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OFFICIAL REPORT
(HANSARD)

Monday, February 26, 2018

The Honourable GEORGE J. FUREY,
Speaker

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THE SENATE

Monday, February 26, 2018

The Senate met at 6 p.m., the Speaker in the chair.

Prayers.

SENATORS' STATEMENTS

QUESTION OF PRIVILEGE

NOTICE

Hon. Lynn Beyak: Honourable colleagues, I stand today to raise a question of privilege: that Motion No. 302 not be allowed to proceed, as the matter is already being dealt with through proper procedures by the Senate Ethics Officer. This matter should not be decided by a select group of senators who want to prevent another senator from expressing a point of view with which they disagree.

A senator's website is to keep Canadians aware of the current issues facing the Senate, keep Canadians apprised of a senator's work, and to address the concerns and opinions of all Canadians. If Senator Pate's motion is allowed to proceed and my website is ordered to be removed, my ability to do my job as a senator of Canada will be seriously impeded.

KAETLYN OSMOND

CONGRATULATIONS ON GOLD AND BRONZE MEDAL PERFORMANCES

Hon. Elizabeth Marshall: Honourable senators, I rise today to congratulate Canadian figure skater and Newfoundlander Kaetlyn Osmond, who triumphed on the world stage during the 2018 Winter Olympics in South Korea. Kaetlyn, originally from Marystown in Newfoundland and Labrador, is an amazing figure skater who had a remarkable comeback after she suffered an injury in 2014 that would not allow her to skate, much less compete in a figure-skating championship.

After her off-season and recovery in 2015, she was able to train with the help of her coach, her coaching staff and her friends and family, who played an essential role in her motivation and confidence.

Although Kaetlyn faced both physical and mental obstacles after this injury, and even considered retiring, she won silver during the 2017 World Championships in Finland, showing strong determination and athletic spirit.

Last week in South Korea, Kaetlyn was able to fulfill what she loves to do —skating — and, more importantly, she was able to win two Olympic medals doing it. Kaetlyn, as part of Team Canada, won a gold medal in the team event, along with the extraordinary Canadian figure skaters Scott Moir, Tessa Virtue, Gabrielle Daleman, Eric Radford, Meagan Duhamel and Patrick Chan.

They are all bringing back the gold after a fabulous ice-skating team event. Congratulations to all of them.

Hon. Senators: Hear, hear.

Senator Marshall: Honourable senators, Kaetlyn also won the bronze medal in the women's figure skating competition. Skating to "Black Swan" in a program that was the perfect combination of power and elegance, Kaetlyn landed seven triple jumps, earning over 231 points and smashing her previous personal best.

Honourable senators, I invite you to join me, my fellow Newfoundlanders and Labradorians, and Canadians from coast to coast as we celebrate Kaetlyn's astounding bronze medal in the women's singles competition and her gold medal, along with Team Canada, in the figure skating team event.

Kaetlyn, congratulations on your impeccable and outstanding performance in the 2018 Winter Olympics in South Korea.

Hon. Senators: Hear, hear.

2018 ONTARIO WINTER GAMES

Hon. Gwen Boniface: Honourable senators, with the end of a thrilling Winter Olympics, which held its closing ceremonies in Pyeongchang yesterday, you may think that this sporting season is over. Well, I am delighted to inform you that the 2018 Ontario Winter Games are taking place between March 1 and 4, and are being hosted in my hometown of Orillia.

This is the first time that Orillia will be hosting the games, which is set to welcome over 3,000 athletes, coaches, managers and officials participating in 25 different sporting events. Athletes between the ages of 12 and 18 will partake in traditional winter sports such as curling, para-alpine skiing, and hockey, as well as other team and individual events such as wheelchair basketball and squash.

For many athletes, the Ontario Winter Games are the high point of their sporting career; and for others, they are a stepping stone for other events such as the Pan Am, Parapan Am or Canada Games. Some athletes who have competed at the Ontario Winter Games have even gone to compete at the Olympics.

Opening ceremonies will take place at Couchiching Beach Park and include a welcome from Orillia Mayor Steve Clarke, followed by a traditional song by The Drumming Circle of the Chippewas of Rama First Nation. The ceremonies will close with fireworks after a headlining performance by Bleeker, Orillia's own Juno-nominated band. All events over the four days are free admission, family-friendly and sure to draw a crowd.

The Ontario Winter Games will be a fun-filled and exciting source of entertainment for those who attend, as well as an excellent venue for those athletes participating to showcase their

skills. I encourage my fellow senators to tune in to experience the best up-and-coming athletes from Ontario who may well end up being some of the household sporting faces of the future.

I wish all participants the best of luck in what is sure to be a successful event in Orillia.

JESSICA TELIZYN

CONGRATULATIONS ON LORAN SCHOLARSHIP

Hon. Richard Neufeld: Honourable senators, I rise today to pay tribute to a bright young Canadian from Fort St. John, British Columbia, Miss Jessica Telizyn.

Earlier this month, we learned that Jessica was one of 34 Canadians to be named a Loran Scholar. The Loran Scholarship is Canada's largest and most comprehensive four-year undergraduate award for young Canadians on the basis of character, service and the promise of leadership.

The $100,000 scholarship includes annual stipends, tuition waivers from partner universities, mentorship, summer internship funding, as well as annual retreats and forums.

Jessica will graduate from high school later this year. Her plan is to attend Dalhousie University in Halifax, where she will enrol in a double-major undergraduate program in neuroscience and business. She then plans to apply to medical school to become a surgeon. There is little doubt in my mind that she will be as successful and involved in Halifax as she has been in Fort St. John.

Jessica's long list of achievements and contributions to our community includes raising funds to help build schools in impoverished countries, collecting food to support the women's centre, setting up a social justice club, and launching a number of agri-tech start-ups to reduce food waste.

And this girl is only 18 years old. I bet her CV already has many pages.

The best part of the story is that Jessica plans to return to the North after her studies. I've often publicly said how difficult it is to recruit and retain medical professionals in northern and remote communities. I am delighted that Jessica intends to, as she puts it, "serve those underserved communities like Fort St. John, where there are not a lot of surgeons, or even further north."

Honourable senators, there is something Jessica said in an interview that caught my attention. In reaction to the news that she received the scholarship, she said, "It is such an incredible opportunity. The odds are so minute that it's mind boggling to think that I'd be one of the 34, coming from Fort St. John."

In my view, the moral of the story is that if you dream big and work hard, you can achieve anything, regardless of where you come from, even a small community in northeastern B.C. Success is achievable if you put your mind to it.

Honourable senators, please join me in congratulating Fort St. John's very own Jessica Telizyn, a 2018 Loran Scholar.

• (1810)

I wish her all the best in her future studies, and I hope that in 10 years from now, when I'm a not so young retired senator, I will read in the news that Jessica has returned home to practise medicine.

[*Translation*]

ROUTINE PROCEEDINGS

CREE NATION OF EEYOU ISTCHEE GOVERNANCE AGREEMENT BILL

BILL TO AMEND—FIRST READING

The Hon. the Speaker informed the Senate that a message had been received from the House of Commons with Bill C-70, An Act to give effect to the Agreement on Cree Nation Governance between the Crees of Eeyou Istchee and the Government of Canada, to amend the Cree-Naskapi (of Quebec) Act and to make related and consequential amendments to other Acts.

(Bill read first time.)

The Hon. the Speaker: Honourable senators, when shall this bill be read the second time?

(On motion of Senator Harder, bill placed on the Orders of the Day for second reading two days hence.)

[*English*]

AGRICULTURE AND FORESTRY

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY ISSUES RELATING TO AGRICULTURE AND FORESTRY

Hon. Diane F. Griffin: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

> That the Standing Senate Committee on Agriculture and Forestry, in accordance with rule 12-7(10), be authorized to examine and report on such issues as may arise from time to time relating to agriculture and forestry; and
>
> That the committee report to the Senate no later than June 30, 2019.

[*Translation*]

QUESTION PERIOD

DELAYED ANSWERS TO ORAL QUESTIONS

Hon. Peter Harder (Government Representative in the Senate): Honourable senators, I have the honour to table the answers to the following oral questions:

Response to the oral question asked in the Senate on November 1, 2017 by the Honourable Senator Dagenais, concerning monuments to honour service.

Response to the oral question asked in the Senate on November 9, 2017 by the Honourable Senator Dagenais, concerning The Book of Remembrance.

Response to the oral question asked in the Senate on November 23, 2017 by the Honourable Senator Patterson, concerning the legalization of cannabis — consultation with Inuit communities.

VETERANS AFFAIRS

MONUMENTS TO HONOUR SERVICE

(*Response to question raised by the Honourable Jean-Guy Dagenais on November 1, 2017*)

The Government of Canada remains committed to the development of the National Memorial to Canada's Mission in Afghanistan. The Memorial will recognize the commitment and sacrifice of Canadian men and women who served in Afghanistan, as well as the support provided to them by Canadians at home. Identifying the appropriate site for the Memorial is critical. In 2016, to ensure that the most appropriate site is chosen, Veterans Affairs Canada requested that Canadian Heritage and the National Capital Commission revisit the site selection of Richmond Landing Upper Plaza and propose alternate sites. In addition to the Richmond Landing Upper Plaza, Canadian Heritage and the National Capital Commission proposed sites near the Canadian War Museum, the Cartier Square Drill Hall and the Canadian Phalanx. At Veterans Affairs Canada's October 2016 Stakeholder Summit, the majority of participants supported the site near the Canadian War Museum. Veterans Affairs Canada is awaiting the federal land use decision of the National Capital Commission's Board of Directors regarding the site near the Canadian War Museum.

At this stage, no decision has been made with respect to a Victoria Cross memorial.

CANADIAN HERITAGE

BOOK OF REMEMBRANCE

(*Response to question raised by the Honourable Jean-Guy Dagenais on November 9, 2017*)

Veterans Affairs Canada:

The Memorial Chamber located in the Peace Tower houses the Books of Remembrance which list the names of Canadian soldiers who have paid the ultimate price in the defense of our freedom. Currently, seven books are on display for all to view: First World War, Second World War, Newfoundland, Korean War, South African War/Nile Expedition, Merchant Navy and In The Service of Canada.

An eighth book is now ready to be displayed in the Memorial Chamber, The Book of Remembrance – War of 1812.

Veterans Affairs Canada is working with Public Services and Procurement Canada as well as the Sergeant-at-Arms office in the Parliamentary Precinct to coordinate the installation of this book into the Memorial Chamber.

The Books of Remembrance are a heritage collection and are handled, maintained and displayed based on standards identified by the Canadian Conservation Institute.

JUSTICE

LEGALIZATION OF CANNABIS—CONSULTATION WITH INUIT COMMUNITIES

(*Response to question raised by the Honourable Dennis Glen Patterson on November 23, 2017*)

In 2016, the Task Force on Cannabis Legalization and Regulation consulted with Indigenous organizations across Canada, including the Inuit Tapiriit Kanatami (ITK).

In September, October and November 2017, Government officials met with ITK to: share information on the Government's objectives; understand Inuit perspectives; and seek input on public education activities. ITK also participated at a Partnership Symposium on Cannabis Public Education and Awareness.

On November 21, the Nunatsiavut Government (NG), Inuvialuit Regional Corporation (IRC), Makivik Corporation, Nunavut Tunngavik Incorporated (NTI) and ITK were notified of public consultations on the proposed regulatory framework, and invited to information sessions. A meeting with ITK was held on November 22 to discuss Inuit engagement. Subsequent meetings included: National Inuit Committee on Health (January 17); National Inuit Youth Council (January 19); IRC (January 5), NG (January 12), and NTI (January 22).

On January 31, the Minister of Health met with the Hon. Pat Angnakak, Nunavut Minister of Health. Parliamentary Secretary Bill Blair met with Pauktuutit on February 5, and with NTI and Iqaluit Mayor Madeleine Redfern on February 1.

The Government will continue to engage with Inuit communities to provide information, discuss concerns, and work together in developing and delivering effective public education.

[*English*]

ANSWERS TO ORDER PAPER QUESTIONS TABLED

INDIGENOUS SERVICES—FIRST NATION INFRASTRUCTURE

Hon. Peter Harder (Government Representative in the Senate) tabled the reply to Question No. 55, dated September 19, 2017, appearing on the *Order Paper and Notice Paper* in the name of the Honourable Senator Dyck, regarding First Nation infrastructure.

STATUS OF WOMEN—FUNDING OF WOMEN'S ORGANIZATIONS

Hon. Peter Harder (Government Representative in the Senate) tabled the reply to Question No. 57, dated October 4, 2017, appearing on the *Order Paper and Notice Paper* in the name of the Honourable Senator McPhedran, regarding the funding of women's organizations.

PUBLIC SAFETY AND EMERGENCY PREPAREDNESS—INCARCERATION OF INDIGENOUS PEOPLE AND PEOPLE WITH MENTAL HEALTH ISSUES

Hon. Peter Harder (Government Representative in the Senate) tabled the reply to Question No. 61, dated October 26, 2017, appearing on the *Order Paper and Notice Paper* in the name of the Honourable Senator Pate, regarding the incarceration of Indigenous people and people with mental health issues (Public Safety Canada).

JUSTICE—INCARCERATION OF INDIGENOUS PEOPLE AND PEOPLE WITH MENTAL HEALTH ISSUES

Hon. Peter Harder (Government Representative in the Senate) tabled the reply to Question No. 61, dated October 26, 2017, appearing on the *Order Paper and Notice Paper* in the name of the Honourable Senator Pate, regarding the incarceration of Indigenous people and people with mental health issues (Department of Justice).

NATIONAL REVENUE—CANADA REVENUE AGENCY TAX EVASION INVESTIGATIONS

Hon. Peter Harder (Government Representative in the Senate) tabled the reply to Question No. 62, dated October 31, 2017, appearing on the *Order Paper and Notice Paper* in the name of the Honourable Senator Downe, regarding CRA tax evasion investigations.

HEALTH—VANESSA'S LAW

Hon. Peter Harder (Government Representative in the Senate) tabled the reply to Question No. 63, dated October 31, 2017, appearing on the *Order Paper and Notice Paper* in the name of the Honourable Senator Seidman, regarding Vanessa's Law.

