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**Official Report  
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(Hansard)**

**Thursday 7 March 2013**

**Journal  
des débats  
(Hansard)**

**Jeudi 7 mars 2013**

**Standing Committee on  
Justice Policy**

Members' privileges

**Comité permanent  
de la justice**

Privilèges des députés

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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

**STANDING COMMITTEE ON  
JUSTICE POLICY**

**COMITÉ PERMANENT  
DE LA JUSTICE**

Thursday 7 March 2013

Jeudi 7 mars 2013

*The committee met at 0830 in room 151.*

**MEMBERS' PRIVILEGES**

**The Chair (Mr. Shafiq Qadri):** Chers collègues, j'appelle à l'ordre cette séance du Comité permanent de la justice.

Ladies and gentlemen, and colleagues, I call to order this meeting of the justice policy committee. There are a number of smaller items to go through before we invite our first witness to come before the committee.

To begin with, I'd like to just apprise the committee of the motion enabling the expanded scope. I've been advised to read this into the record, which I will now do. This was passed Tuesday, March 5, 2013, and it reads as follows:

“With unanimous consent,

“On motion by Mr. Milloy,

“Ordered, that, pursuant to standing order 110(a), the Standing Committee on Justice Policy shall be authorized to consider and report its observations and recommendations concerning the tendering, planning, commissioning, cancellation and relocation of the Mississauga and Oakville gas plants;

“That the committee be authorized to consider all documents filed with the Clerk of the Legislative Assembly by the Minister of Energy, the Ministry of Energy and the Ontario Power Authority on September 24 and October 12, 2012, and February 21, 2013, and that such documents be deemed to have been ordered by that committee;

“That, notwithstanding standing order 108(h), the committee be authorized to consider any report prepared by the Auditor General with respect to the cancellation and relocation of the Mississauga and Oakville gas plants;

“That, pursuant to standing order 110(b), where the committee exercises its authority to send for persons, each party shall be entitled to an equal number of witnesses;

“That these terms of reference shall be incorporated into the terms of reference for the Standing Committee on Justice Policy adopted by the House on February 20, 2013.”

Again, to summarize, that was the enabling motion for the expansion of scope.

I'd also bring to the committee's attention a gesture of extraordinary modernity: the 16-gigabyte, 56,000 docu-

ments, which are now in the possession of each member of the committee—which you have—so that you may read and parse at your leisure.

HON. PETER MILLIKEN, PC

**The Chair (Mr. Shafiq Qadri):** Nous sommes honorés aujourd'hui d'accueillir l'ancien président de l'Assemblée du Parlement du Canada.

We are honoured to welcome Mr. Peter Milliken, the former member for Kingston and the Islands who served the Legislature in Ottawa for 23 years and also holds the distinction of being the longest-serving Speaker in the history of Canada. We're honoured, and I'm sure we'll all be beneficiaries of your insight and wisdom, Mr. Milliken.

To begin with, I would just invite you—as is protocol for all of our witnesses—to swear an oath, which I would now invite our Clerk to administer.

**The Clerk of the Committee (Ms. Tamara Pomanski):** Do you solemnly swear that the evidence you shall give to this committee, touching the subject of the present inquiry, shall be the truth, the whole truth and nothing but the truth, so help you God?

**Hon. Peter Milliken, PC:** I do.

**The Clerk of the Committee (Ms. Tamara Pomanski):** Thank you.

**The Chair (Mr. Shafiq Qadri):** Also, to remind all members of the committee and those interested parties watching and listening, Mr. Milliken, you will have 95 minutes in which to give your address; five minutes is the actual address, and it'll be 30, 30, 30 for the committee members to ask questions, divided as they understand—I understand that we're going to do 20, 20, 20; 10, 10, 10. All right?

Mr. Milliken, I respectfully invite you to please begin now.

**Hon. Peter Milliken, PC:** Thank you very much, Mr. Chairman. It's a privilege and pleasure for me to be invited to be here. I can't say that I know a lot about the subject of this matter—certainly I read a little bit in the media when the issue first arose, but not a lot. The Clerk kindly sent me some documents yesterday on a computer, which I haven't had an opportunity to read, because I was travelling up here anyway, last evening, for an event in Toronto. Fortunately this worked in terms of time, but I haven't had much opportunity to look at the material. So,

really, I'd be glad to answer the questions that the members of the committee have to pose as best I can.

I have certainly seen something of the Speaker's rulings on this subject in the Legislature in the material that was sent to me, but not much more than that. So I'm afraid I may be at a bit of a disadvantage in terms of being of assistance to you, but if I can be, I'd be more than happy to answer the questions that honourable members propose.

I want to say, it's a pleasure to be back here. It's been some years since I paid an official visit and enjoyed very much meeting with the then Speaker. I hope things are going well in the Legislature now. Minority Legislatures are always fun from all perspectives, I guess. So, thank you for inviting me.

**The Chair (Mr. Shafiq Qadri):** Thank you, Mr. Milliken. That's precisely how we characterize it, too, yes.

We now move the speaking opportunity to the honourable opposition. Gentlemen, you have 20 minutes in which to make your opening comments, and you're welcome to start now, please.

**Mr. Rob Leone:** Thank you, Mr. Milliken, for taking the time to visit us on short notice. We acknowledge that you haven't had a lot of time to prepare yourself since you probably had a day's notice to come here, but we do recognize you to be one of, if not the leading expert in parliamentary privilege, and we've noted in this committee and in previous committees some of the decisions that you rendered as Speaker of the House of Commons with respect to matters that touch upon what we're going to do today. Even though the subject matter of energy and gas plant locations may not have been the subject of what you were dealing with in terms of Afghan detainees and other things, we would like to ask you some questions related to privilege and the privileges held by members of the Legislature with respect to their right to seek documents.

My first question, sir, is essentially that: When a committee of the Legislature asks for documents, are there any limits to that request that essentially you could list for this committee?

**Hon. Peter Milliken, PC:** Well, as I've stated on previous occasions in rulings on this subject, technically, the committee can demand what it wants, as can the Legislature. In my view, the Legislature has the privilege of claiming any documents it wants to see and having them produced.

However, as I stated in my ruling in the Afghan one, I believe was where that occurred: Generally, the Legislatures—at least the Parliament of Canada and the House of Commons—have not persisted in demanding something where the release of a document of a certain type would result in damage to national security. In other words, the members try to act as responsible citizens in respect of that and ensure that by having something produced, they're not placing the security of our country in jeopardy by making information public that in the hands of some other individual or individuals could be very

damaging to our country. That was part of the argument that was advanced in the Afghan case and one that I dealt with in the ruling. So there are limits at least in terms of security.

I've not dealt with a case that I recall that involved one of privilege. I don't mean parliamentary privilege; I mean solicitor-client privilege or something like that where documents were being demanded that involved a lawyer and his or her client. I don't recall dealing with such a case. But, again, the committees can work in a way that they can demand production of documents that are produced for the benefit of the members of the committee to see—not to be made public but just for them to look at.

There are various ways this can be dealt with that I think Legislatures could do in terms of their demands for production, seeing things and not making them public. The understanding is that they'd not be photocopied or put on a website or anything like that.

**Mr. Rob Leone:** So, Mr. Milliken, we as a committee, in the estimates committee of this Legislature, requested documents last May related to the cancellation of the Oakville and Mississauga gas plants. We were denied those documents in a letter from the OPA and the Minister of Energy at the time with respect to the release of those documents. They cited basically three arguments. The first argument was solicitor-client privilege, as you noted. They also cited commercial sensitivity, and they also cited sub judice as reasons.

**0840**

In your mind, would there have been a possibility for those documents to be released, perhaps in a different way, to allow us actually to view those documents and ask questions pertaining to them?

**Hon. Peter Milliken, PC:** It's hard to say. Without having seen them, it's difficult to say that. I faced the same difficulty in respect to the Afghan situation because, of course, I had not seen the documents and didn't know what was in there. There were just the arguments on both sides as to what should be the right way to proceed.

So it's hard to answer that question, not knowing what the contents were and not knowing what the litigation matters were or anything about the case from that perspective. Clearly, if there's litigation ongoing, and the release of the documents was going to be harmful to the case of one side or the other in the litigation, or benefit one side at the expense of the other or something like that, there may be arguments for not making the documents public.

The question is, is the demand for the production making them public? It's one of the issues that was there with the Afghan documentation, and one that—as you know, there was a deal made finally between the parties to re-view the documents and decide what should be made public.

