ultimately how we vote on this piece of legislation, on this yes-or-no vote. What is important is that we should not be in the position of inventing arguments as to unconstitutionality as a way of killing items of private members' business that are difficult for us to deal with. By definition, the things that are difficult for us to deal with are the hard questions that are the most important for us to deal with: language rights, other constitutional rights....

Just go through all of the things that have been hard during your career, Mr. Christopherson.

Mr. David Christopherson: Abortion, divorce....

Mr. Scott Reid: There were issues relating to—

● (1210)

Mr. David Christopherson: Gender rights....

Mr. Scott Reid: Yes, euthanasia, assisted dying, the cannabis legalization discussion that's gone on for a number of years.... We should not be killing private members' business dealing with this sort of stuff. We should allow an open debate in the House at which point we all go out and vote according to our consciences. That splits our caucuses. That is a sign that it is an issue that is not easily resolvable, not easily incorporated into a party's platform, and if that's the case, then my goodness, we really should be discussing and debating it as parliamentarians, as decision-makers. That's the principle. Even if I consider the precedent we set, we just get into the habit of killing every uncomfortable piece of legislation. Having been in the position of arguing as someone asking the private members' business committee to make my item votable, and having also sat in the committee when it was trying to deal with these things, I'd just say that is a really bad precedent to set.

The best place to deal with the contentious issues is first by means of private member's legislation so we can work out the bugs, and then when government legislation comes along, we are better equipped to handle those pieces of legislation.

Openness in government, openness to the private member's initiatives is surely the hallmark of an increasingly open society. We've moved really far in this direction over my career, and Mr. Christopherson's career. I would like to not see us starting to backpedal now.

That is my plea to the Liberal members on this committee.

Thank you, Mr. Chair.

● (1215)

The Chair: Well put.

Just so people know, if this is turned down, it doesn't totally mean the House wouldn't see it. It means they wouldn't vote on it. The member has a couple of options. One is to appeal to the House, and the second is to replace it with another item, or to waive that, and then it can go to the House for debate, but it wouldn't be voted on.

The next person is Mr. Graham.

Mr. David de Burgh Graham: I appreciate your comments, both Mr. Reid and Mr. Christopherson, very much. I resent the comments that it's because it's going to cause a division in the caucus.

I'm an English MP for a riding that's 94% French, and I'm the one here on the record saying that this is unconstitutional. If it's going to be awkward for anybody, it's going to be awkward for me. I'm the one who is taking this quite as far as I can because I think it is fundamentally on its face unconstitutional, and that is a standard we as a committee have adopted.

If we don't agree with that standard, then it's up to us in the committee, and we have the power, to change that standard. But when I look at this law, cut and dried, it attacks minority language rights in all of Canada on its face, and that is against the purpose and the intent of the Constitution, and the Constitution itself.

That's the only reason I'm voting against it being votable. It's not to go after his rights. He has the right, as was just outlined, to replace it with another bill that is not unconstitutional. He has that right. We're not taking away his right to present a bill. We're taking away his right to violate the Constitution out of the gate.

People vote where they may, and if one person on this side changes their mind, then I'll lose my argument too, and that's fine. That's the way this place works. This is private members' business. It's up to us as individuals to make our decisions.

I was at the private members' meeting. I looked at the bill. I had this debate all the way through it. My assessment of it is that it is 100% unconstitutional. I see a credible founding, but I do not see a credible argument to how this could be constitutional. You are communicating with the government and you are being forced to pick a language in one province alone that goes against several aspects of the Charter of Rights. That is the only reason that I am opposing this. In English, as a minority anglophone in a French riding in Quebec, I am saying this is wrong. On the rules that we have adopted as a committee, we cannot vote for it.

That is my take. I'll leave it there. It is my personal decision. I came to this myself, and this is where I land.

The Chair: Okay.

Mr. Bittle, you're on the list.

Mr. Chris Bittle: Thank you so much.

I guess I'll speak to a couple of points first about my academic dishonesty. Again, this isn't a government-led subcommittee, where the government's trying to kill this and I'm looking for any excuse to do this. This is about backing up colleagues. I guess speaking to Mr. Reid's point about deference and that courts don't deal with deference, courts deal with deference all the time. It's one of the—

Mr. Scott Reid: Yes, it's higher up and not lower....