VETERANS AFFAIRS—VETERANS PRIORITY PROGRAM SECRETARIAT

Hon. Peter Harder (Government Representative in the Senate) tabled the reply to Question No. 65, dated November 2, 2017, appearing on the *Order Paper and Notice Paper* in the name of the Honourable Senator Downe, regarding the Veterans Priority Program Secretariat.

• (1820)

ORDERS OF THE DAY

BUSINESS OF THE SENATE

The Hon. the Speaker: Honourable senators, the witness for Committee of the Whole has arrived.

It is about 10 minutes before the designated time of 6:30. We have a question of privilege that must be heard before going to the Notice Paper, so we can either agree to start the Committee of the Whole 10 minutes early or we can suspend until 6:30.

Is it your wish, honourable senators, to begin 10 minutes early?

Hon. Senators: Agreed.

The Hon. the Speaker: Honourable senators, pursuant to the order adopted on February 15, 2018, I leave the chair for the Senate to resolve itself into Committee of the Whole to hear from Ms. Caroline Maynard respecting her nomination as Information Commissioner.

[*Translation*]

INFORMATION COMMISSIONER

CAROLINE MAYNARD RECEIVED IN COMMITTEE OF THE WHOLE

On the Order:

The Senate in Committee of the Whole in order to receive Caroline Maynard respecting her nomination as Information Commissioner.

(The Senate was accordingly adjourned during pleasure and put into Committee of the Whole, the Honourable Nicole Eaton in the chair.)

The Chair: Honourable senators, rule 12-32(3) outlines procedures in a Committee of the Whole. In particular, "senators wishing to speak shall address the chair", "senators need not stand or be in their assigned place to speak" and each senator shall speak for no more than 10 minutes at a time, including the time for the witness to answer.

Honourable senators, the Committee of the Whole is meeting pursuant to an order adopted by the Senate on February 15. The order was as follows:

> That, at 6:30 p.m. on Monday, February 26, 2018, the Senate resolve itself into a Committee of the Whole in order to receive Ms. Caroline Maynard respecting her nomination as Information Commissioner;
>
> That the Committee of the Whole report to the Senate no later than two hours after it begins; and
>
> That the provisions of rule 4-16(1) be suspended until the Committee of the Whole has reported to the Senate.

I would now ask the witness to enter.

(Pursuant to the Order of the Senate, Caroline Maynard was escorted to a seat in the Senate chamber.)

The Chair: Ms. Maynard, thank you for being with us today. I would invite you to make your introductory remarks, after which there will be questions from senators. I would ask that you keep your introduction rather brief because there are many senators who would like to ask you questions. Ms. Maynard, you have the floor.

Caroline Maynard, Information Commissioner Nominee: Honourable senators, it is an honour to be here with you today and a privilege to be considered for the position of Information Commissioner of Canada.

[*English*]

I am particularly honoured to be nominated given the importance to Canadians of the role of the Information Commissioner in protecting and promoting access to information, a right that has been recognized as a core principle in a functioning democracy.

The challenges and changes ahead cannot be underestimated. However, as a jurist with 20 years of experience in oversight agencies, I cannot hide my enthusiasm in being considered for the position of the commissioner that would be responsible to oversee the implementation of the proposed new legislation, Bill C-58.

Building on the Office of the Information Commissioner's 34 years of knowledge and experience, I would ensure to make full use of the current and proposed powers to provide a fair and efficient independent review of government decisions relating to access requests to increase both transparency and accountability.

But before I discuss in greater detail how I envision fulfilling my duties as an agent of Parliament, let me introduce myself.

[*Translation*]

I was born and raised in Saint-Hyacinthe, Quebec, and later studied civil law at the Université de Sherbrooke. In the final year of my program, I met my spouse, who was also studying law at the time, but in Alberta. We moved to the Outaouais region in 1993 and have been married for 20 years. I am the proud mother of three boys between the ages of 13 and 18, and when asked about my hobbies outside of work, I reply that I am an official chauffeur, a busy grocery-getter and definitely a hockey mom.

[*English*]

After a brief period in the private sector, I joined the federal government. My public service career has been spent largely in agencies responsible for providing an independent review of grievances submitted by members of the RCMP and of the Canadian Armed Forces. Whether I was acting as legal counsel, Director General, General Counsel or, recently, as a chairperson of the Military Grievances External Review Committee, I have always been guided by the same values: integrity, excellence, fairness and timeliness.

My leadership style is based on the same principles. My employees would tell you that I am a very open and reasonable person who recognizes a job well done and promotes innovation and efficiency.

When I began with the External Review Committee in 2006, it was a relatively new tribunal. The committee is responsible for providing an independent review of military grievances that are referred by the Canadian Armed Forces. It issues findings and recommendations to the Chief of the Defence Staff, who is the final authority of that grievance process. As a civilian oversight of military grievances and decisions, the committee had to work very hard to build its credibility. Collectively with management and in consultations with employees, we worked diligently to find ways to improve our internal review process.

Through teamwork, innovation and determination, we reduced the average time spent on files from nine months to four months while we increased the quality of our findings and recommendations. We showed that an oversight civilian agency could provide significant value added to the administration of military affairs. As a result, I am proud to say that the committee portfolio has increased from receiving about 40 per cent of all grievances — mainly military referrals — to now receiving 95 per cent of grievances, as it also includes files that are sent on a discretionary basis.

[*Translation*]

I have been working in the field of grievance resolution for nearly two decades because I am keenly aware of the difference we can make. I am motivated by the fact that my organization has competent public service employees who care about the impact their work has on Canadians. I have dedicated my entire career to ensuring that the rights of people without representation are upheld and ensuring that the decisions that affect them are justified and reasonable.

[*English*]

Should I become the next Information Commissioner, this is the spirit that I would bring to my duties. I see this opportunity as a logical progression in my career in the public service. I am more than ready to report to Parliament on how I would oversee the access to information regime.

[*Translation*]

This leads me to explain not only my specific interest in the position of Information Commissioner, but also my vision of what I perceive to be the major challenges I will have to face if you approve my nomination.

• (1830)

In Canada, access to information about government decision-making is a well-known and established quasi-constitutional right. This statement is supported by the growing number of requests submitted every year and reported by the Treasury Board Secretariat. Based on the Office of the Information Commissioner's website, I also note that the number of complaints has increased every year. Furthermore, with the new proposed amendments to the act and the recent launch of the Office of the Commissioner's online complaint form, it is reasonable to assume that the number of complaints will continue to grow.

[*English*]

Should I be appointed, I can assure you my first commitment to Parliament and to all Canadians would be to tackle the current backlog of complaints. From the reports submitted by the current commissioner, I understand that this has been one of her main concerns as well, and obtaining additional resources is listed as part of her office's priorities. In this regard, I know that the President of the Treasury Board has committed to providing further funding for the implementation of Bill C-58, and that's very encouraging.

Also, with the lessons that I have learned in streamlining the grievance process for the Canadian Armed Forces at the committee, I'm confident that I would bring a critical eye to the commission's internal processes that could help optimize efficiencies.

Addressing backlog issues is a necessity, as I truly believe that Canadians are entitled to have their complaints dealt with in a timely manner. Access delayed is access denied.

That being said, success relies on a change in culture — a change of culture towards access rights within the federal institutions subject to the act. I can say from my own experience that even though the access to information legislation was enacted 34 years ago, there appears to still be an impulse to look for exemptions and exclusions rather than transparency.

I believe that we need to give meaning to the concept of open government. It has to become part of federal institutions' day-to-day practices and approach. It is only when the access right becomes a foundational right and principle — like the respect of our official languages is now ingrained in our society — that Canada will reassert its leadership in an open and transparent government that is a model for all democratic nations.

In consultation with the commission's stakeholders, I believe that our efforts must be geared towards the promotion of disclosure and transparency. I am pleased to see that these efforts would be supported by the new wording of the purpose found in Bill C-58, which clearly states that the goal is to enhance accountability and transparency in order to promote an open and democratic society. This is, in my view, a clear message that there is a commitment to hold federal institutions accountable with respect to not only their decisions but also their obligations under the act.

This express intent, in addition to the new powers provided to the commission to issue and publish orders, suggests that accountability and transparency are to be taken very seriously.

[*Translation*]

In closing, I want to point out the important work and the undeniable dedication of Commissioner Legault and her employees in defending and promoting the right to access to information in Canada. I pledge today to carry out my mandate by building on the solid foundation of expertise acquired by the commissioner over the past 34 years, should Parliament confer on me the honour of becoming the next Information Commissioner.

[*English*]

I also pledge to act with integrity and to the best of my abilities, and to serve Canadians and Parliament with the highest degree of independence.

I thank you, Madam Chair and honourable senators, for considering my nomination.

[*Translation*]

I am now ready to answer your questions.

The Chair: Thank you, Ms. Maynard. We will start the round of questions with Senator Smith.

[*English*]

Senator Smith: Ms. Maynard, welcome. My questions for you concern the process surrounding your nomination as the next Information Commissioner.

As you know, the current commissioner, Suzanne Legault, announced last April that she decided not to undergo the new appointment process set in place by the current government for a job that she has held since 2010. The government extended her appointment twice as they searched for her replacement.

[*Translation*]

Ms. Maynard, can you summarize the process for us?

[*English*]

Could you give us some background? What did you go through?

[*Translation*]

Ms. Maynard: Last November, I attended mandatory training for new members appointed by the Governor-in-Council.

[*English*]

This training was offered and was required. It was mandatory training for all new Governor-in-Council appointees. So as an interim chairperson of the committee, I was asked to attend.

At that training I met somebody from the PCO who was there to explain to us the process and the terms and conditions of new appointees, so I asked a few questions with respect to the new members that were coming to be at that committee because we were supposed to receive four new committee members. She followed up with a phone call a week later, and it was during that phone call that she made me aware of the Information Commissioner's position that was still available and that they were looking for somebody.

I was so focused on getting the committee ready for the new members and the transition that I often forgot about my own aspirations in my career. I was hoping to do something different in the next year because I've been at the committee for 11 years now.

I researched the position of the Information Commissioner and realized that it was very similar to the mandate at the committee, such as investigating complaints, often with somebody who is not represented, making sure that their rights are upheld. It was really interesting.

On November 20, I applied through the public online application process. About a week later I got a call from a private firm asking me if I was interested in going for an interview, which happened on December 1 before four different representatives, two from the Treasury Board Secretariat, one from PMO and one from PCO. I was also asked to do psychometric testing.

I didn't hear anything during the Christmas holidays. By mid-February, I received a phone call from Treasury Board to find out if I was still interested in the position, which I was. I was told that the consultation process was going to be starting and I knew that my nomination was going to be put forward, so now I'm here.

Senator Smith: During the interview process, what did you do to differentiate yourself from the other people who applied? What was your unique selling point or factor that you utilized to get this opportunity?

Ms. Maynard: I don't know what the other candidates would have done, but I used my experience at the committee to talk about — I believe that one of the problems or one of the big challenges of the commission is that it is still not well understood within the institutions. I really believe that open government has to become more than a slogan. I really think that the institution has to believe in it. It has to be part of their practices every day.

I still hear a lot of people talking about not entering their decision or their discussion in writing because they are afraid of being accessible and atypical. That's the term they use.

I think the work of the commission, with the new powers and with hopefully — I'd like to even suggest that we need to do more in terms of communication, not only those decisions or orders to an institution that has not followed the act as well as the commission thinks, but also having best practices promoted.

At the committee where I currently work, we issue case summaries for every finding and recommendation. By doing that, we show that we are very balanced and consistent in our approach. When a complainant has an issue that another complainant has, they can refer to it. We keep everything private. It's confidential, so we don't issue names. But it's one of the best tools we've had at the committee. It has really increased the credibility of the committee because both the members of the Canadian Forces and the chain of command have relied on that tool to support their decisions and to understand our decisions. So I think this is something that I'd like to promote and look for.

• (1840)

Senator Smith: According to the 2016-17 Annual Report on the Access to Information Act, the Military Grievances External Review Committee has just two employees who dedicate an average of 0.02 per cent of their time to fulfill committee obligations under both the Access to Information Act and the Privacy Act.

At the present time, there doesn't seem to be a large number of issues or requests that you folks dealt with that dealt with access to information. How do you look at going into a situation that probably is much different than the situation that you existed in before in terms of numbers? How are you going to handle that? How are you going to manage that? Tie that to the point that you brought up earlier, namely, we need to change the culture. What step are you going to do to change the culture? The first one, of course, is the actual experience of handling of multiple complaints.

Ms. Maynard: I don't think the volume itself is something that I'm worried about, because the complexity of the complaints differs. I would rely on the people at the commission who have 34 years of experience.

I also realize that when I say we don't know what's going on within the commission, it is because every time you look for examples, you have to go through each annual report right now to

find what kind of investigation has been done and the results of those investigations. There's definitely an opportunity out there to publish and to be more visual.

Regarding my own experience at the committee, I've been dealing with the access requests not just as an institution but as a tribunal. I've been a requester; I've been a deciding person; I've been an administrator. When we review a grievance, the member is not represented. Often, they don't even know information exists that could support or explain the decision that was rendered.

At the committee, we often have to request the information from National Defence to see whether the decision that was rendered, which is being grieved, was reasonable and justified. We've often been denied access to information on behalf of members.

I know what it is to request and be denied, and I know the importance of relevance of information. To me, that's a big issue. As I was saying earlier, access delayed is access denied. When a person is asking for information, they have to have it now; it is relevant at that point. If you're waiting six months, one year or two years, often it's going to be too late. This is something else that I'd like to work on, because at the committee we have obtained a lot of experience in streamlining the process. That is, doing informal resolutions and investigations, and dealing with teamwork internally. That's something I would like to talk about with the employees at the commission. Often best practices and lessons learned come from them. That's something we would have to look into.

[*Translation*]

Senator Saint-Germain: Welcome, Ms. Maynard, and thank you. My question has to do with the oversight model at federal institutions like yours. Your institution currently uses the ombudsman model, which means that you can make recommendations, but they are not binding.

Both houses of Parliament have received reports over the years recommending significant changes to this model. The first of these reports was from a House of Commons committee and was sent to us in 2016. The second report was from your predecessor, Ms. Legault, and was submitted to us last September. Both of these reports recommended a much more coercive approach, such as an order-making model in which an arbitrator would receive complaints from individuals who had been denied information. Once the arbitration was complete, the commissioner would be required to issue a binding order to solve the issues in question, and this order could be appealed before a higher court. This would make it easier for Canadians to access documents from public agencies.