**Mr. Rob Leone:** So essentially we could have viewed—or in the Afghan detainee case, they did view the documents in question. In camera? Without—

**Hon. Peter Milliken, PC:** No. What happened in that case, and I don't know whether it has ever been resolved—I've never heard that it was, but they might not have told me. Maybe it has, maybe it has not; I do not know. But the deal was made that there would be a panel of members of Parliament—one from each party, except one party which refused to participate—that would sit and look at the documents and recommend whether they be made public or not. If the recommendation was not unanimous, then the documents were sent to a panel of judges who were to examine the documents and then decide whether they would be made public or not. I have not heard whether they have ever been made public. I'm not sure that they have.

**Mr. Rob Leone:** Okay. We have some documents that we'd like to circulate, some specific ones. Is that possible to do in this committee?

With respect to the matter at hand—the question, Mr. Milliken, is with respect to redactions, blacked-out, whited-out portions. We've seen in the course of the release of documents that there are whited-out portions, redactions; there are missing gaps with respect to timelines. We still do not have a great deal of communication from interaction between the Ministry of Energy and the OPA and the government and cabinet, and documents relating to those issues have not been forthcoming. Do you have a copy of what we just sent?

*Interjections.*

**Mr. John Yakabuski:** Yes.

**Mr. Rob Leone:** So, if you look through the documents, Mr. Milliken, we can go through and see clearly that parts have been whited-out, that we don't have—if you go to, I guess, the document isn't clearly numbered, but page 5, clearly the documents and the contents of those documents from a person named Nimi Visram have been totally whited-out and blacked-out.

We feel, as a committee, that we still do not have all the documents that we've requested. In your mind, and in your opinion, how is a committee of the Legislature able to do its work when we do not have the information before us to properly hold the government to account? And what is the right of the opposition to this information, given the fact that we don't know what the contents of this information really are? If we continue down, you can see clearly more redactions, more intentionally deleted parts of the release of information that we clearly still do not have at our disposal.

What is the right of the opposition, essentially, to this—sorry, the right of Parliament and a legislative committee and the Legislature itself to actually have that information?

**Hon. Peter Milliken, PC:** Well, as I said, I've not studied the issue of privilege in terms of solicitor-client privilege and that sort of issue, so I'm not able to answer specifically in respect of a document of this kind. I have no idea, of course, what has been deleted—none of us do—so it's hard to say whether this was taken out because of some claim that the material was private, that it

belonged to a certain individual and because litigation was involved, it could not be made public.

As I say, a deal was reached in respect of this issue by the parties after my ruling on the Afghan issue that allowed for a method of reviewing these documents and deciding what in the documents should be made public and what not. And it could be edited, I assume. I assume they could agree that certain paragraphs could be deleted and the rest of the document made public, but I wasn't part of the panel; I have no idea. But they could have done that, and I don't think there would have been any difficulty with it. The difficulty was getting through the pile, because I understand it was a huge number of documents, and it would have taken them quite a long time to go through it.

It's hard for me to say, in terms of what the Legislature's practice has been, not being familiar with it, as to whether solicitor-client privilege is something that the Legislature has recognized as a privilege that they would not trample on in exercising their authority to demand the production of documents. I'm just not aware of the practice in that field of documentation demand, either nationally or on a provincial level. I just don't know what has happened in the past.

Technically, as I say, I'm sure the Legislature could demand production, but again, whether they would want to, where there is a solicitor-client privilege that may result in damage to one of the parties, is another matter. It's just a matter of discussion and trying to find out what's going on.

I think it's fair to ask some witness what happened to this document and why it was taken out, and if that is in fact the reason. It may be that somebody will want to take a look. Maybe the procedural clerk can examine the matter and decide whether or not it constitutes solicitor-client privilege or something. There are other ways of doing it is all I'm saying.

**Mr. Rob Leone:** Right. So, Mr. Milliken, we were told as a committee in estimates that the reason why these weren't released was because the government was upholding the public interest, which I patently reject because as members of the Legislature, we're all entitled to uphold the public interest. Is that a justification, in your mind, for not releasing documents, because one person in this Legislature has command of what exactly is the public interest?

**Hon. Peter Milliken, PC:** It's a novel argument. I think, as I say, the Legislature has the right to demand production, and I'm not sure that the public interest is the overriding concern; it strikes me as a bit general. I think it needs to be a little more specific in terms of either solicitor-client privilege or something to do with security or some issue that's very important for the people in the province, rather than this straight public interest.

**The Chair (Mr. Shafiq Qaadri):** Mr. Yakabuski.

**Mr. John Yakabuski:** Thank you very much, Mr. Milliken. It's always a pleasure to welcome a seasonal resident of mine to our committee here.

Just on that issue of redaction or nondisclosure based on solicitor-client privilege and/or matters of the public interest, it would seem that that could be a very convenient way of not responding or not complying with an order of a committee if that was given too much breadth and the ability to use it.

I just want to read a quote of yours, if I may. It was in your finance committee ruling on March 9, 2011, on the issue of tabling complete documents: “While the Chair does not judge the quality of documents tabled in the House, it is clear from a cursory examination of the material tabled that, on its face, it does not provide all the information ordered by the committee.”

If you can expand on where you were going with that: If it’s not giving all the information ordered by the committee, then they would be directed to provide all the information ordered by the committee? Because that seems to be part of the problem here, that many, many documents had significant portions removed, and in every case, or almost every case—because there are thousands of documents and thousands that had portions removed or the entire document removed other than the title, the subject matter; if that’s the case, where do we have the ability to get that information, or should the committee have the ability? You need to justify in each and every case, where is the issue of solicitor-client privilege and/or the public interest—otherwise, that document, in your view, should it not have been disclosed?

**0850**

**Hon. Peter Milliken, PC:** Right. Well, it’s a matter of calling the witness, I guess—the person who tabled them or persons working for that individual who edited or changed the documents in some respect—and asking on what basis this change was made.

In fairness, as I ruled in the Afghan issue, I think it’s fair to have somebody look at this, or some small group look at it, in confidence. The deal that was made was that these people were all sworn to secrecy. They were not to reveal anything they discovered as a result of their work, and they were to review these documents. That was the deal the parties made, and they adopted a resolution in the House, as I recall, that set this small panel up to look at these things. They all were sworn to secrecy; they looked at the materials. That’s partly why I’ve heard absolutely nothing about it. I asked some of the members, “What’s going on?” and they said, “We can’t say a word. We’re sworn to secrecy,” and that was that. So I don’t know what happened.

But I think there are ways of doing this that will not damage the public interest. If the argument is that making this public is damaging to the public interest, I can see why there might be disagreement among members of the Legislature as to whether this should be made public or not. But if there is a way of looking at the documents and making sure that that is the case, that the one person who wrote the document is the one making the decision and not others, not a more independent body, I can see there might be an argument that maybe that person is biased and thinks that saying this in public would be bad,

whereas some other group that looked at it might say, “That’s nonsense. It’s not going to hurt anything.”

So these arguments are there, and I think it’s a tough one. Given the power of the Legislature is to demand production of documents, I can see where their practice has always been one way or another in terms of—I stress national security. I don’t know what it is in terms of solicitor-client privilege, but on national security, the practice has always been to make sure that they weren’t damaging national security in making these demands, and so they set up this arrangement to examine. I think it could be done in other areas for the same purpose, if it was necessary to do so to protect the public interest, which is, after all, what we’re all here for, what all members are here for.

**Mr. John Yakabuski:** So would you say, sir, then, that it would have been reasonable for, we’ll just say the government in general—because the documents were requested from the government—for them to have approached the other parties on the committee and said, “Look, we will release all of the documents, unredacted, to a special committee, if you want to call it that, to review them, to see what is and isn’t appropriate to be viewed by the public,” and treat it in that fashion, as opposed to a massive document dump, with thousands and thousands, literally thousands of documents that were unviewable?

**Hon. Peter Milliken, PC:** They could have done that. I have to say that in my view it’s unprecedented. When the House of Commons did it with this recent Afghanistan thing, to my knowledge, it was the first time such a deal had been worked out. It may have been done informally before, but, if so, I was unaware of it.

**Mr. John Yakabuski:** Thank you very much.

**Mr. Rob Leone:** I want to pick up on where Mr. Yakabuski left off there—

**The Chair (Mr. Shafiq Qaadri):** A minute and a half left.

**Mr. Rob Leone:** I’ll be very quick.

In the absence of an explanation for why these documents were redacted, would you consider that to be a breach of privilege in terms of what the committee has asked for?