Mr. Chris Bittle: No. One of the issues of judicial review is the level of deference that you grant to a lower court or tribunal.

Mr. Scott Reid: But you look for errors in law.

Mr. Chris Bittle: You always look for errors in law, and that's fine —

Mr. Scott Reid: My point is that once it's decided—

Mr. Chris Bittle: Mr. Reid, I have the floor. I don't interrupt you when you have the floor, and this is now the second time today.

The issue at the end of the day.... Maybe we're speaking to it from a different standpoint. I'm coming at it from the legal side of things in terms of how a court would view deference, which is polite respect of a lower court, or in this case the subcommittee that had the chance to hear it, debate it and deal with it. It was not just the members from this side. It required a vote from the opposition to engage this process, and that's the reason we're here.

Again, at the end of the day—and back to Mr. Christopherson's point—I don't think it's the members' responsibility to bring us a legal case, but it's their duty to bring forward their best case and their best foot forward. The fact that we have Mr. Dufresne here....

That's part of that case and I respect that, and different members can think differently about that, but what I'm hearing is that it could go either way. In my mind, if the subcommittee heard...and in their view it went one particular way, I haven't been blown away by evidence to overturn that subcommittee's decision. That's where I'm coming from.

I didn't want it to come across as academically dishonest and I don't want to discount Mr. Dufresne and his expertise, but that's where I'm coming from at the end of the day.

● (1220)

Mr. David de Burgh Graham: I might also point out that this bill has now had more debate at this committee than it would otherwise have had.

The Chair: Mr. Dufresne.

[*Translation*]

Mr. Philippe Dufresne: I would just like to make one clarification.

Ms. Lapointe, in our discussion, we talked about doing the citizenship test on the knowledge of Canada in French. We had a discussion about whether or not this would be required.

If paragraphs 1(1)(d) and 1(1)(e) of the bill are considered together to be joint requirements, the argument could be the second: knowledge of benefits and responsibilities should be demonstrated in French.

It is also important to ask whether this part is stricter than paragraph 1(1)(d), which simply requires an adequate knowledge of French

As for taking the citizenship test in French, would the court consider whether the interpretation of this part could be mitigated, because it would be considered excessive, while the first part would be justified?

That would also be part of the discussion.

[*English*]

On the issue of appeals, the only thing I would add is that, in some cases, courts will defer—that's quite right—and courts also, in other cases, will ask the questions: Who is best placed to make the determination? Is the administrative tribunal a better place or has it better expertise than the reviewing court? If no, then sometimes the reviewer court may call for less deference.

However, that's a part of administrative law in terms of asking those questions: How much deference, if any, is owed to the initial decision-maker?

The Chair: Are there any more questions for the witness, or any more views that members want to express?

Mr. David de Burgh Graham: Is anybody convinced of anything?

Mr. David Christopherson: That's why we vote, to find out.

Mr. Scott Reid: I was persuaded by Mr. Christopherson's arguments.

Mr. David Christopherson: That's high praise.

Mr. Chris Bittle: Can we suspend and—?

Mr. David Christopherson: For what? Why aren't we voting?

The Chair: Do you want to have a vote now?

Mr. David Christopherson: Why wouldn't we? I'd like a recorded one at that.

Mr. Scott Reid: Mr. Chair, there is a reason why we don't have a vote just at this moment.

Mr. David Christopherson: Okay.

Mr. Chris Bittle: Can we suspend for a couple of minutes?

Mr. Scott Reid: That's fine. Would that be okay?

Mr. David Christopherson: Yes, absolutely. We used to have a rule for that provincially. I don't know what it is here.

Yes, let's take a couple of minutes and give everybody a chance to regather.

The Chair: Then we'll come back and make our decision.

Mr. David Christopherson: Very good.

The Chair: We have other committee business to do too.

We'll suspend.

● (1220)

(Pause)

● (1230)

The Chair: Welcome back to the 136th meeting. We will have discussion and then a vote. People want to continue in public.

Is there any discussion?

Mr. Graham, you brought a list.

Mr. David de Burgh Graham: As I said to David, this comes from a very personal place for me as a minority in Quebec who wants French to spread across the country and English to be protected in Quebec. I spent my whole life in a position where I was, quite frankly, being pushed out of Quebec. The culture's changed in Quebec and that's not the case anymore, so it allowed me to be an MP in my home area.