You seem satisfied by the new powers granted in Bill C-58. Can you explain more specifically your views on a potential order-making model and on avoiding the courts?

Ms. Maynard: Based on my experience issuing recommendations, I think that, since the authority to issue orders set out in Bill C-58 includes the authority to publish these orders, this would be enough to encourage institutions to fulfill their obligations under the act.

We must keep in mind that the commission will retain its role as an intervener in the Federal Court if an institution were to appeal the order. It is a huge honour for a commission or a tribunal to have the authority as an intervener to explain an order or even to intervene on behalf of a complainant before a higher court, after conducting an investigation and issuing an order.

Even if this seems to say that the order would not be enforceable, simply being able to publish the order would create an incentive that isn't there at this time in the current legislation and, as I said earlier, the commissioner does not lose his or her right to go even further and intervene on behalf of a complainant if the institution refuses to apply the order or if it decides to appeal the order. In my view, that is sufficient.

Senator Saint-Germain: If I understand correctly, your view of Bill C-58 is more positive than that of your predecessor. So you would not go as far as demanding the powers that she had recommended be granted to the commission?

Ms. Maynard: In my opinion, the purpose of the Access to Information Act is to give Canadians access to information. Any changes that limit access or that could slow the access to information process are troubling, in my opinion, and any changes that ensure greater access or that improve the access to information process for Canadians I see as considerable progress.

Senator Day: Ms. Maynard, thank you for being here this evening and welcome to the Senate of Canada.

[*English*]

My questions relate to Bill C-58 and your thoughts and opinions in relation thereto. Just so the record is clear, Bill C-58 is entitled "An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts."

Dozens of First Nations and tribal councils have raised concerns regarding how Bill C-58 would affect long-standing land claims, given that the majority of evidence related to historical land claims is in the possession of the federal government. I'll refer you to the area in and around clause 6 of Bill C-58, and section 6 of the previous legislation that talks about the ability of the commission to refuse a request on certain grounds. I understand that some amendments have been made, but there are still concerns being expressed.

According to the National Claims Research Directors, Bill C-58 would hinder the ability of First Nations to access information related to their claims, grievances and disputes with the Government of Canada.

In October of last year, Treasury Board President Scott Brison pledged to address those concerns. And as I indicated, some changes were made, but it is still felt that they're not sufficient.

• (1850)

Could you provide me with an update on whether there is any appetite, any desire, any likelihood that the federal government will make further changes to this legislation to meet these concerns being expressed?

Ms. Maynard: Unfortunately, I am not aware. I am not working with the people responsible for the amendments to the act. All I know, as you would know as well, is what I read in the newspaper and what I've read in the reports.

From my own perspective and with my own experience, when I read the amendments to the act I do share some concerns with the fact that section 6 would possibly limit access to information or would delay access, because now section 6 has been amended so that access cannot be denied without the authority or the approval of the commission. As I said earlier, when you add criteria that could potentially limit access or delay access, it is concerning.

I understand that the act will be reopened for review in a year and in five years from now. If I were to become the next commissioner, in the next year I would be in a better place to assess and re-evaluate those concerns that have been raised so far and report back to Parliament on whether or not there have been concerns that are the result of the impact of these changes on access rates.

Senator Day: Thank you. Can I take from that that you agree with some of the concerns being expressed by First Nations and those who help First Nations with their long-outstanding land claims?

Ms. Maynard: I definitely agree with concerns that anything that limits further access of Canadians is of concern.

Senator Day: I agree with that too. More specifically, how about First Nations and those who help First Nations with their claims in relation to land claims?

Ms. Maynard: I do, yes.

Senator Day: Thank you. I'm having some difficulty hearing you, but you're probably having difficulty hearing me too, so we're even.

I will take up one other area of questioning, if I may. It's my understanding that where one research topic spans various types of media, such as quite commonly used Post-it Notes that would often be stuck to a file, or a verbal communication, or digital messages, Bill C-58 would not apply. Are you in agreement with my interpretation of Bill C-58 in relation to those various types of media?

Ms. Maynard: Again, I haven't been in the position of commissioner and I don't have all the expertise of the commission, but my understanding is that currently it applies to those Post-it Notes. They would be considered transitory documents, and in some institutions, for sure, people would tend to remove those. That's why I said earlier that we need to change the culture within our institutions and we need to make sure people understand why access to information is important to Canadians.

The best example is when we refer to our managerial experience: Employees need to understand the decisions made on their behalf, and they need to have some information to trust a manager. It's the same thing for the government. Canadians are entitled to information so that they can trust the decisions that have been made on their behalf.

I keep thinking that even if we had the best legislation, the most progressive legislation in the world, if the institutions don't document their decisions, you're not going to have better access. That's why we need to work with institutions. We need to promote access and transparency, not just best practices.

One of my concerns with the current publication authority is that it seems to be focused on insisting on those decisions that are against institutions. I don't want to work against institutions. I would want to work with institutions on making them aware of their responsibilities, encouraging best practices and finding solutions. The Auditor General has the green, the yellow and the red. Maybe that's something we can do with institutions to encourage best practices.

Senator Day: Your comments with respect to best practices prompt another question. Given that certain types of communications are excluded and given that it's important for the public to be able over time to have access to what might have been said in the past, would you consider now or in the future a legal obligation to document whenever a government representative — a civil servant — is in discussions on a file with respect to someone on the outside? Would you consider a legal requirement to document so that the documentation and the historical trail would be there?

Ms. Maynard: Whether or not a duty to report should be legislated, I would leave to Parliament to decide, but I think a policy, encouragement from the commission and from every partner and stakeholder in this access is definitely the way to go — working together with stakeholders and with the Privacy Commissioner to make sure everybody is consistent in their approach. My mandate will be to apply the law. If the legislation adds some obligations, I will make sure those obligations are respected.

Senator Day: We would hope you would see it as part of your obligation to encourage policy development as well, and if there is a need for changes in legislation in the future, as you indicated, there would be reviews of the legislation in the future. We would expect that you could provide us some guidance in that regard.

Ms. Maynard: I would. It's encouraging to know that in one year the act will be reopened, and there will also be a review in five years, so those lessons learned and those concerns can be reassessed. As the agent of Parliament, I would make sure that it would be my duty to report on the data and the concerns that I would have investigated during my tenure.

[*Translation*]

Senator Carignan: First of all, welcome to the Senate of Canada, Ms. Maynard. I believe that we are the only two graduates of the Université de Sherbrooke faculty of law in the room.

I would ask you if you could speak a little louder because we are having a hard time hearing you. People who are following the debate outside the chamber have told me that they can hardly hear you.

In June 2017, the current Information Commissioner, Ms. Legault, explained that the public service uses the Access to Information Act as a shield. I would like to know what you think about that and whether you share Ms. Legault's opinion. Many people have said that there is a culture of secrecy in the public service and that public servants have developed a variety of techniques for circumventing the Access to Information Act. For example, they no longer take notes during meetings, and they use means of communication that are not governed by the act, such as SMS and PIN messages. People are even saying that some public servants use their personal devices so that they will not have to disclose their correspondence.

As a member of the public service, are you aware of this practice or phenomenon? I would like you to comment on that subject in particular.

Ms. Maynard: I can assure you that that is not the practice or culture in the committee on which I work. We do not receive a lot of access to information requests, but I think that is because most of our information is already shared openly.

• (1900)

As I have often heard from people in other departments and have seen for myself in certain grievances that we have reviewed, some Canadian Forces members who requested access to their personal medical files were told to submit an access to information request. Obviously, the right of access to information is poorly understood. There is a culture emerging where people who know their rights and submit a request in writing have an easier time accessing information than those who make a request orally. In my opinion, that culture is what we need to work on. We have to motivate people and encourage them to fully understand why decisions need to be documented. That is why the commission needs to work with the people in the field, not just force them to disclose information. The power to issue an order can make people see disclosure as something that is mandatory. It would be better if the desire to disclose came from them and was encouraged. It is also important to publish the lessons learned and success stories in institutions, not just the cases where we did our work wrong or failed to comply with the act.

Senator Carignan: I get the impression that there are some devious public servants who avoid documenting their decisions specifically because they do not want to provide access to that information. Some public servants fail to document information either because of negligence or because it could be a bit complicated. But there are others who do it deliberately to thwart access.

Don't you think that public servants should be required to document their decisions? If not, how do you possibly reconcile that with the desire for an open government?

Ms. Maynard: Once again, I think it is necessary to encourage people to provide written decisions. Will we be able to change every person's intent? Can we know whether the information was not documented because the person truly didn't want to give access to this information? That will be difficult to determine. I can tell you that in all of the grievance cases I have been involved with, I was surprised by the opposite. There were managers who were diligent in writing out their decisions and their reasoning. If we show that this has a positive impact, even if the decision is justified, if the written justification is there, the people receiving this information will be much more likely to understand and accept it.

Senator Carignan: I'm not talking about encouraging. I'm talking about the obligation to document. Encouraging is one thing, but legally obligating someone under the act is a whole other thing.

Ms. Maynard: I cannot speak to whether this should be in the act or whether it should be in a policy. I admit that I would like to get more experience within the commission to see which tools would help encourage people or prompt them to make decisions. Does the act need to be amended in that sense? I think that's up to the legislators to decide. If they decide to include it in the act, my mandate will be to enforce it.

Senator Carignan: Do you think that PIN and SMS messages should be saved and be accessible?

Ms. Maynard: Absolutely, yes. Based on my own personal experience, since I don't have experience at the commission, if these messages are sent with a government device, or as soon as documents are created with a government device, they should be accessible.

Senator Carignan: You know that PIN and SMS messages are not currently covered. Would you recommend amending the act to include PIN and SMS messages?

Ms. Maynard: I am not making any recommendations, but I would be open to the idea of making information related to government decisions accessible if those decisions are supposed to be accessible under the law.

Senator Pratte: Thank you for being with us this evening, Ms. Maynard. Before I ask you my question, I would like to go back to the question Senator Saint-Germain asked about orders. I have to say I was a little surprised by what you said. I would just like to put this idea to you. In our study of the bill, we found that the commissioner's authority to issue orders as set out in Bill C-58 actually looks a lot like an authority to issue recommendations. In other words, it is called an order but has no enforceable authority. All it means is that if the department doesn't comply with the order, the commissioner can go to court. That is what happens with recommendations now. It's exactly the same thing, and the court hears the case de novo. It's not the same as a binding decision. I would therefore encourage you to reconsider your thoughts on the subject. I am not so sure that the order-making authority you will inherit if you are appointed is as robust as you think.

I don't want to get bogged down in the details of Bill C-58, but it does introduce one important concept, which is proactive disclosure for the office of the Prime Minister and ministers' office. This is a major step forward, but at the same time, there are some people, myself included, who feel that, although this is interesting, it is important to distinguish between proactive disclosure and the right to access to information. Those are two different things. I would be interested in hearing your thoughts on the difference between the two.

Ms. Maynard: It is definitely not the same thing. Proactive disclosure does not mean the same thing as making offices and institutions that fall under Part II comply with access to information. It is a step forward because we have increased the number of documents that will be subjected to proactive disclosure and because we have included the obligation in the legislation. In other words, we are legislating what was already being done in practice. Is that enough? I leave that up to the legislators to decide. It is encouraging to know that the legislation can be reviewed in a year, and I will have an opportunity at that time, if I am appointed commissioner for next year, to look at the complaints and concerns that have been raised regarding the application of Part II and provide you with a report.

Senator Pratte: In one of your replies, you raised the issue of the new clause 6 in Bill C-58, which requires the person submitting an access to information request to indicate the specific topic of the request, the type of documents requested and the time period for the request or the date of the document. Going forward, that information will have to be included in the request. Naturally, it is always about striking a balance. If the request is too general, the department will say that it doesn't know where to look and it will take hours or even days, and so on. That said, asking the requester to be too specific about the request makes it easy for the department to determine that since the requester did not describe exactly the type of document being requested then they do not have it.

How do you strike this balance? How do you resolve this problem when it comes to providing the best possible access to information?

• (1910)

Ms. Maynard: This is a major concern of mine. Any change to the legislation that limits access, that might limit or delay access is deeply concerning. Will that happen in practice? Will this lead to denials or decisions to deny access to information? We have to wait and see whether that is the case.

I am satisfied with the fact that clause 4 has been changed to ensure that the new commissioner has the power to agree with an institution's refusal to respond to a request. Some justification will have to be provided and it will be my responsibility or that of the next commissioner to set clear limits and establish guidelines.

I come back to my argument that the order is now accompanied by the power to publish. That is why I submit that there is now greater authority than simply that of making recommendations that are included in the annual report a year later.

Nonetheless, there is a still a gap. Let me explain. The commission has 34 years of experience in making recommendations, conducting investigations, and establishing findings. However, during those 34 years, no lexicon or glossary of all these rulings was created. This is a major oversight in my view when it comes to tracking precedents. Institutions and individual Canadians are therefore unable to determine whether there is consistency in the rulings and applications. If you have an access to information request, you cannot refer to a commission ruling because it is not accessible.

From now on, orders will be accessible 30 days after they are issued. Right now, the institution must appeal the order if it disagrees. If the institution does not appeal, then the order will be published. In my opinion, that gives orders more teeth and makes them a bit stronger than recommendations.

Senator Dagenais: Good evening Ms. Maynard. My intention is not to call into question your professional qualifications, but I would like to talk about your professional background and your suitability for the important position of Information Commissioner.

I am sure you will agree that any conflict of interest or appearance of conflict of interest should compel you to withdraw from this process. Let me explain. In the past, you held positions in connection with the Canada Revenue Agency, the Royal Canadian Mounted Police and the Department of National Defence. These three groups are particularly known for hiding information from the public and they have never hesitated to take legal action to make their case. Have you ever participated, directly or indirectly, in efforts to limit access to information in your previous capacities?

Regardless of your answer, how can you assure us today that you can hold the position of Information Commissioner and advocate transparency when you worked for the RCMP, the Department of National Defence and the Canada Revenue Agency, where access to information is particularly problematic? Can you alleviate the doubts that I and the public have because of these associations?

I would like to hear your comments on that.

Ms. Maynard: It is important to remember that the jobs that I held over the past 16 years were jobs in agencies that review the decisions made by the RCMP and the Canadian Armed Forces. I worked for three years in the Charities Division of the Canada Revenue Agency, where I granted charitable status to new organizations.