**Hon. Peter Milliken, PC:** I suppose it would be a prima facie breach, because the Legislature does have, I’m sure, the power to demand production of documents. So, having made that demand, I think it’s entitled to see the documents. The question is, there’s a dispute here as to what parts should be made public in order to protect the public interest, which everyone has an interest in. That’s the argument.

**Mr. Rob Leone:** So, in essence, in your view, these actions, without providing that document—I don’t have enough time to go through the whole thing, but we started this in May. We were denied—and again, we sat through July to report back to the House. The House received it. I rose on a point of prima facie breach, which the Speaker agreed to, which is why we’re basically here. At each given step, we’ve received documents only after

the eleventh hour that we've actually moved the breach and contempt of the Legislature—

**The Chair (Mr. Shafiq Qaadri):** Thank you, Mr. Leone. I need to intervene there and pass the speaking opportunity now to the NDP, to Monsieur Bisson.

**M. Gilles Bisson:** Bonjour, monsieur. Comment ça va?

**L'hon. Peter Milliken, CP:** Ça va bien, merci.

**M. Gilles Bisson:** C'est donc beau de vous voir ici aujourd'hui parmi nous.

**L'hon. Peter Milliken, CP:** Un plaisir pour moi.

**Mr. Gilles Bisson:** So you know the story. I'll just set this up so that we put some context to it. The government decided that they were going to build this particular plant—there was Oakville and Mississauga, but we're speaking of Mississauga particularly. They made the decision to go forward, and the government, as a result of, I guess, political pressure, decided that they wanted to go in an opposite direction and do the cancellation.

My question to you is this: How wise is it for a government to cancel a contract halfway through construction?

**Hon. Peter Milliken, PC:** I have no idea.

**Mr. Gilles Bisson:** You're a very learned person.

**Hon. Peter Milliken, PC:** How much were they going to save? There's all kinds of arguments on that one. I think it would be a matter of vigorous argument on both sides.

**Mr. Gilles Bisson:** What are your thoughts? If you have a contract that's signed to build something and you're halfway through construction, is it wise for a government to cancel such a contract?

**Hon. Peter Milliken, PC:** Well, I guess it depends on whether the thing's going to be useful or productive or generate money or whatever. Those issues are all part of that. I have no idea.

**Mr. Gilles Bisson:** In this particular case, in regard to Mississauga, where they were building a plant to generate electricity—it could have been done there, it could have been done somewhere else, I guess. But the point is, your thoughts in regard to cancelling those contracts—was that wise on their part?

**Hon. Peter Milliken, PC:** I'm sorry; I have no view. I have no idea because I—maybe the shipping costs of the power for Mississauga are greater than sending them from wherever else they were going to do it.

**Mr. Gilles Bisson:** No, no. It's actually going to be more expensive. It'll actually be more expensive the way we're doing it now.

**Hon. Peter Milliken, PC:** I see.

**Mr. Gilles Bisson:** So we're going to ship electricity further, we'll have line losses, which means to say it'll be less efficient and it'll cost us more money.

**Hon. Peter Milliken, PC:** I see.

**Mr. Gilles Bisson:** So, I go back: Is it a wise thing for governments to get in the habit of cancelling contracts halfway through construction? Is it something you would do?

**Hon. Peter Milliken, PC:** Well, I haven't been in government, to that sense. I've never been a minister, so I don't know—

**Mr. Gilles Bisson:** You were in charge of the House of Commons, and the entire precinct was under your jurisdiction. If you would have been halfway through a construction project in the House of Commons, would you have cancelled the contract halfway through construction?

**Hon. Peter Milliken, PC:** We don't run those; the Department of Public Works does. We're merely tenants. It's tough, and I'd certainly have cancelled some of those at the expenses that they were running.

**Mr. Gilles Bisson:** Is it wise to be cancelling contracts halfway through construction?

**Hon. Peter Milliken, PC:** As I say, I don't know. It depends what the—

**Mr. Gilles Bisson:** Okay.

**Hon. Peter Milliken, PC:** If you don't want the project finished, then that makes sense.

**Mr. Gilles Bisson:** Okay. Let me go on to the next one. Clear enough; you don't want to answer that. That's fine.

There is a convention during elections that there is a caretaker provision for government that when the House is in session and prior to a writ or after a writ, whoever is the government enjoys the power of the executive and collectively enjoys the power of the legislative in regard to what we do here at Queen's Park.

There's an understanding within government, as far as the civil service, that a government is not to make decisions that are going to undertake any kind of additional cost to the incoming government. Can you speak to that somewhat?

**Hon. Peter Milliken, PC:** Sorry. The government—

**Mr. Gilles Bisson:** It's called the caretaker provision.

**Hon. Peter Milliken, PC:** Okay.

**Mr. Gilles Bisson:** In the period of a writ the Legislature is dissolved—

**Hon. Peter Milliken, PC:** Right.

**Mr. Gilles Bisson:** —but the executive still remains, because somebody at the end of the day has got to be in charge of the executive. You can't be without an executive for the 27-day period of the campaign. But there's an understanding and there is a convention called the caretaker convention that essentially says that during the period of a writ a government is not supposed, by way of the executive, to make decisions that'll encumber the incoming government with costs that are not fully contemplated by the authorities of the Legislature as far as appropriation of monies. Can you speak to that in any way?

**0900**

**Hon. Peter Milliken, PC:** I can't claim a lot of familiarity with it. I think I've heard of it before, that a government in between can't make announcements, for example, that—or start; it can make an announcement, but it can't alter policy that might raise tensions during an election campaign or something like that—

**Mr. Gilles Bisson:** Yes.

**Hon. Peter Milliken, PC:** —without legislative authority. It's got to wait until the Legislature meets—

**Mr. Gilles Bisson:** Essentially, so—

**Hon. Peter Milliken, PC:** —or announce its intention to do so when the Legislature comes back, but it can't do it right on the spot. You're right, I think, there.

**Mr. Gilles Bisson:** So one of the key responsibilities a Legislature has, or a legislative body, is to approve the money. The whole basis of our system is, the Legislature approves the money, and then it's up to the executive to spend it. And during the period of the campaign, it is understood during the writ period, the caretaker provision that establishes that governments cannot encumber the future government is one that you can't make decisions that are all of a sudden going to change the fiscal outlook, in one way or another, of the government itself.

Do you think it was wise for a government, in the period of a writ, to actually change the outcomes of what actually would be the financial expenditures of the government in the following year?

**Hon. Peter Milliken, PC:** To change it during the writ? I don't know what you mean by how—they can announce they intend to change it. They could announce that they're planning to spend more money on a certain project than was planned in the following year, but they can't actually spend it.

**Mr. Gilles Bisson:** But it appears from the documents that we've seen so far—and this is part of what this committee will establish—that certain decisions were made during the period of the writ and certain actions were taken by the executive. Is that a good thing to have happen, or is that something that shouldn't have happened? In other words, could a government use its power as the executive to change policies that would cost the government more money as a result of those actions during the period of a writ?

**Hon. Peter Milliken, PC:** I guess it depends on whether the policy is a legislative one or not. Governments can govern and make decisions. They have to; that's why they're there. Even after a writ has been issued and before the Legislature reconvenes, governments have power to make certain decisions. Yes, they need authority to spend more money, so they can't actually spend it, but they can announce they plan to spend it. They can announce changes in policy that they intend to bring in. If a legislative change is necessary, it will be delayed until that happens, but they can announce it, and this does happen. Now, what I'm not clear on—

**Mr. Gilles Bisson:** We all understand that governments and political parties can make announcements during a campaign. I think we've all done that. That's not the issue.

**Hon. Peter Milliken, PC:** No.

**Mr. Gilles Bisson:** That a government cannot use its executive power to effect a change that would effectively change how much money the government is going to—like what they're going to make the new government liable for. It would appear by looking at the documents

that there were documents that were generated during the period of the writ that effectively made decisions that set everything in place, that put everything into motion, as we would say.

I guess what I'm saying is that it seems to me that the caretaker provision would prevent a government from doing that kind of thing. It's one thing to make a political promise; it's quite another thing for a government to use its power of the executive to effect any kinds of changes during the period of the writ.

So my question is: Is it appropriate for a government to use its powers of the executive during the period of the writ that would affect the overall amount of money that the government is going to spend in the following year?

**Hon. Peter Milliken, PC:** Well, if it was going to reduce it, yes, I think they could do that. If they're going to increase it, they've got a problem, because they have to get it passed. So I don't know what you're talking about specifically here.