This is all about undoing the protection the Constitution has given us. At the Subcommittee on Private Members' Business, our job is to follow the four criteria that the members of PROC approved last year. If we don't look at something, ask if it's constitutional and if it's not, reject it, then what's the purpose of that process in the first place? Why do we even bother with the Subcommittee on Private Members' Business? Let everything go to the House and don't worry about it.

That's my final comment on this. When you're going to go after minority rights in this country against the Constitution, I will be there to protect the Constitution and I'm ready to vote on that basis. Thank you.

● (1235)

The Chair: Mr. Simms.

Mr. Scott Simms (Coast of Bays—Central—Notre Dame, Lib.): I've been sitting here for the past hour and a half as the proverbial sponge to take it all in. As I meandered my way through the arguments, I'm going to be quite honest with you, it was a fantastic discussion in many regards.

Mr. Christopherson brings up some really salient points about who we are and what we need to do, not only to represent our constituents but on our shoulders comes the responsibility of governing a nation as parliamentarians—not an executive, but as parliamentarians. We keep them in check, but by the same token, we also have given to us, thank goodness, by the sheer grace of this wonderful democracy, that we can put together a private member's bill to be understood by everybody and voted on by our peers and which eventually may or may not become the law of the land. Thank goodness for that.

Let me go to Mr. Graham's argument. There is a process in place by which the protection or the reputation of the Constitution is not held in contempt by anyone's private member's bill. At the core of it, some of that needs to be changed because it just might be too overly prescriptive in how we filter through these bills, who gets to go to the House and who does not.

The standard is set at a certain level. Maybe that standard should be—I know this is going to sound terrible—lowered to the point where we defer to the sheer respect of a member of Parliament to bring a law to this land.

Mr. Christopherson, I'm with you all the way, but this gentleman here has got a point about the system that exists right now. I'm going to have to defer to that, but in the future, I'm going to look at it with a closer eye and say maybe we're just being a little overly prescriptive in how we may be.... We're not allowing a member of Parliament to freely do their job, not as a partisan, not as an executive, but as a member of Parliament who has rights and privileges.

I'll leave it at that. Thank you.

The Chair: There's nothing to stop the committee from better defining the criteria in the future.

Mr. David de Burgh Graham: If you want to change the process we have now, that's a discussion we can have.

The Chair: Is there anyone else on the list?

Mr. Reid.

Mr. Scott Reid: On my overenthusiasm earlier on for the appropriately named Simms rule, which I just unilaterally invoked and extended its reach, I apologize to Mr. Bittle for that. My comment was really for Mr. Bittle. If I came across as being in any way intentionally disrespectful, then that was not my intention and I enjoy his interventions.

Finally, as someone who has spent time living close to Mr. Graham's riding in Saint-Jérôme—his riding is so freaking large there's not much that isn't in it—I think we disagree on the point but I appreciate his sincere sentiments.

The Chair: Mr. Christopherson.

Mr. David Christopherson: Just to pick up on the last point, I enjoyed the respectful stimulating debate. These things are tough and they do come down to judgment calls. At the end of the day, you have to be comfortable enough in your own skin to go back to your own riding and feel comfortable that you made the right decision as you see it.

This is the kind of thing I am truly going to miss. When people ask what I am going to miss in politics, it's exactly this. Things that really matter, debated by really smart caring people who are trying to do the best they can and trying to prove that there are other ways to resolve massive differences without being violent, but that you can still make important points on important matters.

I just want to say again how much I respect everybody here, and I enjoyed the debate. I found it stimulating. Chair, we don't give enough credit to you, because you have a very low key way of doing things, but it's incredibly effective. You do set the tone that allows us to have these kinds of debates, and that comes from your deep respect for everyone at the table and the institution we serve. I want to thank everybody. I've enjoyed this, separate and apart from the outcome. This is why it's a great country, the greatest country in the world.

● (1240)

The Chair: Thank you, David. You made an excellent point. I appreciate that.

Mr. David Christopherson: Now a recorded vote, we haven't left politics.

The Chair: A recorded vote has been requested.

(Motion agreed to: yeas 5; nays 4)

The Chair: The subcommittee's decision is sustained.

We're going to suspend for a minute while we go in camera.

[*Proceedings continue in camera*]