In all of my positions, I have always ensured that the rights of members of the Canadian Armed Forces and the RCMP were upheld or that the decisions affecting them were fair and legally justified.

I am confident that I have always acted with integrity in all of my positions, and I promoted access rights for members throughout the grievance process. When I was dealing with grievance cases — whether I was working on the complainant or decision-making side — I never hesitated to bring up that a member's access rights had been violated in the decisions I made

over the last year and to recommend that the people I worked with do so as well. This includes the last three chairs I worked with on the committee.

I would therefore not hesitate to address problems related to these three or four agencies.

[*English*]

Senator Lankin: Thank you for being here, Ms. Maynard. I am pleased to have the opportunity to chat with you. Thank you for spending this time with us.

I have three questions. I want to begin with reviewing what you have said thus far on about three occasions. You used phraseology that any amendment that denies or delays access is a matter of concern. You also spoke about anything that furthers exemptions or exclusions doesn't support transparency. Yet, you talked about, in your job, having been a fair-minded member of the public service and doing the right thing around access to information.

It appears that you are coming into the job with a view that many departments are not doing a good job on this and you think there are problems; is that correct? Would you reflect on why? Maybe you could give us some insight as to why you think they deny access or are opposed to access to information in certain situations?

Ms. Maynard: I've read a lot over the last three months on access to information — more than I have ever done — and I have talked to people about their experiences. I have my own experience at the tribunal dealing with denied access. We are an administrative agency dealing with reviewing grievances from Canadian Forces members and it is not always understood that these members are entitled to their personal information. We've been dealing with this issue sometimes as requesters of the information. So I've seen it and I've heard about it. Unfortunately, we don't know who is doing a good job at providing access to information because the information is not public or is not accessible.

I find that when I look at the commission statistics, it's hard to understand or to know because it's so confidential and you have to go through every annual report to find out how many recommendations have been issued, how many cases have been determined to be founded and how many cases have not. They don't provide a lot of examples and complaints are increasing. You get the idea that maybe institutions are not understanding their obligations under the act. Instead of asking for more rights, maybe we should promote transparency and accessibility within institutions.

• (1920)

Senator Lankin: Thank you. I appreciate your comments about wanting to focus on administrative efficiency and clearing up the backlog. Almost all public service administrative law tribunals get themselves into that problem, and good case management is essential.

I'm also attracted to your idea about publishing reports in a way that is searchable for precedents. In fact, many law tribunals do that, and I think those are important contributions. I would perhaps suggest not to jump too quickly on the bandwagon that paints all public servants with the same brush as being opposed to being transparent about their jobs. It seems to me that a number of governments — this one, the previous one and probably others in the past — have committed themselves to open government and to transparency. At a certain point in time, those things shut down. Have you looked at what it is, in that process of interaction between complainants and government, that causes that breakdown?

Ms. Maynard: No. I have seen it as a requester at the committee, and I've been told by others that the issue is going to be atypical, or there is some secrecy, but I agree with you.

I have also talked to some of my colleagues who have said, "I wish I could put everything on our website. I don't have any secrets. I want everything to be accessible." The problem is that because we also have the rights of official languages, everything you put on your website has to be translated, so sometimes it is a very big job to provide access to everything from your institution.

It's one of those issues where a lot of institutions would like to do more, and we need to raise those and the best practices for other institutions who may not understand how important it is and also the advantage of providing information.

Senator Lankin: Coming at it from the other way, one thing we should be concerned with is not just freedom of information but protection of privacy, and there's a balance to be struck. How do you think about that balance coming into this job? Is that an equal balance on the scales of decision making? Is transparency more important than privacy? Where does your thinking engage with those issues and that balance?

Ms. Maynard: I find both to be equal.

I noticed that the intervention or the consultation with the Privacy Commissioner has now been added to Bill C-58, and as much as I have a small concern that it could delay access, I totally understand why we would also want to make sure we protect privacy. And the two commissions have to work together on those cases where access is requested but a breach to privacy could result from access. I see this as an opportunity to work with the Privacy Commissioner. I think we need to sit down and come up with some joint proposals on how we will deal with this, because we don't want to delay access, but we also don't want to breach privacy.

Senator Lankin: Do I have time for one more question? Informal chat around the hallways here and certainly in the Ontario legislature — and I'm not aware of other provincial legislatures — is that in the last few years, people have talked more about parliamentary officers and legislative officers. There seems to have been a trend to more outspoken people, more flamboyant presentations of the issues. Sometimes it looks like the "gotcha" politics are coming more from the commissioners than from the media or opposition politicians. I'm not saying whether that's good or bad; it is just noticed.

Would you please give us your thoughts about the role you're seeking to take on, what the sensibilities are and what your style of presentation will likely be as we go forward?

Ms. Maynard: One of the commissioners that really impressed me was Graham Fraser, the Commissioner of Official Languages. One thing he said in many of his speeches was that as an agent of Parliament, first of all, we're not legislators. We are there to apply the law, and our mandate is in the law, and I truly believe in that. He said something about not working against institutions either, wanting to work with them. And it's partly nagging and cheerleading about their rights, and that gets to me.

As an operations type of person, I'm really into "let's get the job done." This is what the act is saying. We have to apply the law, and if we need to work with the stakeholders, we would need to. My first priority is to target that backlog, the complaints that are waiting for an answer, and I'm sure that the information they requested is no longer relevant if they have to wait too long. How long is too long? I don't know, but sometimes one month is too long.

The other thing is that when you ask for access to information, it's sometimes to raise another right that you have, and if you don't have that information, you cannot support that right. So you have to be able to access this in a timely manner.

All of these really get to me, and I would be following that type of leadership in my role as an agent of Parliament, reporting to you and to Parliament as a whole about what I see and the data that I would get, and let you decide what it means to Canadians.

Senator Lankin: Thank you very much.

Senator Andreychuk: Thank you, Ms. Maynard, for coming this evening. Some of the points have been touched on, but I recall when the Access to Information Act was put in, and previous to that, we would have a right to information but it would be driven by statute or regulation. At that point, there was a great discussion that the government should serve the people. Therefore, the people should know what is happening in their name, and they should have access.

It was interesting that they put in the term "access to information" because it still seems to say that we, the citizens, don't own that information. Somehow we have to plead our case.

It seems to me that Bill C-58 falls into that same problem. You lauded that it says accountability and transparency, but we used those same terms 34 years ago. Perhaps we didn't use the word "transparency," but we talked about getting the information. Are we not going to step back, and wouldn't you be the leader to step back and say, "What does information mean today?" You seem to still talk about a paper society when we're increasingly a paperless society, and I think Senator Carignan touched on some of the problems. Do we not have to not just amend the act a little bit but have a complete shift in our thinking and give that instruction in the bill back to the government and to the bureaucracy?

Ms. Maynard: I'm not sure; I think I understand your question.

The Chair: We cannot hear you.

Ms. Maynard: You don't hear me. Sorry.

I think what you're saying is, can we expand access even more than it is currently? To have access, you have to have something. I understand it would be difficult to request access to some decision-making processes or discussions that are not somehow reported in a document. But I am encouraged by the intent of the purpose of the new Bill C-58 when it says that it is to increase accountability of institutions towards an open government. I think this is something that we needed — not to focus, like you say, on the right of access but on the responsibility of institutions to respect that right.

• (1930)

So I think that by using this intent and by promoting accountability and transparency, we're moving forward towards accessibility.

Senator Andreychuk: I don't know if it gives you a problem, but it gives me a problem when we talk about transparency and accountability as a preamble or a principle. The minister has been quoted defending Bill C-58 as a limited open data disclosure system. When I first read it, I thought an open data disclosure system sounded great. I missed the word that said "limited." What I think, troubles all of us is that it will be back in the hands of the governments and bureaucracies to determine our rights.

The bill is nebulous in many ways, leaving the ultimate decisions and discretion in the hands not of the public, not of the users, not of the customer but of the government again. It is, therefore, defensive by nature as opposed to being open.

Ms. Maynard: I think I would be in a better position to answer that question after — if I am honoured to be the next commissioner, I will probably see exactly what the concerns are and how they're applied in the different institutions.

I think the act is giving a clear message about access and accountability, but is it being applied or is it being respected? That's something I would have to come back and report on in a year from now.

Senator Andreychuk: In the broader scheme of things, we've had the Auditor General come to us in one of our committees, indicating that the websites and the information are often self-selected to make the department look good, and even their surveys are done that way. They aren't serving the needs of the public. The needs of the public may be the service but also to get the knowledge, which is what access to information is.

So I would encourage you to think beyond the act and clamp down about accountability and transparency as the answer because that is not new; that will not change the culture.

I think it's going to have to take a seismic shift from you, with some daring, to say the public has a right to know and then look at where we don't have a right to know, particularly in the databases we have today, particularly with cybersecurity, where it seems others can get the information before we can legitimately get it. Therefore, we're not arming our citizens or preparing them well if we don't share information.

My plea is that we're still trapped in the old jargon. We're still trapped in the old thinking when we've created a whole new world. I know cabinet ministers who are not using any paper. I may be the only old fossil who still likes paper. This access to information still seems to be geared to paper and a paper trail rather than a data trail, which is very different. It wasn't so long ago we thought we could delete things. We now know somebody can get at it — maybe we won't be able to — and it can be misused, too.

This whole shift doesn't appear to be in Bill C-58, so I'm inviting you to think beyond Bill C-58 to your mandate. Would you agree with me that your mandate is to the public, to get the information to them, and occasionally restrict it when there's a need to restrict it?

Ms. Maynard: As an agent of Parliament, I believe that my mandate will be in the statute. But I do agree that because of that, I will be entitled to see what's going on outside of Canada and inside Canada within different jurisdictions. I will also see the types of concerns and complaints that will come to me. Based on that data and information we will gather, it's something that, as an agent of Parliament, I would be honoured to come back and report to Parliament on so that maybe the act will need to be changed towards those concerns.

Senator Andreychuk: The term that hasn't come up is ministerial responsibility for departments, et cetera. Very often the culture shift is not within the bureaucracy, per se; it's with ministerial responsibility and how a minister allows for more freedom and more risk-taking within the department. Generally, that was based on the old Westminster principle that whatever happens in the department, the minister is accountable. There has been a use of access to information to dumb it down the line.

How are you going to look to ministerial responsibility for the proper implementation of access to information?

Ms. Maynard: I agree that the message definitely has to come from the top down. If the ministers and the heads of institutions internally promote access, it will definitely have a better impact. One of the tools or best practices that needs to be encouraged is maybe to have champions of access to information, like we have champions of official languages, or to have it in your performance evaluation — the best accessibility and how the institution did.

What I was saying earlier, the Auditor General and the Commissioner of Official Languages have report cards, and they raise those institutions that —

The Chair: Excuse me.

Senator Omidvar, please.

Senator Omidvar: Thank you, Ms. Maynard, for joining us today. I'm going to shift the conversation to the global stage a little.

Canada will co-chair the Open Government Partnership in 2018-19. This is a partnership made up of more than 70 national jurisdictions and a whole bunch of subnational jurisdictions. It's really always wonderful to see Canada step up to take a leadership position, but as you know, people in glass houses should not throw stones. Canada ranks 49 out of 111 on the right to information ratings globally. We don't even make it to 50 per cent. Mexico is at the top of the heap here.

What will you do to improve significantly — not incrementally, but significantly — our standing in these ratings?

Ms. Maynard: The ratings, if I understand — I do believe I've read those ratings — are based on the progressive legislation that those countries have. I was reading about some of the ratings, and how the legislation is being applied in those countries and in other jurisdictions. Sometimes it proves that you can have the best intention and the best law, but if in practice it's not being applied, you don't have better accessibility.

I do encourage legislation to increase our progressive legislation and make the law better, but I really think that if we don't have a better practice and if the message doesn't get to the offices that are responsible for access to information, no good law will increase accessibility.

This is why I believe that our role — mine, Parliament's and the government's — is to work on the culture vis-à-vis access to information.

Senator Omidvar: You've talked a lot about best practice in your presentation, and I like that. We have some best practices in Canada right now at the provincial level. Newfoundland and Labrador in particular have far better and far more modern access to information laws.

How do you propose to work with the provinces so that each of the jurisdictions is helping others to become the best they can in terms of access to information?

• (1940)

Ms. Maynard: I understand that group of commissioners and stakeholders are meeting and a network exists.

This is just from reading, because I'm not at the commission. And I will definitely listen to the employees who are there and the experts on how often these meetings happen and what network is really important.

I would be really open to meeting these people and having open discussions about what works in their province, what works in other countries, what they have done and what we can bring to Canada that we can apply at the commission currently.

Senator Wells: Thank you, Ms. Maynard, for being here. I first want to ask you whether you're familiar with Ms. Legault's report to the Speaker of the Senate *Failing to Strike the Right Balance for Transparency*. Are you familiar with that? Good. My question relates to that.

The outgoing Information Commissioner, Ms. Legault, regarded the government's failure to deliver transparency through modifications to the Access to Information Act; it was the essence of the report that she provided to this chamber last fall.

Specifically, Bill C-58 does not deliver on several government promises. These are that the bill would ensure that the acts apply to the Prime Minister's Office and ministers' offices appropriately, that the bill would apply appropriately to administrative institutions that support Parliament and the courts, and that the bill would empower the Information Commissioner to order the release of government information.

In other words, this bill doesn't strengthen access to information but in fact allows for the opposite. I'll read from the report. It says, specifically, that Bill C-58 ". . . would result in a regression of existing rights."

In your opening remarks you spoke of the necessity of an open government. If Bill C-58 in its current form becomes law, how would you address the necessity for openness in government and transparency despite the restrictions that would be in the legislation?

Ms. Maynard: I think I understand your question.

The Access to Information Act, to me, provides a right of access. It clearly says that accountability and transparency are the goal of the act. There are some limitations and exclusions and exemptions that are provided by the act. My goal would be to make sure those exemptions are not being abused. If there is a discretion to be used, it will be used reasonably, and a constant and consistent approach will be applied for each institution and each exclusion. And those decisions must be made well known — not just published, but well known.

I'm going to repeat myself, but I think this is what we need. We need consistency. I'm not saying that it was not consistent, but we need people to know that it's consistent. They need to know that the commission is applying these restrictions, limitations, in a reasonable way and according to the act and that the access to information, when it is provided, is in line with what the act has provided.