**Mr. Gilles Bisson:** Okay, fair enough. So you're saying, in your view, that if it's going to increase the cost, it's a problem, and if it's going to decrease it, maybe they get away with it. But, in either case, my understanding of the caretaker convention, an executive can't make a decision other than if there's an emergency; you've got to do something that absolutely—you know, something happens on a highway like we saw in Wawa and you've got to fill the sinkholes, you know, that kind of stuff.

**Hon. Peter Milliken, PC:** I see.

**Mr. Gilles Bisson:** Of course, the government has to do that. But for the other stuff, it is a problem.

Let me get to one other thing. Our Speaker was pretty clear in his decision that sub judice doesn't apply to give any right for people to withhold information.

**Hon. Peter Milliken, PC:** Okay.

**Mr. Gilles Bisson:** Can you speak to that? Because it was pretty clear in our Speaker's ruling.

The government argued at committee that they were not going to release that information because of the sub judice rule, that there was financial information that was in there that was sensitive etc., and there may be some information in there as well that might be used in the courts. Our Speaker was pretty categorical and said sub judice doesn't count; the committee has the right to ask for documents and the fact that this is before the courts or there's some sort of financial transaction going on is no reason to withhold releasing those documents. If you can speak to that?

**Hon. Peter Milliken, PC:** As I say, it's an argument I have not dealt with at the federal level. It was not advanced in any of the arguments that I remember on any question of privilege that came before me when I was there. If the Speaker has made that ruling in Ontario, I'm sure it's correct and based on practice here.

I'm unfamiliar with the issue because I haven't dealt with it, so I have not researched and I didn't in advance of today either, since I got called yesterday. So I haven't had a look at that.

**Mr. Gilles Bisson:** Okay. What is the consequence of non-compliance with a request for documents?

**Hon. Peter Milliken, PC:** Well, it's a matter for the Legislature to decide. It's contempt of the Legislature, so it's a matter for them to make a decision on what the punishment should be to the malefactor.

**Mr. Gilles Bisson:** In regard to your experience in the House, can you give us some examples as to what the consequences were for non-compliance?

**Hon. Peter Milliken, PC:** I must say I'm unfamiliar with it. It's not something I looked at either, in the course of the work. I guess it would be a motion saying the member was wrong and beyond that I'm not sure what more the House can do. I guess technically they could expel the member but the House of Commons has fairly limited powers, I think, in that regard for contempt. There may have been somebody put in prison once for a period of time years ago, but if so, I don't know the details of it—

**Mr. Gilles Bisson:** Okay, fair enough. In your view, when a committee or the House requests information, is it appropriate for the government to restrict the information that is being released?

**Hon. Peter Milliken, PC:** Generally, as I said in my ruling, it's done not because the government wants to restrict it, but the public interest demands that it be restricted, because members of the House don't want to get the country into some difficulty by making public information that's damaging to national security. That was the argument.

I don't think any of the members disagreed with me in making that part of the decision, because the national public interest—national security is part of the national public interest—is something that members would be careful not to want to overstep in their demand. If it turned out that they had demanded certain papers, a single document, for example, and the minister said, "Well, I can't make this public because it contains material that if it was public would damage our country," I think the members would all agree, "Yes, you're right; we won't make this one public," and they'd shut up about it.

The difficulty is who gets to see it first and make that kind of arrangement. In the case of the Afghan detainee documents, there had been no review of those documents by anybody except the government, and that's why I think there was a dispute. Whether it's ever been settled, as I say, I don't know.

That's the trick for a Legislature, and it's sometimes difficult because the government—or if it was an opposition member who had the document from a time they were in government before, for example, they might say, "Well, we don't want to make this public because it'll damage the public interest." You need to get some arrangement between the members to look at the thing and make a decision as to whether that is in fact the case.

**Mr. Gilles Bisson:** But that's in cases of national security; right? That was essentially what you were arguing in that decision.

**Hon. Peter Milliken, PC:** Right, yes

**Mr. Gilles Bisson:** My colleague has a question.

**Mr. Peter Tabuns:** Speaker Milliken, you were asked about the penalties for non-compliance. It seemed clear that not a lot of that has actually come before you.

**Hon. Peter Milliken, PC:** No.

**Mr. Peter Tabuns:** Is it rare, then, for governments to be non-compliant with a request by a Parliament?

**Hon. Peter Milliken, PC:** I presume so. But of course, in a majority Parliament you wouldn't have a request made to the government that the government didn't want, normally.

**Mr. Peter Tabuns:** No, that's true, although you did have the experience of working with minorities over an extended period. So it is a fairly rare thing for a government to not comply.

**Hon. Peter Milliken, PC:** That's my impression, yes. I think it's fairly rare.

**Mr. Peter Tabuns:** And when we are in a situation where governments don't comply with a request of Parliament, what are the implications for parliamentary democracy if a Parliament cannot get the documents that it requests?

**Hon. Peter Milliken, PC:** Well, it's a matter of whether the Parliament has the right to the documents, assuming that that's the case. It's simply a matter of then deciding who's in breach of the rules in respect of this issue.

#### 0910

Parliaments, in my view, do have the power to demand the production of documents. It's a matter of which other arguments might be looked at to decide whether the documents should be in fact made public. I'd say, in my view, there's a difference which I tried to indicate in the ruling between demand for production and making them public. The assumption is that if they're demanded and produced, they're made public, but there could be a system where certain parts are not made public by agreement because it would be damaging to the public interest to make them public.

I think generally, as I said in my ruling, Parliaments have tried to be reasonable in that respect in making demands to make sure they're not damaging national security at least, and there may be other arguments in other areas that would affect their decision-making.

**Mr. Peter Tabuns:** I appreciate that answer. Maybe I should phrase my question more clearly. When Parliament is in a position where it cannot get the documents that allow it to hold a government accountable, what does that mean for parliamentary democracy?

**Hon. Peter Milliken, PC:** Well, there may be other ways of getting it, by asking specific questions and so on. The documents may be helpful or may not be in making sure the answers are accurate or correct or whatever, but generally, I'd say Legislatures and Parliaments have the right to get this information so they can make their decisions properly. The failure to get it is a serious issue, and I think if you look at the historical precedent for the exercise of this privilege going back into the British

House and so on, it obviously was a matter of considerable gravity.

At various times, I think there have been cases, but I don't claim to have researched these. I think I may have read about them when I was young, but haven't for a long time. They indicate that Parliaments do have this quite significant power and can enforce it through various means. It's a matter of how.

**Mr. Gilles Bisson:** A question, two parts; first part: In your decision of the Afghanistan situation, as I remember it, you asked the parties to come to some sort of agreement about how they're able to deal with this.

**Hon. Peter Milliken, PC:** Correct.

**Mr. Gilles Bisson:** My question is, if they had not come to an agreement, what would you have done?

**Hon. Peter Milliken, PC:** I think I made it clear that I would rule there was a breach of the privileges of the House. I said that it was important that members not be seen to be damaging national security by making these demands. That's why I said that we should make some arrangement to make sure that national security matters were not made public in the delivery of the documents and invited them to work that out. I said that, in my view, that was the past practice—

**Mr. Gilles Bisson:** That made sense, but what would have happened if the parties couldn't have worked it out? What would you have been stuck with?

**Hon. Peter Milliken, PC:** I guess ordering production.

**Mr. Gilles Bisson:** Ordering production of the documents?

**Hon. Peter Milliken, PC:** Yes, I think so.

**Mr. Gilles Bisson:** So if they had not worked it out, you would have ordered the documents to be released.

How much time do I have?

**The Chair (Mr. Shafiq Qadri):** Two minutes or so.

**Mr. Gilles Bisson:** Two minutes. Let me ask a 30-second question. Do you have anything? Mine are longer than two minutes. We'll bunch our time later, okay?

**The Chair (Mr. Shafiq Qadri):** The time expires, the 20 minutes. You don't recover it later.

**Mr. Gilles Bisson:** Well, listen, if I've got two minutes, I might as well use it. I ain't gonna give it up.

Listen, I guess what's at the crux of it here, and I think you're making it probably clearer, is that in the end the right of a committee and the right of the Legislature—for the committee or a Legislature to do its work, it has certain privileges. One of those is that we have to have the information before us to be able to make the informed decision.

It's pretty clear, by the rulings that we've seen with our Legislature here and the rulings that you've made federally and some of your predecessors, that that is a right that has to be taken seriously. Members and committees have to have the ability to request the information necessary to come to the decisions that it wants. I want to thank you for that, and we'll ask you some questions the next time around.