Senator Wells: Thank you for that. And I'll repeat myself. Bill C-58 would instead result in a regression of existing rights.

Given that your goal is transparency and openness of information to which Canadians are entitled, what would be your comfort level in challenging the government on access to information despite their being in full compliance with the law but not in full compliance with the principle of openness and transparency?

Ms. Maynard: As an agent of Parliament, my mandate will be statutory. I will respect the law the way it's written, and I will follow my mandate according to the act. So if the decisions are reasonable and they respect the word of the act, I will have to uphold those decisions.

If, at the end of the year, I have concerns with the way they are used and with some exemptions or exclusions that are maybe overused or that lead to less access and if we think that maybe there could be an opening there, I will bring those data to you and to Parliament to make sure that you are aware when you make the laws of what is out there and what the concerns are and what Canadians are complaining about.

I have to say, with respect, that as an agent of Parliament, it would not be my role to make the law.

Senator Wells: Okay. Thank you very much for that.

The Chair: Any more questions, Senator Wells?

Senator Wells: No, that's it.

Senator Sinclair: Thank you, Ms. Maynard, for being here.

I have a question that follows up on a question that was asked by Senator Day earlier concerning First Nations and their concerns about the legislation, but it's more of a general type of question. I wonder if you would just bear with me a bit.

In 1892, the Government of Canada amended the Indian Act through a bill, interestingly called the Indian Advancement Act, whereby it deposed traditional Indigenous councils and replaced them with Indian band councils, as defined and described in the legislation, and it took away all of the inherent powers of the traditional councils and replaced the band councils' powers with more limited powers, such as authority over mowing lawns or cutting grass and issuing farm permits.

As a result of the amendments as well, the First Nations band councils could not hold a meeting unless they notified a government official, called the Indian agent. The Indian agent had the right to attend the meeting and he had the right to chair the meeting. All of the notes and all the documents that were approved by those band councils were taken possession of by the Indian agent and none were allowed to remain with the band councils.

In fact, in the 1970s, when I started practising law, there was no First Nation anywhere in Canada that I was able to discover that had its own archive of its own documentation, so the government archives, in fact, were the go-to archives when it came to trying to assess land claims or any other claim against government.

That law remained in place until 1951 when the authority of the Indian agent was more reduced. But because of the limitation upon band councils to get access to documents and reliance upon government archives, any limitation upon access to archives is a matter of grave concern to First Nations leaders.

Therefore, because of this power imbalance, the courts in Canada have raised and adopted the concept of fiduciary responsibility and have imposed it on the government, essentially saying to the government that because you were in charge of everything at this point in time, you have an obligation to show that you act fairly.

My question to you is this: If in the future, under this legislation, the government declines to share information that is in its possession relating to a First Nations council and it can be shown that the documents came into possession during this era when the government was the only party that could create and hold documents relating to those First Nations, how do you see the issue of fiduciary responsibility and this legislation, the draft legislation that we're considering, working together?

• (1950)

Ms. Maynard: The act applies to the government institutions, and if they created those documents, they do have a duty to those documents or the notes and they have a duty to share those documents if they are being asked for access to this information. I say that it wouldn't be appropriate to deny access. I believe that I would make sure that it's respected.

Senator Sinclair: Many times, document access is denied, though, on the basis that some sort of privilege is raised. The government will say, "We were talking to our lawyers," or "It's privileged because it arises in the context of a ministerial advice situation or a cabinet disclosure situation."

The document, though, often relates and reveals information that only the government has in its hands, despite the fact that its information that came from the First Nations, such as where its land holdings were, what its resources were and what its position would be with regard to not agreeing to the government's demand that land be surrendered.

In those situations where access is denied, do you see the fiduciary responsibility as being able to override a denial in a situation like that?

Ms. Maynard: I'm not in a position to give you my position on this. I would need the expertise of the commission. I think I would need more time to reflect. I can tell you, though, that I would not hesitate to use the powers that are given under the act to investigate and to review that information and to order the disclosure should it be, in my opinion, in the public interest and accessible. I would not hesitate.

[*Translation*]

Senator McIntyre: Welcome to the Senate, Ms. Maynard. You have already answered several of my questions, to which I don't intend to return. However, I have managed to find two that you have not yet been asked.

First, I'd like to know what you think of the role of the Information Commissioner and that of the Privacy Commissioner. How do you see them working together? Alternatively, do you tend to see them as rivals?

Ms. Maynard: Could you repeat the last part of your question?

Senator McIntyre: Do you tend to see them as rivals, who work against one another?

Ms. Maynard: Of course not. I believe that their mandates are compatible and complementary. One defends access to information, while the other defends privacy, which are both protected rights. Access to information is a quasi-constitutional right, whereas privacy is a constitutional right. The mandate of both is to advance democracy.

It is important for these two commissioners to work together in order to avoid a duplication of effort. I do not know if both commissioners currently share information when complaints are filed, or if they have an agreement with respect to the division of the work. I am unfamiliar with this, but it would be an area that I would examine if I were to become the new Information Commissioner.

In my opinion, we must avoid overlap because access to information often involves personal information. That is why the decisions must be consistent and coherent. I believe that the commissioners must work together, especially given the amendments set out in Bill C-58. If these amendments were to be implemented, working together would become even more important.

Senator McIntyre: As you know, the Information Commissioner, the Commissioner of the Environment, the Conflict of Interest and Ethics Commissioner, the Privacy Commissioner, and the Commissioner of Lobbying all have renewable seven-year terms, while the Auditor General of Canada and the Chief Electoral Officer are each appointed for 10-year non-renewable terms.

Last week, in an interview with Le Devoir, Suzanne Legault, the Information Commissioner, suggested that officers of Parliament be given 10-year non-renewable terms. What are your thoughts on that suggestion?

Ms. Maynard: I have to say that I haven't given it much thought. At the moment, a seven-year term seems reasonable to me. In many cases, one has to be in the job for two or three years to establish credibility, and then it takes several more years to make sure the law is being enforced consistently.

I belong to a committee whose members are appointed for four-year terms, and we make sure there is a transition period because there are quite a few members. I realize that the Information Commissioner is the only appointee, but the law does provide for appointing assistant commissioners. That could be one way to set up a transition from one office to the other. That is something I will take a look at if I become the Information Commissioner.

Senator Dupuis: Ms. Maynard, I must say that your candour earlier really made an impression when you spontaneously said that the barrier to releasing documents to the public is the obligation to have them translated. I was astounded to hear you say that considering how long the law has been in place. Which language combination is the most problematic in terms of translation? Is it French to English or vice versa?

Ms. Maynard: Do you mean within the government?

Senator Dupuis: They use this pretext, claiming that they agree that documents should be made public, but one of the challenges is the obligation to translate them. Does the problem lie more with English translation or French translation?

Ms. Maynard: I do not have that information but, in my opinion, it could have to do with either language, because a lack of resources has been presented as the problem when it comes to translation and the fact that everything on the web sites has to be translated.

Some have suggested giving people access to our offices so that they can consult the data bases and have access to certain information that might not be public yet, but that is available.

Is that an excuse? It would be interesting to verify that. It would also be interesting to work with the Official Languages Commissioner to find out whether Canadians' right to access to information in both official languages truly constitutes an obstacle to the availability of documents and access to information.

Senator Dupuis: If you are appointed Information Commissioner, what kind of commitment are you prepared to make to study this matter and report on any problems that you identify and that could allow for more informed decision making? I understand that people can send you information, but I think you would have certain responsibilities if you are appointed.

• (2000)

Ms. Maynard: My role over the next few years will be to work with the stakeholders and the staff of the commissioner's office to fully understand the obstacles that exist and that are known to the commissioner's office and the institutions. My goal is to find out what the limitations are, why people complain that they do not have access to information. I also want to find out what problems institutions face in trying to comply with their obligations. At present, of course, the commissioner has access to the special reports. This could be done through a special inquiry, an annual report, or a report to Parliament the next time the act is reviewed.

Senator Dupuis: Thank you for that information. The translation requirement is not a burden because it could give Canada a better international ranking. Today, many countries around the world operate in multiple languages and translate into multiple languages. International organizations do it. It is a question of political will and means. If the political will is there, it is easier to get the means.

My last question is a follow-up to the earlier questions about First Nations land claims. If a First Nation's land claim file is in the federal government's possession rather than its own, it has no way of verifying whether the file handed over by the federal government is actually complete. I want you to be prepared to make a commitment as Information Commissioner, because in some cases, as I well know, First Nations speak French as a second language after their mother tongue, which is their first language. All the documentation is in English because the agent who was in charge of the file for decades controlled what ended up in the documents. These people did not have the means to carry out checks in their second language. What commitment can you make tonight about what I see as a denial of fundamental justice for First Nations?

Ms. Maynard: I am certainly committed to fulfilling my mandate with integrity and openness. If a complaint is lodged with the commission or an investigation needs to be conducted, I pledge to uphold the law and enforce it for all Canadians, including the First Nations. If clause 6 proves to be a limitation or if the official languages cause limitations, that will obviously be part of the findings in my report to Parliament. These will be factors to take into account in order to provide better accessibility for all Canadians.

The Chair: On behalf of all senators, we thank you, Ms. Maynard, for being here this evening. You may now withdraw.

Ms. Maynard: Thank you very much.

[*English*]

The Hon. the Speaker: Honourable senators, the sitting of the Senate is resumed.

REPORT OF THE COMMITTEE OF THE WHOLE

Hon. Nicole Eaton: Honourable senators, the Committee of the Whole, authorized by the Senate to hear from Ms. Caroline Maynard respecting her nomination as Information Commissioner, reports that it has heard from the said witness.

QUESTION OF PRIVILEGE

SPEAKER'S RULING RESERVED

The Hon. the Speaker: Honourable senators, I now call upon Senator Beyak on the question of privilege.

Hon. Lynn Beyak: Thank you, Your Honour.

Esteemed colleagues, I stand today to raise a question of privilege in response to Motion No. 302 and ask that it not be allowed to proceed as the matter is already being dealt with through proper procedures by the Senate Ethics Officer. According to section 7.1 of the *Ethics and Conflict of Interest Code for Senators* , it is the role of the Ethics Officer to govern the conduct of members of the Senate when carrying out the duties and functions of their office as members of the Senate.

This matter should not be decided by a select group of senators who want to prevent another senator from expressing a point of view with which they disagree. A senator's website is to keep Canadians aware of current issues facing the Senate, keeping Canadians apprised of a senator's work, and to address the concerns and opinions of all Canadians. If Senator Pate's motion is allowed to proceed and my website is ordered to be removed, my ability to do my job as a senator of Canada will be seriously impeded.

Senator Pate has stated that this is not about freedom of speech, but in fact that is exactly what it is about. It is about trying to prevent me from expressing the view of many Canadians, Indigenous and non-Indigenous alike — not racism or hatred in any way, just a better way forward that includes all of us in Canada.

My goals of a wiser use of tax dollars and a more hopeful life for Canada's Indigenous people are often taken out of context or deliberately misconstrued to shut down discussion. The status quo industry doesn't want anything to change.

Academics from coast to coast and renowned journalists have read every letter on my site and stated that they are not racist or hateful in any way. They are compassionate and kind and seek a better way forward. But it's not our decision. Ultimately, it is up to our Senate Ethics Officer to make those decisions.

Shutting down this discussion is not the way to go either for correcting past wrongs. Now, more than ever, open conversations are absolutely essential. You can't solve a problem that can't be discussed. If this is considered racism, our society is in serious trouble.

Governments of all stripes — for decades — have spent billions of dollars on Indigenous people and it is simply not working. Suicides, hopelessness, filthy water and inadequate housing are a stark reality. If this motion is allowed to proceed and is successful, who is next? What is next? It is so important that we as senators of Canada are allowed to continue to discuss and speak about issues in our regions and for Canadians without fear. In fact, it states on the Senate's own website that senators of Canada are "free to speak their minds and act on their consciences."

• (2010)

Political correctness has infringed on our freedom of speech by assuming that the populace is too ignorant to realize what appropriate speech is. This term is now as common in our society as the term "freedom of speech." Political correctness, as applied in our society today, seeks to control freedom of speech and poses a true danger to a free society. Freedom of speech is a fundamental characteristic of human rights. Canadians have the right to section 2 of the Charter of Rights and Freedoms, which is:

> Everyone has the following fundamental freedoms:
>
> (*a*) freedom of conscience and religion;
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Imagine a time when one could be fined, imprisoned and even killed for simply speaking one's mind. Speech is the basic vehicle for communications of beliefs, thoughts and ideas. Without the right to speak one's mind freely, one would be forced to agree with everything society stated. None of us wants that.

With freedom of speech, one's own ideas can be expressed freely and the follower's beliefs will be even stronger. The words sound so simple, but without them the world would be a very different place.

In closing, I would like to read a quote from Margaret Thatcher:

> New ideas are created when they can be discussed freely, but if there is a CORRECT view then you cease to have new ideas.

We need new ideas for a fresh start for Indigenous Canadians.

Thank you for your time, honourable senators.

Hon. Kim Pate: Colleagues, I'm speaking to the motion that Senator Beyak has brought, and there are four key elements that we need to focus on in terms of this issue. One is timing. Another is concerns about privilege or serious and grave breach of her right to freedom of speech, and whether there is in fact an alternative remedy. I would like to address each of those.

First, with respect to rule 13-2(1)(a), in terms of whether in fact the issue raised by Senator Beyak is raised at the earliest opportunity, the indication, as we know from the interpretation of this procedure in *Beauchesne's* Sixth Edition, at page 29, is that "even a gap of a few days may invalidate the claim for precedence" of a priority privilege issue.

Interpretation of this provision has received even stricter guidelines from your rulings as well as other rulings, specifically the ruling of February 24, 2016. In this situation, my notice of motion was given to the Senate on Wednesday, February 14, during Routine Proceedings. At that time, the content of the motion was made known to the Senate.

Following the logic of Your Honour's ruling previously, the earliest opportunity to raise the question of privilege would therefore have been the following sitting day, Thursday, February 15. Instead, the notice of the question of privilege was actually given Friday, February 23.

In your ruling of June 26, 2016, you also talked about the question of delay and about the fact that normally any type of delay would mean that the senator raising the question of privilege would not have access to the priority process.