I figure about now, I've probably killed my two minutes.

**The Chair (Mr. Shafiq Qadri):** Merci, monsieur Bisson. You have about a minute and a half left, but in any case, I'll pass speaking opportunity now to the government.

Mr. Delaney.

**Mr. Bob Delaney:** Mr. Milliken, thank you for having come in.

**Hon. Peter Milliken, PC:** It's a pleasure to be here.

**Mr. Bob Delaney:** It is unfortunate we didn't have a bit more time to bring you up to speed on the sequence of events over which you're being asked admittedly hypothetical questions and asked for your speculation.

You've talked about the ultimate authority of the House to produce documents and the difficult issues and competing interests that you dealt with in your 2010 Afghan detainee ruling.

As you know, we're here in part to review the matter of the Speaker's finding of a prima facie case of privilege with respect to the production of documents by the Minister of Energy and the Ontario Power Authority and the Ministry of Energy to the Standing Committee on Estimates.

Now, the Standing Committee on Estimates in May of last year made a request to three entities, the Ontario Power Authority, the Minister of Energy and the Ministry of Energy, for correspondence—not documents, but correspondence—related to the cancellation of these two power-generating facilities, and it asked for such correspondence and was silent on attachments within a narrow date range.

I'd like to put before you a letter the former minister provided to the Standing Committee on Estimates related to their request for document production, and we'll table that letter with the Clerk. In the letter, you'll see that the minister raised several concerns at the time. He flagged that there were files that were highly confidential and subject to solicitor-client privilege and litigation privilege. The concern raised at the time was that disclosure could have a negative impact on ongoing commercial discussion and litigation.

Ultimately, the committee chose not to address the concerns raised by the former minister. Instead, the majority of the committee decided at the time—May of last year—that it would force the production of sensitive documents. It essentially said, "We want it all, we want it now and we want it public."

Because of this approach by the committee's majority, the minister was ultimately required in a ruling from the Speaker to produce the documents requested. September 24, 2012, was the deadline provided by the Speaker for that production, and the minister claims that he complied with that deadline.

Let's start off with one question. The minister ultimately complied. Shouldn't that end the matter?

**Hon. Peter Milliken, PC:** If he complied with the demand for production of the documents, I would have thought it would have, yes.

**Mr. Bob Delaney:** In your experience, would you find it counterproductive, then, for there to be a finding of contempt based upon an order with which the minister ultimately complied?

**Hon. Peter Milliken, PC:** You mean after the minister complied, there was a finding of contempt?

**Mr. Bob Delaney:** Yes.

**Hon. Peter Milliken, PC:** Oh. I guess if he complied, I wouldn't have thought there'd be a further argument, but I'm—

**Mr. Bob Delaney:** Okay.

**Mr. Gilles Bisson:** Can you speak up, please? I'm having a hard time hearing.

**Hon. Peter Milliken, PC:** I said if the minister had complied, I would have thought there would not be further arguments as to whether there had been a breach or not, because if he complied, I don't know why there would be a breach. I don't understand that.

**Mr. Bob Delaney:** Okay. I'd like to just explore some of your thoughts on some matters raised in earlier questions, particularly about redactions of documents. Given the scope of the request originally made in May by the Standing Committee on Estimates to just three entities, the Ontario Power Authority, the Minister of Energy and the Ministry of Energy, if portions of a document requested lay outside the committee's terms of reference and the scope of that request, must, in your opinion, those portions be submitted pursuant to a request for documents?

**Hon. Peter Milliken, PC:** You mean part of the document was outside of the scope of what the committee was asking for?

**Mr. Bob Delaney:** Yes. Well, if, for example, you're asked for something pertaining to these particular plants and a piece of correspondence related to a matter completely unrelated—in complying with a request for the document, if that portion that lay outside the scope of the request is redacted, does it or does it not violate the request for the document?

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**Hon. Peter Milliken, PC:** So you're saying, if the letter concerned the project that you're talking about but there were paragraphs concerning another project in the letter, can you take those out? I don't know. I guess you could. I don't know why you couldn't. It doesn't appear to have anything to do with what was demanded.

**Mr. Bob Delaney:** Also the time span was very short, and the ministries involved in this case discovered that there were some employees who had left or other circumstances and subsequently found more documents, which they subsequently disclosed. With regard to the redactions, one of the issues here is: Does the civil service have the flexibility to disclose information outside the scope of that requested in an order from a committee?

**Hon. Peter Milliken, PC:** Does it have the authority to do it? I would have thought the public service can make public what they want. I'm not aware of restrictions. I'm not an expert in this area, but I would have

thought they could make public what they want to, unless there's a law that says they cannot. There would be restrictions on them in terms of personal information about individuals, but whether they can make public contracts they've signed or whatever—I don't know the law in that regard. I wouldn't think the law prohibits them from making public such contracts unless there's some security issue or something in there, but I don't know what the laws of Ontario are in respect of government contracts, for example. I don't claim to be an expert in this at all.

**Mr. Bob Delaney:** I understand. I was asking your opinion on it, and I thank you for that.

What advice or caution would you provide to members who are tasked with the various serious responsibilities about making a determination related to contempt to either a sitting member or a former member?

**Hon. Peter Milliken, PC:** Generally, if there's an allegation of contempt respecting a member, I think the normal thing is for the committee that's in charge of the investigation to be thorough in its examination of the evidence of that contempt and, of course, the member's own statements in respect of the matter and what the member thought he or she was doing and whether it was, in the member's opinion, in compliance with the demand that was made.

**Mr. Bob Delaney:** If a minister of the crown makes a statement, based upon information provided to him by his ministry or by the public service, that, at the time he makes it, he truly believes to be accurate, factual and complete, would that place him within the threshold of being found in contempt if such statement is later found to be either inaccurate or incomplete?

**Hon. Peter Milliken, PC:** I guess it was a matter of whether it was deliberately inaccurate on the part of the minister to make the statement. Obviously, that would put him in contempt. But if the minister believed, when he made the statement, that all the information that he or she had available was, in fact, tabled or made available or delivered to the committee or to the House, I'd have thought that would be fine.

**Mr. Bob Delaney:** In your 2010 work on the Afghan question, what time frame was given to produce the documents in question?

**Hon. Peter Milliken, PC:** There was no agreed limit on the time because there was such a volume, they didn't know how long it would take for the panel to go through them, and then appeals to the judges to be dealt with. So there was, in fact, no time limit imposed on the terms of the order.

**Mr. Bob Delaney:** At the time, was it required that all of the documents be delivered at once or could they have been delivered in batches?

**Hon. Peter Milliken, PC:** I'm sure they were delivered in batches.

**Mr. Bob Delaney:** Okay. For the finding of contempt, are there many precedents of finding a member of a provincial assembly or the federal Parliament in contempt?

**Hon. Peter Milliken, PC:** I don't know the answer to that.

**Mr. Bob Delaney:** Is it a censure that is commonly used?

**Hon. Peter Milliken, PC:** I'm sure that it has happened before; whether it was on production of documents or on other issues is another matter. Members can get into trouble for breaching the privileges of other members in the House, and so on. That has happened in the past, I'm sure. Members have been called to the bar of the House and dressed down by the Speaker, on occasion, in the past for various offences in the chamber, so yes, I'd say it has happened. It's not all that common, but it has happened.

**Mr. Bob Delaney:** The threshold is actually quite high. Why is that?

**Hon. Peter Milliken, PC:** The threshold of?

**Mr. Bob Delaney:** The threshold for a finding of contempt is actually quite high. Why is that?

**Hon. Peter Milliken, PC:** I couldn't tell you the answer to that. I think it's in part because the members generally work together in a legislative body and all have similar responsibilities. If somebody is going to be found in contempt of the Legislature as a sitting member of it, you'd want to make sure that there were good arguments in favour of making that kind of decision, because it's potentially damaging to one of your members.

**Mr. Bob Delaney:** All right. Based on your experience—in your view—what factors need to be present for a finding of contempt to be appropriate in the circumstances?

**Hon. Peter Milliken, PC:** A deliberate ignorance or ignoring the order or demand of the chamber, the Legislature, the House.

**Mr. Bob Delaney:** What kind of weight would you place on the word you just used, "deliberate"?

**Hon. Peter Milliken, PC:** Quite a lot of weight. I think, normally, you've got to make sure the person was misleading the House—"fairly deliberately" would be the words you'd want to have applied in there—by not producing documents that were demanded and were required.

**Mr. Bob Delaney:** I'd like to ask the Clerk to distribute a news release by the official opposition back in September 2012. Specifically, on the first page—I'm just going to quote from it—it says, "Contempt of the House is considered extremely serious.... Punishment for a person found in contempt may range from jail time to being brought before ... the House to be censured and admonished by the Speaker."

Again, I'm asking you in the context of your experience at the federal level: Would you agree that raising the possibility of jail time for a former minister in relation to this matter might be inappropriate?

**Hon. Peter Milliken, PC:** I think it might be unnecessary, yes. I would have thought that an admonition in the Legislature or that sort of thing would likely be enough, but I'm not sure. Of course, it's for the Legislature to decide what the punishment would be. I

think it's normally done by resolution; that's my recollection.

**Mr. Bob Delaney:** The news release in this case also raises the possibility of professional sanctions from the Law Society of Upper Canada. In this case, the individual that we're referring to, Chris Bentley, is the former Attorney General and a very prominent lawyer in London. Basically, Mr. Bentley makes his life in the practice of law and always has. The news release raises the possibility of professional sanctions from the Law Society of Upper Canada. Again, I'd like to ask your reaction: Is such speculation an abuse of process?

**Hon. Peter Milliken, PC:** Speculation as to whether the law society would do something?

**Mr. Bob Delaney:** Yes.

**Hon. Peter Milliken, PC:** I'm not sure it's an abuse of process, but it is, as you say, speculation. I have no idea whether the law society would do anything in circumstances where someone was found in contempt of Parliament. I've never heard of them doing anything, but how would I know? It's not something I'm aware of. That's the best answer I can give.

**Mr. Bob Delaney:** Chris Bentley, of course, is now a private citizen. Does it seem appropriate to continue contempt proceedings against a former minister of the crown, who is no longer a member of this assembly, based on what we've discussed here this morning?

**Hon. Peter Milliken, PC:** Yes, if that's the case, I find it odd. I would have thought the argument was, if there is continuing contempt, it would be whoever the minister is for failing to deliver these documents. I assume it's still an outstanding demand, from what you're saying, and if that's the case, the minister can always resolve the matter by tabling the documents, and that's that.

**0930**

**Mr. Bob Delaney:** Okay. And, again, I'd like just your reaction based on your experience. At the time the request was originally made for correspondence from the OPA, the Minister of Energy, the Ministry of Energy, Mr. Bentley was not the Minister of Energy nor associated with the Ministry of Energy, and yet much of the reason that we're here today is to pursue sanctions against someone who was not the minister at the time the request was made.

**Mr. Rob Leone:** Point of order: The motion before the House does not name any individual; it actually names the Minister of Energy, not any particular individual, so I think this line of questioning is out of order.

**The Chair (Mr. Shafiq Qadri):** I'll take your point of order under advisement, although I will not act on it. I give the floor back to Mr. Delaney.

**Mr. Bob Delaney:** Thank you. And given all the comments made in the Legislature, I think it's a little rich of Mr. Leone to claim that something he said in the House doesn't apply here.

**Mr. Rob Leone:** Point of order: In the Legislature, we've never mentioned Mr. Bentley's name. The only people who do that is you.

**The Chair (Mr. Shafiq Qadri):** Mr. Leone, that is not a point of order. I would invite you to pursue that in the Legislature.

Mr. Delaney.

**Mr. Bob Delaney:** To go back to Mr. Milliken and your experience, sir, much of what we are dealing with here pertains to a request for correspondence from three entities during a narrow date range, and much of the objection that we've seen here concerns the actions imputed to a minister of the crown.

I want to come back again to these redactions. What latitude should the civil service have in complying with a request? Does the civil service, in complying with a request, have the latitude to provide a superset of the documents, or would it be expected by a committee that the civil service would do what's asked of them?

**Hon. Peter Milliken, PC:** What's a super—

**Mr. Bob Delaney:** In other words, more than what you asked.

**Hon. Peter Milliken, PC:** Oh. Should they produce more than what was asked for, is what you're asking?

**Mr. Bob Delaney:** Yes.

**Hon. Peter Milliken, PC:** Well, that's up for the minister to decide. The public service can provide whatever they want to the minister, but normally the minister would go through the documents, I assume, and say, "This is what was demanded. This is what I'm producing," and that's it, I assume. I don't know how that's handled, of course, at the administrative level. I think the demand is to the minister to produce, so it's the minister who has to make the final decision, but admittedly, he's going to get a lot of help from public servants who have a whole lot of the correspondence. But of course, it's not his, or very little of it will be, so almost all of it will be stuff that was done by departmental officials.

**Mr. Bob Delaney:** And obviously it would be very difficult for the minister to presume what is or isn't in documents that were generated by that ministry when he wasn't the minister of the crown.

**Hon. Peter Milliken, PC:** Sure.

**Mr. Bob Delaney:** Okay. Thank you, Chair.

**The Chair (Mr. Shafiq Qadri):** Thank you, Mr. Delaney.

The floor now goes to the official opposition, to Mr. Yakabuski. Ten minutes.

**Mr. John Yakabuski:** Thank you very much, Chair.

Again, Mr. Milliken, thank you for joining us.

I just wanted to touch on an item, a question you were asked by the governing party here and your answer on it. I'll go back to the press release that he cited on the 21st of September 2012: "'Contempt of the House is considered extremely serious,' Wilson continued. 'Punishment for a person found in contempt may range from jail time to being brought before the bar of the House to be censured and admonished by the Speaker.'"

He asked you, I would suggest, a political question in that regard, to which you answered your own view as to what you might have done, not necessarily as the Speaker but as a politician, it sounded to me. But my question to

you would be as someone who is considered to be an expert in procedural matters. Was there anything in that statement that was inaccurate from the point of view of what the possible censure could be for someone found in contempt of Parliament? I think that is the question, not what someone may have done in their case. It was simply outlining the possible penalties. Is that statement accurate?

**Hon. Peter Milliken, PC:** As far as I know, it is.

**Mr. John Yakabuski:** Yes. Thank you very much.

I'll turn it over to—

**The Chair (Mr. Shafiq Qadri):** Mr. Leone.

**Mr. Rob Leone:** Mr. Milliken, when a Speaker in a Commonwealth Parliament finds a person in prima facie breach of privilege, what exactly does that mean?

**Hon. Peter Milliken, PC:** In contempt, not—is that what you're asking?

**Mr. Rob Leone:** If you want me to repeat the question—

**Hon. Peter Milliken, PC:** The privileges are the privileges of the House itself that have been breached by a person. My understanding is that if there has been a breach of privilege, then that person has been found in contempt of the House for breaching its privileges.

**Mr. Rob Leone:** Okay, thanks. Now, if the cabinet had knowledge that not all documents were tabled, but numerous ministers stood in the House and repeatedly said the opposite, would that concern you?

**Hon. Peter Milliken, PC:** You mean they've said that all the documents were tabled?

**Mr. Rob Leone:** Yes.

**Hon. Peter Milliken, PC:** I see. Well, they would be inaccurate statements if they haven't all been, yes.

**Mr. Rob Leone:** And if portions of the documents that we have requested have been redacted—you've seen a small portion of them, and there's lots of them—would that, in your view, constitute the release of all documents to date? Even though we have requested them all—

**Hon. Peter Milliken, PC:** There's certainly an argument about it, if they have been redacted in that way, because you haven't received the documents. You've got nothing that's in it, really, except an indication there was one.

**Mr. Rob Leone:** Okay. If a staff member in the ministry or ministry officials tell their minister to say something that is untrue, whether intentional or not, once that statement is found to be untrue, wrong or incorrect, is there, in your view, a moral or parliamentary obligation to immediately correct the record?

**Hon. Peter Milliken, PC:** I'd think a minister would want to. If a minister had made an incorrect statement because of information that he or she had been given, if there was something that came out later that was damaging or altered the answer that had been given, you'd think you'd want to say, "My answer was incorrect because I've now discovered this, this and that," to make sure the Legislature was not misled.

**Mr. Rob Leone:** Then in the event that they potentially knew of the fact that their previous statements or

attestations were untrue and they waited some weeks before they actually informed the House of that, would that, in your mind, be a breach of our privileges as members of the House?

**Mr. Bob Delaney:** Chair, on a point of order.

**The Chair (Mr. Shafiq Qaadri):** Point of order, Mr. Delaney.

**Mr. Bob Delaney:** I believe Mr. Leone is asking the witness to comment on something on which the Speaker has already ruled.