With respect, Senator Beyak's attendance record shows that she was present at the chamber both on Wednesday, February 14, the day I gave the notice of motion, and Thursday, February 15, the earliest opportunity to raise a question of privilege and therefore could have raised the question of privilege on that day.

As Your Honour's ruling notes, access to priority process depends on there not being any type of delay. This is a rule that has been enforced strictly because it does not bar a senator from raising a question of privilege. It only determines whether they can get additional benefit of an expedited process.

Now I would like to move to the second step, with respect to rules 13-2(1)(b) and (c). We need to look at whether this is a matter that directly affects privilege and the privileges of the Senate, any of its committees or any senator, and whether in fact there has been a serious breach of that privilege.

I would suggest there has been no grave nor any serious breach of that privilege. Rule 13-2(1)(b) provides that the question must "be a matter that directly concerns the privileges of the Senate, any of its committees or any senator." Rule 13-2(1)(c) provides that the question must be raised to correct a grave and serious breach.

The *Rules of the Senate*, Appendix I, with respect to privilege, talk about the "rights, powers and immunities enjoyed by each house collectively and by members of each house individually, without which they could not discharge their functions."

In addition, I'd like to point to Speaker Kinsella's ruling on May 23, 2013, in which, with regard to privilege, the Speaker explained that there are a "range of privileges and rights enjoyed by this house and its members. One of these rights is to regulate internal affairs, and in exercising this right, the Senate can implement measures intended to safeguard its public reputation even if it appears to be detrimental to the interests of individual members."

Similarly, we have here not a question of interference with the senator's privilege, but rather a question regarding the internal affairs of the Senate, specifically the issue of how its resources should be allocated in order to safeguard its public reputation.

The issue of governance over internal affairs is the right and privilege of the Senate as a whole. The principles that govern the exercise of this privilege point to particular obligations to Indigenous peoples based on Charter principles and the role of the Senate as a representative of those who are under-represented.

As was recognized by the Senate Rules Committee in its 2013 report on parliamentary privilege, led by its then chair, Senator White, the exercise of parliamentary privilege must be in harmony with the Charter. In particular, the committee, at pages 38 to 39, talked about the "obligation to be accountable in the exercise of privilege in a way which respects the values and principles set out in the Charter and consistent with our rights-based legal system."

A key role of the Senate is to represent under-represented groups including, as indicated prominently on the Senate's website, Indigenous peoples: "Created to counterbalance representation by population in the House of Commons, the Senate has evolved from defending regional interests to giving voice to under-represented groups like Indigenous peoples, visible minorities and women." This role makes clear that the Senate has the privilege and the obligation to ensure that the messages advanced in its name and its resources used to promote are not discriminatory, racist or derogatory.

I would suggest that there has been no impairment of Senator Beyak's privilege and definitely not a grave and serious breach of privilege. Senator Beyak's ability to do her job as a senator is not impeded by this motion, nor is her ability to keep Canadians apprised of her work and the issues facing the Senate, as well as addressing their concerns and opinions. She would still have her Senate bio page and an ability to operate her office and issue statements, et cetera. She would be able to keep her website, as long as it is moved off the Senate server and run without the use of Senate resources. Parenthetically, some 30 to 40 sitting senators do not have a personal website and still manage to keep Canadians aware of their work and the work of the Senate.

Furthermore, materials and views posted on websites have already been used by the Conservative caucus to justify Senator Beyak's removal from committees and from the Conservative caucus, both of which are much more significantly likely to hamper her abilities to carry out her job as a senator. Neither of these actions gave rise to any concern about interference with parliamentary privilege or due process.

Moreover, the Senate's privilege concerning internal affairs has been found to justify much more serious limitations on senators without being found to breach their parliamentary privilege.

• (2020)

In 2013, for example, the Senate suspended three of its own members on the basis that ". . . there is nothing in the Constitution Act, 1867, or in any other constitutional instrument," which restricts ". . . the power of the Senate to control its own process and to protect itself from being brought into disrepute."

Those suspensions occurred while an investigation by the Senate Ethics Officer was open, but suspended, that is before she had reached a decision. Unlike that suspension process, it should be noted that Motion No. 302, my motion, does not seek to reprimand Senator Beyak. A reprimand, if any, would result from the Senate Ethics Office investigation, with which Motion No. 302 would in no way interfere in any manner.

All material on the website would be assessed as of the time the ethics complaint was made with no reference to Motion No. 302.

With respect to the infringement of privilege related to free speech, the motion does not require Senator Beyak to take down her website. It would merely require her to move it off the Senate server and to run it with non-Senate resources.

To be clear, colleagues and Your Honour, as the *Pankiw v. the Canadian Human Rights Commission* decision in 2006 held, parliamentary privilege related to free speech does not extend to others making derogatory, racist or discriminatory statements on a website or elsewhere. We cannot allow Senate resources to support messages that promote discriminatory attitudes or racist stereotypes, such as:

> I'm no anthropolgist but it seems every opportunistic culture, subsistance hunter/gatherers seeks to get what they can for no effort. There is always a clash between an industrial/ organized farming culture that values effort as opposed to a culture that will sit and wail until the government gives them stuff.

That was from Paul, March 10, 2017.

> The endless funding pit of reserves has to stop. These people need to join the commerce world and work for money.

That was from Doug, March 30, 2017.

> If you took a bunch of Amish farmers from Southern Ontario and banished them to a reserve in Northern Ontario, within a year they would have built all of their members a new home, a new church and barns for every homestead. Within a year they would have dug wells and built a water treatment plant even if it was a simple sand, gravel and charcoal facility. Within 2 years they would be exporting lumber and furniture to Southern Ontario. At the same time the aboriginals relocated to Amish country near Kitchener would have burned down the house and left the fields to gully and rot.

That was also from Paul, March 10, 2017.

Finally, "trade your status card for Canadian citizenship," Senator Beyak herself said in an open letter, September 1, 2017.

In addition to the reasons discussed above, and those comments that I have just quoted, Motion No. 302 cannot yet constitute an alleged breach because it is still to be debated. It hasn't passed.

The final step of this test is whether another parliamentary process is reasonably available. It is very clear, Your Honour and honourable colleagues, that indeed another process is available. Rule 13-2(1)(d) provides that the question must ". . . be raised to seek a genuine remedy that the Senate has the power to provide and for which no other parliamentary process is reasonably available."

Speaker Kinsella's ruling of May 23, 2013, stated, that as a reasonable alternative remedy, concerns "about the fairness of the process for developing the report and its conclusions can be explored during debate" in the Senate.

As in the case of the Speaker's ruling, there are a range of reasonable parliamentary processes available to address Senator Beyak's concerns about Motion No. 302 — debating, amending, or even defeating Motion No. 302 here in the Senate. Indeed, if she plans to seek a remedy related to the question of privilege by way of a motion, that motion itself will be debatable. This would essentially give her the opportunity to express her views, on the issue of whether the Senate can or should ask for the removal of her website or letters from the Senate servers, to the Senate in the context of debate, followed by a vote on the issue. Motion No. 302 already allows for such a debate and vote. Apparently, the remedy she seeks would simply duplicate Motion No. 302. It is reasonable to debate the effects of Motion No. 302, but it is also reasonable that this be done within the context of Motion No. 302. It does not require a separate priority procedure. Thank you, Your Honour.

Some Hon. Senators: Hear, hear.

[*Translation*]

Hon. Ghislain Maltais: Honourable senators, we are once again being asked to debate a question of privilege. I humbly remind this chamber that a question of privilege concerns Parliament, and what happens in Parliament and parliamentary committees. Otherwise, it is not a question of privilege. I do not believe that Senator Beyak is raising this issue simply because she believes her future is at stake. In my view, and based on my parliamentary experience, this is not a question of privilege.

However, that does not give anyone in this chamber the right to tell a senator how to conduct themselves outside this chamber. We are free to think and to speak as we wish. Honourable senators, in a democracy, and His Honour the Speaker knows this because of his extensive experience and training, people do not always agree. People can express an opinion, and a group of other people will not agree. War will not necessarily break out. However, it is unacceptable in a Parliament and in a society governed by the rule of law to want to muzzle someone.

Freedom of thought and freedom of speech exist. In this case, we must be very careful, honourable senators, not to interfere with the work of the Ethics Officer. If the Senate saw fit to appoint an Ethics Officer, then for goodness sake we must let him do his job. I do not believe that the senator who just spoke has any advice to give the Ethics Officer. I do not believe that we are qualified to make a recommendation to the Ethics Officer. His rulings must not be influenced by anything that is said in this place.

Honourable senators, in a democratic country like Canada, respect for Parliament and respect for the right to have a different opinion is incontrovertible, whether or not we agree. You read the news; you watch the reports on television. You've certainly read or seen things you did not like, but we have to live with that because we live in a democracy.

We have the freedom to think differently. Before he makes his decision, I urge His Honour the Speaker to reflect on parliamentarians' fundamental rights and freedoms, inside and outside of Parliament, and to make a clear distinction so that such questions of privilege do not continue to come up in this Parliament. Otherwise, this will never end; we will not have time to address the orders of the day and we will have to debate questions of privilege every day, because someone will have disagreed with what someone else said about something or other.

This is not how parliamentary democracy works. The Westminster system is very clear on that. Westminster parliaments give all members of Parliament the right to free expression. Even if the majority disagrees, the member has the right to his or her own opinion.

Thank you, honourable senators.

[*English*]

Hon. Murray Sinclair: Honourable senators, much of what I was going to say has already been spoken to by Senator Pate, but I want to raise a few points which I think need consideration, You Honour, with regard to the matter that has been raised by Senator Beyak.

• (2030)

First of all, when the motion was filed on Wednesday and then introduced by Senator Pate on Thursday, I anticipated that based upon some of the questions that had been asked and the comments that were made in the chamber at that time that a point

of order might be raised with regard to whether or not a motion would be appropriate given the fact that there was a proceeding before the Senate Ethics Officer that might be affected by it. But instead of a point of order, I see we have a question of privilege that's being raised. I was a little confused when I read this because I don't think there is a privilege at all that's being raised here, mainly because of two things.

First, the issue that is before the Senate Ethics Officer is not going to be affected by what happens in this chamber with regard to this. The Senate Ethics Officer has a matter that was raised to him on a certain date with regard to circumstances that were in place at that particular point in time and he has to make a ruling or a recommendation based upon the circumstances as were presented to him so that he can continue to do that work, he can continue to do his assessment, he can continue to make his recommendation. There is nothing in this motion that is going to prevent that from happening, any more than there would have been anything in the motion or the effort on the part of the Conservative caucus members to order Senator Beyak, as a member of the caucus at the time, to take this material off her website. If they had done that, the Senate Ethics Officer could still have continued with his investigation, and now that this matter is before the entire Senate, I don't see any impact whatsoever with regard to the work that the Senate Ethics Officer is being called upon to do. So I don't think that particular ground that was raised by Senator Beyak has any merit.

The second issue that I think lacks merit is the question of whether this is in fact a freedom of expression argument. Freedom of expression, as a matter of privilege, relates to those issues that are raised by a senator in the course of his or her work in the proceedings of this chamber and nothing that has been raised with regard to what's on the website of Senator Beyak technically, legally, by any definition of the word "proceeding" falls within that definition.

The Senate website is maintained — I'm not sure that "maintained" is the right word because it's a Senate website — by the Senate. But the contents of what's on the Senate website that Senator Beyak has been provided by the Senate is content that she has approved and she has placed there, but not because it has come through here or even because it's something she agrees with. These are comments made by members of the public, and no matter how you cut it, no matter what you say about it, most of those comments are racist in nature. Some of them, in fact, are borderline hate speech. Some of them are so offensive that it will instigate people to do and believe things against Indigenous people that we all have to be concerned about and Senate resources are being used in order for that to happen.

The motion that Senator Pate has brought is, I think, an appropriate motion because it's limited in its scope and it's limited to the question of whether the Senate should allow its resources to be used to provide members of the public that kind of access on a Senate website. As Senator Pate said, this is yet to be debated and voted upon and decided upon by the Senate, but I don't see that as a question of privilege at all. I don't see it as Senator Beyak's privilege because she says it's not her expression, it's the expression of members of the public.

Clearly freedom of expression as a matter of privilege does not extend to members of the public. That's the *Pankiw* decision. But it's also in all of the citations and rules relating to privilege that I've been able to find. Freedom of expression is a senator's privilege, and if a senator is not the one who has expressed the view, then the other person who has expressed the view does not have the privilege. Therefore nothing can be used to justify the claim that this is a matter of privilege. Therefore I think that this is not a question of privilege at all.

I was going to respond to the issues that are raised by rule 13, but Senator Pate, I think, has done a very good job of dealing with that.

The only other comment I wanted to make was the question of whether there is a remedy here that His Honour can provide to the request made by Senator Beyak insofar as her privilege is concerned, and I don't see it, quite frankly. What is it that His Honour would be asked to do? To say to members of the public, "You can write your racist comments and send them to every senator and put them on a Senate website"? Is that the remedy that is being sought here? I don't know. All I know is that the motion seems to be in order, the privilege argument has no merit and I suggest we deal with it on that basis.

Thank you, Your Honour.

Hon. Anne C. Cools: Honourable senators, I see life quite differently from the previous senators. I have sat here for many years and have spoken and participated in many debates on questions of privilege. As you know, Your Honour, Senator Furey, your task is to make a prima facie judgment — in other words, on first blush, that is — if there is something there that should be examined.

Colleagues, I am of the opinion that personal offence has been offered to Senator Beyak. I really do believe and see that. I would submit to you that the offence to Senator Beyak is deeply personal and hurtful to her. It may not be deeply personal to Senator Sinclair or to others, but it is obviously showing in her delivery. And consequently, as we all know, for many years now, that offences that are deeply personal tend to impair parliamentary and work performance on many occasions. We also know that such offence cannot add any dignity to this place, and I would submit that such offences tend to impair the dignity of this house.

Your Honour, I would like to put before us a few of the basic principles that should concern us. I would like to submit to you, Your Honour, that the concept of constitutionalism and constitutional governance as we have known them, are wholly founded on the central liberty that we call freedom of speech. I would submit to you that freedom of speech has ever been the most important privilege in this place, this Senate, because freedom of speech is the essential tool to parliamentarians. As we know, we in Canada have had freedom of speech in assemblies and parliaments since our earliest legislative assemblies.