**Mr. Rob Leone:** Which you were doing as well, just to be clear.

**The Chair (Mr. Shafiq Qaadri):** Thank you, Mr. Delaney. We take your point of order under advisement. It is up to the witness whether they answer or not.

Please continue, Mr. Leone.

**Mr. Rob Leone:** Mr. Milliken?

**Hon. Peter Milliken, PC:** Well, if the answer is given, whether it took a week or three weeks or two days or an hour I don't think is of particular concern. Once the answer is given, say the corrected answer, then there's no more contempt; it has ended it because the issue—

**Mr. Rob Leone:** How about if it was some weeks afterward?

**Hon. Peter Milliken, PC:** Well, I don't think the time is the issue, because if it's coming before the Legislature as to whether there was contempt, once the answer is given, that's the end of the contempt. You've made do. So I wouldn't have thought the timing was an urgent thing.

**Mr. Rob Leone:** But in the absence of the complete release of documents—because I believe we still do not have a complete release. We have asked for all documents. There are redactions, gaps in time and information missing. We would expect some documentation from the minister, from the Premier's office; we've requested all that information. In the absence of having that information, would you consider that still to be in breach of privilege, given our position that all the documents have not been released?

**Hon. Peter Milliken, PC:** Well, it's certainly a subject of argument for the Speaker to decide.

**Mr. Rob Leone:** Mr. Yakabuski has raised a pretty interesting question: In the future, if we should receive more documents, would that prove the inaccuracy of the statement that ministers have made in the House, in terms of the complete release of documents?

**Hon. Peter Milliken, PC:** You mean a minister has said, "Everything has now been released."

**Mr. Rob Leone:** That's right.

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**Hon. Peter Milliken, PC:** Well, it may be that everything the minister had has been released, and maybe there are other documents that the minister has never seen, that he doesn't know about, that haven't been. I don't think the minister is misleading the House if that turns out to be the case and some other documents were turned up from some other source or some other part of the

department that he had never seen. This is the difficulty with a large administrative department.

**Mr. Rob Leone:** True, but if there's a compliance date in the order of the House, that we want requested documents by a specific date, and we still have not received all those documents and the compliance date has long since passed, does that pose a problem to you in terms of what we're dealing with here?

**Hon. Peter Milliken, PC:** Not to me.

**Mr. Rob Leone:** In your opinion.

**Hon. Peter Milliken, PC:** It's a matter for the committee or whoever is making the demand, whether the Legislature or a committee that's making the demand, but it may be that they wanted to question some other officials who have been the ones who produced the set of documents for the minister to table. Who knows? I don't know how these things are done. The committee might want to find that out to see if they're getting everything because the minister may genuinely not know of things that have gone on, handled by other people, that have not made these available to the minister. This can happen, too.

It's not an area where everything is just as black and white as can be. You may have to look at other individuals.

**Mr. Rob Leone:** We'll have an opportunity to interview, in the course of our investigation, people who could answer that question for us.

If, during the Afghan detainee matter, you had uncovered examples of political interference at the staff or elected officials—that either staff had ordered departmental people to withhold documents from Parliament, would that be of concern to you?

**Hon. Peter Milliken, PC:** Yes, if that had come up. Yes.

**Mr. Rob Leone:** So if we have evidence—and we believe we do—that a member of a political staff has refused to release documents on this matter, that would be of concern to you, in terms of asking ministry officials, the Ontario Power Authority, to withhold documents? Would that concern you?

**Hon. Peter Milliken, PC:** If they hadn't been released as a result, yes, I suppose it would. Somebody can say, "Don't give that away," but if they go ahead and give it, then what difference does it make that the person said that? If that's your question.

**Mr. Rob Leone:** Last October, we were told that we had received all documents. We just had a release two weeks ago of another batch.

**The Chair (Mr. Shafiq Qaadri):** About a minute left.

**Mr. Rob Leone:** My question is, does that gap in time, in your view, constitute non-compliance with an order of the House?

**Hon. Peter Milliken, PC:** It's a matter for the House to decide, but there may be reasons why it was not made available at the time. There may be the fact that they were unavailable or undisclosed to the minister. Who knows? I don't know anything about it, but clearly, the

committee of the House considering the matter can look at those facts.

**Mr. Rob Leone:** How much time do I have?

**The Chair (Mr. Shafiq Qadri):** Thirty seconds.

**Mr. Rob Leone:** I will conclude, Speaker Milliken, by just suggesting that I think in summary, we have established that a breach of privilege has existed, that there has been non-compliance with the order of the House—I think those are the claims that we have made—and that we still do not have a complete release of the documents, which is in breach of an order of the House, which is why we continue to pursue this matter. Thank you, Mr. Chair.

**Le Président (M. Shafiq Qadri):** Merci, monsieur Leone. Je passe la parole à M. Tabuns.

**Mr. Peter Tabuns:** Thank you, Mr. Chair; Mr. Milliken.

Following on Mr. Leone's questions, we as a committee demanded production of documents. We were given a large batch of documents and told, effectively, that everything is now healed. When that was done, a short time later, yet another batch of documents was produced, and we were told that everything had been addressed. Then a third batch of documents was produced and we were told that everything had been addressed. As you might imagine, this has formed a suspicion in our minds that, in fact, not all documents were produced, and as has been said by the opposition, we see documents blanked-out. Given the level of what we think is well-found suspicion, we don't have confidence that what was blanked-out was necessarily irrelevant to the matter before us.

I assume, based on things you've said so far, that you would see strength in our argument that this breach of privilege has not yet been healed and that it is reasonable for us to ask for evidence to determine whether or not there is an end to the breach of privilege?

**Hon. Peter Milliken, PC:** Well, I can see why the issue is around, yes, given the circumstances you've just outlined.

**Mr. Peter Tabuns:** In one instance, we asked the Premier's office, under a freedom-of-information request, for documents relating to Operation Vapour, to operation vapourlock—documents that had been released in batches by the government at an earlier point. We knew that there were documents beyond those in the time frame specified, and—

**Mr. Bob Delaney:** Chair, on a point of order.

**The Chair (Mr. Shafiq Qadri):** Mr. Delaney.

**Mr. Bob Delaney:** May I ask whether or not a question regarding an FOI from the Premier or anyone else is within the scope of this committee's mandate?

**Mr. Peter Tabuns:** If I may say simply, my question leads to the question of violation of privilege. I understand the point you're making. I'm coming back to the documents that were released and their continued existence.

**The Chair (Mr. Shafiq Qadri):** Thank you, Mr. Delaney. We'll prompt Mr. Tabuns to make the connection.

Please continue.

**Mr. Peter Tabuns:** When we asked for documents, some of which we had in our hands that had been released in one of the document dumps, we were told that such documents did not exist, and when we pressed further, we were told that there wasn't a requirement to preserve documents.

Can you tell us: Is it the responsibility of governments who are undergoing questions for production of documents to ensure that those documents are preserved?

**Hon. Peter Milliken, PC:** I have not read anything on that subject. I don't claim to know an answer to that one, and of course I don't know what government practice is in respect of maintaining or keeping documents in terms of records. When there is a demand for production, all I can say is, the documents that are in existence should be produced. That's what the request is for.

If some of the documents had been destroyed, obviously they're not going to be produced. Of course, it's possible that some of these were destroyed without the minister being aware of it because somebody else lost them or destroyed them. It could happen that you shred something by mistake that was an important document that should have been in the bundle that got tabled but wasn't because it was gone. I don't know how a demand for documents, once made and complied with in terms of delivery, can be argued to be incomplete if that sort of thing happened. I say "if": I'm not urging that it happened at all—don't misunderstand me—but I can see that it could happen. Just working in an office, you may have chucked something out that you shouldn't have, and then the document is lost. So when a demand for production comes along, somebody has to go through all the files and bring them out, and if that one isn't in there, it isn't there, and who's going to know? It's just one of those issues.

Where you could see it happening is, if a Legislature demanded production of documents and the government's copy of the letter that was sent to somebody else was destroyed and lost, but then the person who received the original letter comes up months later and says, "Oh, here's a document. This wasn't produced to you," do you then hold the minister in contempt for not producing it? I don't see how you could, because it wasn't in their possession.