Honourable senators, I shall cite Joseph Maingot, in his 1997 book *Parliamentary Privilege in Canada*. In chapter 3, headed "Privilege of Freedom of Speech," Maingot states:

> It required a decision of the Privy Council in 1842 to eventually define the limits of pre-Confederation legislatures in respect of contempt, but there never was any quarrel that the Members of the legislative assemblies in the Maritime Provinces in Upper and Lower Canada, from their inception, beginning in 1758, had the privilege of freedom of speech in debate. This statement may be made because that was the common law of the U.K; i.e., freedom of speech is a necessary incident for the Members of a legislative assembly to perform their legislative functions, and that law carried over to British North America.

I shall repeat that since 1758, there has been no doubt that Canadian assemblies have had the high privilege, freedom of speech. We do not have to prove whether or not this privilege exists.

Your Honour, I shall cite John George Bourinot, in his 1916 book *Parliamentary Procedure and Practice in the Dominion of Canada*. His chapter 6 explains the origins of the rules, orders and usages of the Parliament of Canada, at pages 201 and 202, that:

• (2040)

> The principles that lie at the basis of English parliamentary law have, however, been always kept steadily in view by the Canadian parliament. These are: to protect a minority and restrain the improvidence or tyranny of a majority; to secure the transaction of public business in an orderly manner; to enable every member to express his opinions within limits necessary to preserve decorum and prevent an unnecessary waste of time; to give abundant opportunity for the consideration of every measure; and to prevent any legislative action being taken upon sudden impulse.

Colleagues, I shall turn now to one of the greatest lawyers of all time. I cite him often in speeches. In particular, I am speaking of William Blackstone. I shall cite his famous 1765 work called *Commentaries on the Laws of England*. The particular volume that I cite was annotated by George Sharswood, the Chief Justice of the Supreme Court of Pennsylvania. The books of which I am speaking — because it was laid out in four books — is *Of the Rights of Persons* and *Of the Absolute Rights of Individuals*.

Blackstone wrote, at pages 126 to 127:

> The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course, the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. Very different from the modern constitutions of other states on the continent of Europe and from the genius of the imperial law; which in general are calculated to vest an arbitrary and despotic power of controlling the actions of the subject, in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or negro, the moment he lands in England, falls under the protection of the laws and so far becomes a freeman; though the master's right to his service may *possibly* still continue.
>
> The absolute rights of every Englishman, (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

William Blackstone explains, at page 129:

> The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These, therefore, were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles: the right of personal security, the right of personal liberty, and the right of private property: because, as there is no other known method of compulsion or abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.
>
> I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

William Blackstone continues on the question of reputation, saying at page 134:

> 5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come), it will suffice to have barely mentioned among the rights of persons: referring the more minute discussion of their several branches to those parts of our commentaries which treat of the infringement of these rights, under the head of personal wrongs.

Honourable senators, I would like us to review the history of Canada's Confederation and its creation and the mighty minds that made it, and the motivation and the causes they had in their minds. We can all agree on the enormous success that the Fathers of Confederation had in building Canada the way they did.

Your Honour, a few days ago I was in here speaking to a young audience of students. I noted whereas the American Founding Fathers, held ". . . these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Canada did not go down that road. George Brown and John A. Macdonald did not go down that road. They went down the road expressed as Section 91 of the British North America Act 1867. It said:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada . . .

Your Honour, peace, order and good government is our ground. Do these questions and events before us now contribute to the peace, order and good government of Canada or do they not?

I would submit that the circumstances here today do not contribute to peace, order and good government and in fact have hurt an individual senator in a very deep and personal way.

I would submit to you, Your Honour, that there is a question of privilege here, and it should be examined closely and to the fullest degree. I thank honourable colleagues.

Hon. Yonah Martin (Deputy Leader of the Opposition): Your Honour, I wanted to add some important points to this debate for your consideration. I also see the real seriousness of what has happened in this chamber with the introduction of the motion we began debating on Thursday.

What Senator Beyak is doing is exercising her right and raising a question of privilege. That is her right. I believe after what happened on Thursday, being named in a motion to be asked to cease and stop our work on a website, that's a very serious order for our chamber to be considering.

The Senate Ethics Officer is responsible for administering, interpreting and applying the code. Section 41 of the code affirms the independence of the Senate Ethics Officer as well as his responsibility alone to provide advice to individual senators regarding the application and interpretation of the code in any given circumstance.

• (2050)

I also have a copy of the press release that was issued by the Independent Senators Group after a number of members penned a letter asking the Office of the Senate Ethics Officer and the Standing Committee on Internal Economy, Budgets and Administration to review what is being asked, again, in this motion.

So the question I raised on Thursday is the order in which this is happening and that there is a process already being undertaken. We're being asked to consider this motion, which is very serious for any one of us to be named and potentially be part of a decision that may be made by this chamber.

So I understand that the entire Internal Economy Committee, in being asked to review this, decided that they would wait until a decision was taken by the Senate Ethics Officer. So even the committee — a very important committee that our colleagues serve on and that was also asked to look at this matter — made that decision.

So I would simply say that, in what Senator Beyak is asking, this motion in essence is out of order. It's delivering a decision on something that is being undertaken by an officer of Parliament. We have given him our blessing. We had him here to ask questions, and it's his jurisdiction, as stated in his mandate, that it's his responsibility alone to provide advice to individual senators regarding the application and interpretation of the code in any given circumstance.

Your Honour, I would simply state that I think this question of privilege is in order and that the motion that we have begun is out of order. Therefore, for us to make any judgment as a chamber and to name a senator and to order something of such magnitude is something that we should all take very seriously.

So I simply wish to state that I do support the question of privilege that has been put forward and that all of us should take a very careful look at what is happening in this chamber. We have processes and we should respect that.

Some Hon. Senators: Hear, hear.

Hon. Leo Housakos: Colleagues, I rise this evening on this issue of the point of privilege. Again, over the last few weeks I've become more and more concerned about the frequency, of course, with which people are rising on a point of privilege and a point of order and the endless number of hours that this chamber has spent over the last few months on process.

That is quite remarkable, because our main responsibility here is to conduct sober second thought on legislation. Of course, we hear all the time from the representatives of the government side talking about how it's important that we engage in making sure that the government agenda is going through, or at least we participate in a discourse when it comes to the government's agenda. But the chamber has, like I said, spent an extraordinary amount of time in the last few months on process, and I have never seen that in the 10 years that I've been here has a senator.

But I rise today to clarify a few issues on the debate today that have been brought up by other colleagues on the other side of the floor, by Senators Pate and Sinclair, that don't necessarily reflect reality and the facts.

A couple of those have to do, number one, with a statement about the Conservative caucus removing Senator Beyak from the caucus, asking her to remove certain statements from the website and asking her to remove herself from certain committees.

Just so we're clear, colleagues, according to the *Rules of the Senate*, no caucus can remove any senator from any committee. That's the fundamental privilege we have as a senator: that once the Senate Committee of Selection appoints you to a committee of the Senate, you serve until the end of that Senate Committee of Selection's process and, of course, the Parliament. So no caucus can remove you from your committee to serve. That would be a fundamental infringement of privilege.

If a senator is requested to step down from the committee and the senator acquiesces, that is, of course, her right to do so but no one can force a senator to step down. And that's the indication in the debate that's been brought forward — that somehow we forced the senator to stand down.

The second issue that Senator Sinclair keeps talking about is Senate resources, and Senator Pate has done so as well. If we remove Senator Beyak's website from the Senate server tomorrow for the next few months, she will not cost any less to the Senate than your websites already do, Senator Pate or Senator Sinclair.

Any senator who has a right to put their website on that platform costs the Senate nothing at all. That was a decision taken a couple of years back. That platform exists and it belongs to the Senate. There is a fixed cost to it. Obviously, any senator who has a website can link themselves to that server, but there's no cost. So on this idea of resource cost to the Senate — and I'm sure Internal Economy was aware of this when they were reviewing the whole process themselves a few weeks ago — they came to the conclusion that they should allow the Senate Ethics Officer to conduct his independent investigation.

The other and the most serious issue, of course, is the independence of this chamber. And all senators have accurately pointed out in the course of the debate that we're a self-governing body and that's the fundamental premise of the Westminster independent system of Parliament.

But how can the independence of a chamber be respected when we ourselves as senators don't respect the processes and rules and regulations we've implemented? The code of ethics is something that was proposed, debated and passed unanimously in this chamber by senators, and the establishment of our Senate Ethics Officer was debated, put forward and established by this chamber.

We put a process in place, and one that I think is a pretty good one. I'm very proud of our code of ethics; I think it has withstood in the last few years the test of the challenges we had before us. We saw recently a senator that lost a seat, the most unprecedented price for any parliamentarian to pay for behaviour that we thought was not becoming of a senator. And it cost him his seat. But that senator and that particular case went through a process that this chamber has instilled and put into place. Despite the fact that, at times, we got caught up in the public debate, and there was a propensity for certain senators to pontificate and run out to the foyer and talk to the press and be "Captain Ethics," we all allowed and we all stood back and were as disciplined as we needed to be, and we said, "Let the Ethics Officer do his work as per the directive that this chamber had established a number of years back."

Yes, it took time. Yes, it was messy. Yes, it was arduous. And at the end of the day, he came to a conclusion and then it went to the Senate Ethics Committee and the Ethics Committee did their job and, again, independently.

I was a little bit stunned when a senior member of that Senate Ethics Committee rose in the chamber today and didn't find it unusual that there's a motion on the table debating a case already before the Senate Ethics Officer. Somehow, you don't think that's infringing or interfering on the arms-length process that this chamber has put into place.

Colleagues, there is nothing that infringes upon that process more than what we're engaging in right now. I'm sure the Senate Ethics Officer is sitting back and saying, "Boy, that's unusual. The chamber says I'm an independent body with a clear code of guidelines," and, of course, a complaint has been filed before him, but yet the chamber gets up in order to have a long discussion.

I think that's unacceptable, and I think that's dangerous.

In the last few weeks we've called into question the processes that this chamber has put into place. It could be on harassment. It could be on questions of hate speech. Whatever it may be, it falls within the code of ethics and we should allow that code of ethics to conduct its free and independent process.

In terms of free speech, colleagues, we can't pick and choose the degree of freedom of speech. My colleague Senator Pratte sent me an email over the weekend. Of course, we have exchanges from time to time and I appreciated the email and, of course, I appreciate his embracing of free speech. I know he's a former journalist. I know it's fundamental to our democracy and I know he shares that view. But even a few weeks ago, he said there is a limit. Well, no, there is no limit on free speech. I do not decide.

An Hon. Senator: Yes, there is.

Senator Housakos: There is no limit on free speech, colleagues. That's where we differentiate in our point of view. We can stand against certain points of view we disagree with and make a vociferous debate in order to prove our point and beat down a point that we think is not legitimate. I believe in democracy and I believe in debate.

I believe, at the end of the day, the right side will win. But the right side never wins when we muzzle opinions that we don't like. And as much as I disagree with the opinion of Senator Beyak on this particular issue — and I completely disagree with her view. I'm a member of a party where the Prime Minister stood up in the House of Commons and apologized for the residential fiasco in this country. So we have nothing to apologize for on this side. We are on the right side of history in this debate. However, I do not believe it's incumbent upon me — or anybody here — to set the moral limit of what is right or not right in political discourse.

• (2100)

I just wanted to express those views, Your Honour. I know that in terms of the administrative aspects of the issues that have arisen, you have more experience than anybody in the chamber, so I'm sure you will deal with this appropriately. I appreciate the opportunity to express myself in relation to these issues.

The Hon. the Speaker: Honourable senators, please be seated. There are a number of other senators who wish to speak, and I will continue to call upon them. However, my role in a question of privilege is to determine whether or not there is a prima facie case of privilege according to rule 13. Debating the motion or all matters pertaining to the motion is not helpful to me, as the Speaker, in trying to make a decision as to whether or not this is a question of privilege. Please bear that in mind.

I'd like to hear from as many senators as possible to help me in making a decision, but my role is to decide whether or not there is a prima facie case of privilege according to rule 13.

Hon. André Pratte: Thank you, Your Honour. I will try to address precisely this point by reiterating exactly how the question of privilege reads and then try to examine it from that standpoint.

The question of privilege begins by asserting that the matter is already being dealt with through proper procedures, which is exactly the point that Senators Martin and Housakos have just made. With respect, this is not so. The Senate Ethics Officer will determine whether or not the posting of the controversial letters is a violation of our code of ethics. This is the issue that the Ethics Officer will address.

Senator Pate's motion aims to remove the said letters, so this is not the same question at all. The aim of the measure that is proposed in Senator Pate's motion is not to sanction Senator Beyak and not for us to decide whether she violated the code of ethics. That is nowhere in the motion and nowhere in Senator Pate's speech when she discussed her motion. If you read Senator Pate's speech, she doesn't discuss the code of ethics or whether the Senate should decide upon any sanction towards Senator Beyak. Her concern is the harm that the controversial letters will do in terms of public opinion. That is her concern, and that's why she wants the letters removed from a website that is hosted by the Senate. That's the goal of the motion, which is totally different from the investigation that was launched by the Senate Ethics Officer. These are two totally different things.

The second sentence of the question of privilege states:

> This matter should not be decided by a select group of Senators who want to prevent another Senator from expressing a point of view with which they disagree.

Now, being part of this group of senators who submitted a complaint to the Ethics Officer, first of all, I take issue with Senator Beyak impugning our motives. However, that is something I will discuss eventually if Motion No. 302 does proceed. Senator Beyak might be surprised to find me in the camp of people who defend her freedom of expression, but we'll see if that debate proceeds.

The senator claims that the issue should not be decided by a select group of senators. Well, she would be right if this were the case, but it isn't. Whatever happens to Motion No. 302, it will be decided, of course, by the whole Senate, not by a select group of senators.

Senator Beyak goes on to describe the importance of a senator's website. I will not comment on this except to remark that in all probability, our websites are not covered by parliamentary privilege. In their *House of Commons Procedure and Practice*, page 96, Marc Bosc and André Gagnon state:

> Members should be aware that utterances which are absolutely privileged when made within a parliamentary proceeding may not be when repeated in another context, such as a press release, a householder mailing, on an Internet site . . . .

In its 2005 *Vaid* ruling, paragraph 46, the Supreme Court explained that the criterion for determining the scope of parliamentary privilege is the necessity test. This is quite a long quote, but I think it is important:

> In order to sustain a claim of privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfillment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.

In my humble opinion, Your Honour, a personal website is not essential to our legislative and deliberative work as senators; and that would be the conclusion, I believe, of any reasonable person upon examination of Senator Beyak's site.

Consequently, if Senator Beyak's website is not covered by parliamentary privilege, removing the website from the Senate server, as Motion No. 302 considers, cannot be a breach of her privilege. Therefore, Your Honour, I would argue that the matter raised by Senator Beyak does not meet the test set out by rule 13-2(1)(b) of our Rules, which states that it should be a matter that directly concerns the privilege of a senator.

The last part of the senator's question of privilege begins with the most important word of the text, the word "if": "If Senator Pate's motion is allowed to proceed and my website is ordered to be removed . . . ."

Your Honour, this is a very big "if." If you allow debate to proceed on Motion No. 302, we, of course, have no idea what will happen. The senator seems to take for granted that the motion will be adopted. Maybe it will be, but maybe it won't. Maybe it will be amended. As a matter of fact, I have been working on an amendment that seeks to reconcile the senator's right to free speech and the goal of Senator Pate to remove the offensive letters.

However, what matters for the moment is that there has been no violation of the honourable senator's privileges because the motion in question has not been adopted. The breach in privilege that she is concerned about is in a very uncertain future; it is hypothetical. Therefore, I argue that the issue raised does not satisfy the third criteria — (c) in our Rules — that it be raised to correct a grave and serious breach. Colleagues, "correct" is to set something right. You cannot set something right before a wrong has actually been committed.

Your Honour, there have been very few questions of privilege where you or your predecessors, in this chamber or in the other place, have had to deal with a matter such as this, as you will know much better than I. In fact, my staff and I could find only one similar case.

On May 14, 1986, a distinguished member of Parliament, Mr. Herb Gray, who unfortunately passed away nearly four years ago, claimed that opposition MPs' privileges had been violated. According to Mr. Gray, statements by members of cabinet were such that the government would launch a public inquiry on conflict of interest allegations against a former minister and that the investigation would look at whatever allegations had been made in the house by the opposition. So Parliament's privileges would be breached, Mr. Gray contended, because a commission of inquiry had no right to look into statements made in the House of Commons. Mr. Gray, of course, being a very experienced parliamentarian, was well aware that the breach he was alleging was hypothetical. Still he claimed the following:

> As of this moment, it is true that no inquiry outside of Parliament has attempted to improperly examine any statements made in Parliament. However, the Deputy Prime Minister has made it clear that the government intends to instruct such inquiry, quite improperly and in breach of the privilege of the house.

However, this did not convince Speaker John Bosley, who, on May 16, 1986, ruled clearly and succinctly that a breach of privilege cannot be hypothetical; it must have occurred.

• (2110)

[*Translation*]

Finally, in order to be given priority, the question of privilege must seek a remedy, and I quote:

> . . . for which no other parliamentary process is reasonably available.

Firstly, Mr. Speaker, I repeat that it is not possible to seek a remedy for something that has not happened and that may very well not happen or, in any case, not happen in the way that Senator Beyak anticipates.

Moreover, there is an easy way to prevent the consequences that the senator fears: we could debate Senator Pate's motion, and convince ourselves to defeat it or amend it. There couldn't be a more regular parliamentary procedure than that. Accordingly, Mr. Speaker, of the four criteria for determining whether a question of privilege has to be given priority, the question raised by Senator Beyak meets only one, if that.

There is more in terms of the substance of the questions raised by Senator Beyak: the senator invokes the protection privilege against not a colleague or any outside force that might hinder her ability to carry out her duties, but rather against the power of the Senate itself to direct its own affairs. That is what is at issue here.

If Senator Beyak wants to put up a website hosted by a private server with her own resources, nothing is stopping her from doing so, but the use of Senate resources makes it the Senate's business. As a senator, she certainly has rights, but her privileges, as is the case for each and every one of us, are not her own. They derive from the privileges of the Senate of Canada.

This enlightening passage is found on page 7 of a House of Commons publication entitled Privilege in the Modern Context, which states:

It is important to note that the individual member's rights are subordinate to those of the House as a whole in order to protect the collectivity against any abuses by individual members.

As Maingot states:

[*English*]

> The privilege of control over its own affairs . . . is one of the most significant attributes of an independent legislative institution.

This is from *Parliamentary Privilege in Canada*, page 183.

[*Translation*]

This privilege concerns discipline and even includes the power of expulsion, a power that this chamber also has for the most serious breaches. That was confirmed by the Standing Committee on Ethics in its May 2, 2017, report.

The Senate's privilege of self-regulation also concerns its members' freedom of speech. No matter what Senator Housakos says, even in this chamber, we do not have unlimited freedom of speech. I would like to once again quote page 13 of Maingot's Parliamentary Privilege in Canada, where he states:

[*English*]

> While it will be seen that the Member enjoys all the immunity necessary to perform his parliamentary work, this privilege or right, such as freedom of speech, is nevertheless subject to the practices and procedures of the House.

Your Honour, arguing that by exercising its legitimate privileges the Senate can infringe on an individual senator's privilege is contradictory.

On February 24, 2016, honourable senators, the present Speaker ruled that there was no privilege breached in relation to the report of the Committee of Selection's recommendation that only two independent senators be recommended to serve on committees. The Speaker highlighted that the Senate cannot breach its own privilege:

> With this question of privilege, Senator Wallace is arguing that the Committee of Selection's report was a breach of privilege, even though the Senate actually adopted the report. So the senator is claiming that the Senate breached its own privileges or the privilege of individual members. To repeat, these privileges exist to serve the institution itself. The Senate's decisions cannot breach the Senate's privileges.

Your Honour, as you know much better than I do, in his May 29, 2007, ruling, Speaker Kinsella introduced a reasonableness test to evaluate whether or not there is a prima facie case for a question of privilege: The test is if the Speaker rules that a reasonable person could conclude there may have been a violation of privilege — a reasonable person. My contention is that, considering that Senator Pate's motion has not been adopted yet, may never be adopted or may be adopted in an amended form; considering that websites are very probably not covered by parliamentary privilege; considering that there is an available remedy to Senator Beyak's concerns, which is to debate the motion and convince other senators not to order the Senate Administration to remove her website; and, finally, considering that the Senate would be perfectly within its rights if it eventually decided to remove the senator's website from its servers, a reasonable person would conclude that no violation of privilege has occurred in this case. Thank you.

Hon. David Tkachuk: I have just a few points, Your Honour, on this question of privilege, which I do support. I think we can all agree that Senator Beyak has a right to a fair investigation.

This motion then took place — and it's being investigated by the Senate Ethics Officer — in the Senate Chamber. I think there was another breach of privilege because I read the speech. I wasn't here for the speech but I read it. It's an incendiary speech against Senator Beyak, for one. Number two, having a debate in this chamber will influence the Ethics Officer. They don't live in isolation. The Ethics Officer doesn't live in isolation. We're expressing views that he is supposed to be investigating on Senator Beyak. We have now come to the point where even a member of our Ethics Committee is getting into the debate on this debate, for God's sakes. I think that she does have a question of privilege because by having this debate we're going to prevent the Ethics Officer. I think it will colour the effort of the Ethics Officer to come to a fair decision.

The point that Senator Pate made about the earliest time, well, even though the motion was made on Wednesday, the content wasn't raised until Thursday. This happens to be Monday, which is the first opportunity for Senator Beyak to raise it, so I think she's in her right to do it today.

This is an important decision that the Ethics Officer is working on because the question of what's being said on a website isn't just a question of what's being said on a website but what's being said on social media, what's being said on a Twitter account. A senator may have a Twitter account, and other people will be writing into the Twitter account. There will be all kinds of views on there that are not necessarily the views of the senator but are the views of the general population. And some of them will be racist. So do we close all the Twitter accounts? That's what we're asking to do here. We're asking to say that because we don't like what is being said on that account — and there's a civil remedy; if someone doesn't like it, they can sue the Senate. We have all the other social media that this will have an effect on.

I think you have to uphold her question of privilege, stop this debate until the Ethics Officer proceeds and puts a report before the Senate. Thank you, honourable senators.

[*Translation*]

Hon. Renée Dupuis: I tried to listen carefully to my colleagues, but I am still having trouble understanding the allegation itself. A question of privilege is being raised that says:

[*English*]

That Motion No. 302 not be allowed to proceed.

[*Translation*]

In that sense, the responsibility that you have as Speaker is not to allow or disallow Motion No. 302. In other words, there is a problem with the wording of the question of privilege that you need to address. I think that the allegation itself is unfounded and that it is premature because, according to the third criterion of Rule 13-2, priority is given to a question of privilege only if it seeks to correct a grave and serious breach. The wording implies that if a correction needs to be made, that means there's been a grave and serious breach. That's why I have such a hard time understanding what you're being asked to do, which is to decide whether a prima facie question of privilege has been established. If you conclude that there's indeed a question of privilege, there will have to be a discussion here afterwards. However, the question doesn't seem to be well formulated or well founded. To me, it seems somewhat premature.

• (2120)

I want to clarify that I'm not rising to say that I agree with the motion; I'm focusing exclusively on the question of privilege before us. In my opinion, no grave or serious breach has occurred or materialized. That is not the argument being made. What we're being told is rather that there's a fear that if the motion is adopted, it will have repercussions on freedom of expression or on parliamentary privilege, whatever you want to call it.

Your Honour, I therefore ask you to enlighten us on, first, the use of your power to decide on the existence of a prima facie case, and second, the issue of whether this motion is well founded, well argued, and perhaps premature.

[*English*]

Hon. Frances Lankin: Thank you, Your Honour.

Briefly, I want to speak to Motion No. 302. Motion No. 302 is simply a motion before us that is yet to be deliberated and decided. As a result of that, and that alone, a prima facie case has not been made in this situation.

Although I understand the intent of Senator Beyak, and I can empathize with the situation that she is concerned she finds herself in, that in and of itself and taking offence, as Senator Cools indicated, is not a question of privilege.

I want to add a couple of citations to your considerations. In the *Journals of the Senate*, November 7, 1995, pages 1263 to 1264, there is a report of a ruling of a Speaker on a point of privilege that was raised. In this circumstance, the Speaker quotes *Beauchesne's Parliamentary Rules and Forms* sixth edition, citation 69, page 20:

> It is very important . . . to indicate that something can be inflammatory, can be disagreeable, can even be offensive, but it may not be a question of privilege unless the comment actually impinges upon the ability of Members of Parliament to do their job properly.

I think Senator Pate and Senator Pratte in particular have spoken to that and find there is not an impingement in the situation before us.

In this case the person who raised the point of privilege was Senator Cools. The Speaker goes on to say:

> I can find no link between the description given by Senator Cools of the comments by the witness and the ability of the Legal and Constitutional Affairs Committee or the Senators who serve on it to carry out their mandate with respect to Bill C-68. Finding no link, I cannot conclude there has been any *prima facie* breach of the privileges of the Senate.

So finding or feeling deep personal offence is something we should be concerned about in terms of our demeanour in the Senate. I think that it's something on a personal level that we can feel empathetic about. It is not cause for a prima facie case of privilege.

I might say, in looking at what alternative resolution there may be, if we were to provide the understanding to the people, Indigenous communities in particular, and people who feel so deeply offended by some of the comments that have been posted on Senator Beyak's website, we might find that taking down some of these comments could resolve this. That rests with Senator Beyak, and it's something she could do.

Lastly, I want to say that Senator Tkachuk, Senator Martin and Senator Housakos gave strong and reasoned speeches about why they will oppose Motion No. 302. I note in particular that Senator Housakos, a former Speaker, gave very little argument about whether this was a case of privilege and stayed away from that.

I think the concerns raised are things we should all listen to, but it can only happen through a debate if this motion proceeds and if there is fulsome debate in this chamber.

Hon. Marilou McPhedran: Thank you, Your Honour.

In support of Motion No. 302, I want to make a number of points as briefly as I can. First of all, in terms of the discussion of privilege —

The Hon. the Speaker: Order, please. Take your seat, Senator McPhedran, please.

Honourable senators, I'm here to listen to senators. I have cautioned senators that I don't want to enter into a debate on Motion No. 302. Senator McPhedran has just started her comments. Please, let her get on with her comments before we can make a decision on whether or not we are debating Motion. No. 302.

Senator McPhedran: Thank you very much. I appreciate that. I will be brief.

A few key points that I would like to make are primarily around the concept of unlimited freedom. It's actually not freedom of speech. It's freedom of expression. I would like to note that in Supreme Court of Canada decisions, for example, *R. v. Taylor*, *R. v. Keegstra*, *R. v. Sharpe*, *R. v. Irwin Toy* and, most recently, *R. v. Whatcott* in 2013, there are clear and consistent conclusions by the Supreme Court of Canada that indeed there is no such thing as an absolute right, an absolute freedom of expression in Canada. There is a balancing of rights.

We are talking about the content of a website that has been chosen to be placed there, and presumably, if there are costs involved in that and it is seen to be a function of the senator, those are public funds that are subsidizing this. We are talking about the suspension of the website, the content of the website that is racist and that is promoting hate speech. It is a suspension. It is not a burning. It is not an obliteration. If at some point in the course of the ruling, in the course of the Ethics Officer's report, in the various ways in which this self-regulating body is trying to regulate itself, if it is decided that the content of that website should go back up, it hasn't been destroyed. It can go back up.

This is a suspension. This is a request at a point in time when the suspension of material that is obviously racist — and there are all kinds of ways to demonstrate that, particularly in the communications of those who are directly affected by it — could in fact be seen as a respectful action of support for the investigation by the Senate Ethics Officer.

The issues before the Senate Ethics Officer are much broader than the question of this particular website. I won't repeat what previous speakers have said, but I would like to adopt the points made by Senator Pratte in particular and Senator Sinclair.

So we do not have an absolute right here, either within our chamber or under the Charter, and I would like to respectfully submit that in fact the suspension of the material on the website could actually serve to reflect well on our self-regulation and in no way impede what needs to happen for other processes within our Senate. Thank you.

The Hon. the Speaker: I want to take a moment to thank all senators for their very thoughtful insights into this debate. I will take the matter under advisement.

• (2130)

(*At 9:30 p.m., the Senate was continued until tomorrow at 2 p.m.*)