That kind of argument might arise in a situation involving a big volume of correspondence. Similarly, I can see why you might have delays in getting chunks of documents because others were found that hadn't been located when the initial search was made or were in some other office or some other filing cabinet or somebody forgot about them and didn't produce them. Who knows? The committee, of course, can investigate why that happened; that's up to them. But the essential thing is I think that the documents be produced, whatever the government has, and that's the issue.

In terms of destruction, I'm unaware of any rules or anything of concern that deal with that issue within government or within Parliaments, for that matter. I just

don't know how you can go beyond getting what is in physical existence. So, technically, somebody who really wanted to make sure nothing happened could destroy the documents. If it was done before the demand was made for their production, that's the end of that.

**0950**

**Mr. Peter Tabuns:** There is no requirement for a government to preserve documents, or a body of documents, that have been requested by Parliament?

**Hon. Peter Milliken, PC:** There probably is a requirement in the law that they preserve them, but I don't know the ins and outs of that at all. I have no idea what the law requires, but if they were in the habit of destroying documents, and those were gone when the demand came from the Legislature or House to produce them, obviously they are not going to be produced, unless they're available in some other format, like maybe a disk, nowadays, which could happen and which might not have been the case 15 years ago or five years ago.

**Mr. Peter Tabuns:** In going through your Afghan detainee ruling last night, you were quite strong on the issue of the supremacy of Parliament in these matters. Is there any reason to think that this Legislature should have a different approach to the power of the Legislature when it comes to production of documents?

**Hon. Peter Milliken, PC:** Not that I'm aware of.

**Mr. Peter Tabuns:** And you made it clear that there may be circumstances in which a government might be reluctant to issue documents or make them available, but nonetheless, you reiterated the supremacy of Parliament throughout.

**Hon. Peter Milliken, PC:** Yes, and as you would no doubt be aware, if there had been a majority in the House, I suspect that the motion demanding production might not have passed, given it was an opposition motion. Given there was not a majority on the government side, the opposition passed the motion over government objections. The demand was made—it wasn't done in the House; I think it was done in a committee in the Afghan case—and the government had to comply and, obviously, was very reluctant to do so, in my impression. That was the reason the issue was raised, months later, in the House.

**Mr. Peter Tabuns:** My understanding is that, subsequent to all of this—subsequent to your ruling—there was prorogation and an election.

**Hon. Peter Milliken, PC:** Yes, and that's why I'm unaware of whether the documents have ever been produced, whether the committee ever finished its work and whether, in fact, it's continuing to work, because it may be argued now—and as I say, I don't know what has happened—that, with dissolution, the order or demand for the production of documents is dead. I don't know whether that argument has been advanced in the committee or not; I've heard absolutely nothing.

**Mr. Peter Tabuns:** I don't know if that argument has been advanced either. We find ourselves in a situation where a motion was reintroduced, this committee has

been struck and we're investigating the violation of the privilege of this Legislature.

**Hon. Peter Milliken, PC:** Exactly, and I don't know the ramifications of dissolution in that respect. I am just unaware. I didn't research it. I didn't have time to look at it after I heard about this yesterday.

**Mr. Peter Tabuns:** How much time do I have left?

**The Chair (Mr. Shafiq Qaadri):** Fourteen seconds.

**Mr. Peter Tabuns:** Fourteen seconds. Well, I would like to thank you for coming here this morning.

**Hon. Peter Milliken, PC:** It was a pleasure.

**Mr. Peter Tabuns:** It was instructive, and I appreciate the work you did in the House on the Afghan detainee motion. All of us have used it to inform our actions—

**The Chair (Mr. Shafiq Qaadri):** Thank you, Mr. Tabuns.

To the government side: Mr. Delaney.

**Mr. Bob Delaney:** I guess, as your last little piece with us here this morning, Mr. Milliken, I'd like to explore a little more along the lines of the scope of a request by a committee for the release of documents.

**Hon. Peter Milliken, PC:** For the production of documents?

**Mr. Bob Delaney:** The production of documents; excuse me.

**Hon. Peter Milliken, PC:** It might also get released, but it is "production."

**Mr. Bob Delaney:** Production. Okay.

Just as a recap: What was originally requested was correspondence from the Ontario Power Authority, the Minister of Energy and the Ministry of Energy between two date ranges. Is there a case for privilege if a document lies outside the date range?

**Hon. Peter Milliken, PC:** I wouldn't have thought so.

**Mr. Bob Delaney:** Okay. Would there be a case of privilege if a document rested within the power, possession and control of, say, the Minister of the Environment?

**Hon. Peter Milliken, PC:** Where the demand was to the Ministry of Energy?

**Mr. Bob Delaney:** To the Ministry of Energy and the Minister of Energy.

**Hon. Peter Milliken, PC:** I wouldn't have thought so.

**Mr. Bob Delaney:** Okay.

**Hon. Peter Milliken, PC:** Unless the letter came from the Minister of Energy to the Minister of the—

**Mr. Bob Delaney:** Okay, fair enough. And with the caveat that you have mentioned, would that include all ministries of a government save and except for those from which the specific request was made?

**Hon. Peter Milliken, PC:** No. I would have thought if the request was made for the correspondence in three specified departments or areas or organizations, that's all that would have to be produced to comply with the order.

**Mr. Bob Delaney:** All right, and that would include the Office of the Premier of Ontario, which was not asked for the production of documents—

**Hon. Peter Milliken, PC:** Yes, they wouldn't have been included. The Premier's office was not included in the request.

**Mr. Bob Delaney:** That's correct.

**Hon. Peter Milliken, PC:** Right.

**Mr. Bob Delaney:** Yes, okay.

I just want to talk a little bit about the document type requested. The document type requested, and it was very specific in the motion, was correspondence. So if a piece of paper, electronic or otherwise, is produced that falls outside the realm of correspondence, must that be included in that production of documents?

**Hon. Peter Milliken, PC:** I wouldn't have thought so.

**Mr. Bob Delaney:** Okay. In your experience, how did you adjudicate the scope of document production when such matters arose before you in the House of Commons?

**Hon. Peter Milliken, PC:** I don't think I ever had to deal with the issue of scope. It was simply a matter of whether the documents were being produced. I don't recall arguments, even on motions, for the production of papers that were adopted in the House. I don't recall arguments about the materials that were or were not tabled in those things. It may have happened, but if so, it usually happened in a committee, I think, where the member might go and complain that he tabled his motion and didn't get this or that. But how often do you know? I'm sorry, it's not a question I can readily—

**Mr. Bob Delaney:** No, I understand. I just want to ask another process-related question on the production of documents. You spoke about the Afghan issue and you said that you had asked the parties involved to work out an arrangement. In saying that, you were not prescriptive about the arrangement, but you said, "There are matters of national security here. Work out an arrangement."

In this case, the then Minister of Energy said, "I am caught between a rock and a hard place. We're dealing with documents that are the subject of litigation that are commercially sensitive," and the minister asked for some sort of arrangement.

Talk to me a little bit about what might have been the process that the parties could have followed in the circumstances to resolve this impasse in between the public release of documents and what other arrangements might have been within the realm of the possible.

**Hon. Peter Milliken, PC:** I would've thought one of the things that could happen is that a committee that demanded the production of the documents could have sat down with the minister in an in camera session and received the documents in camera, on the understanding they'd be handed back to the minister at the end of the in camera session. So they'd have a look at them and see what was there. But the idea with an in camera thing is, you would not have a public hearing of discussion about the documents and no public access to the documents, but the committee members could look at the documents. And then, the documents would be removed at the end of the hearing and taken out. That kind of arrangement could be made, in my view, and it could have happened with the Afghan documents, but because it was a national

security issue they didn't want to make it available to that many people.

**Mr. Bob Delaney:** Okay.

**Hon. Peter Milliken, PC:** It didn't happen.

**Mr. Bob Delaney:** In fact, all parties were offered exactly such an arrangement, and the majority on the committee demanded all the documents, all public, all now.

**Hon. Peter Milliken, PC:** This is here, in the Legislature?

**Mr. Bob Delaney:** Yes.

**Hon. Peter Milliken, PC:** I see.

**Mr. Bob Delaney:** Yes. So this left the minister of the day in a situation in which he either faced a contempt hearing, if he complied with the majority on the committee, or censure possibly from the law society and certainly litigation on behalf of the parties if he released documents that were then the subject of contractual negotiations, contained sensitive commercial information and, in fact, in some cases, were before the courts. How does that leave the minister?

**Mr. Peter Milliken, PC:** It's hard for me to say. That's a legal issue rather than a procedural one, so I don't know what the ramifications of that are. As I say, I'm not—I know I'm a lawyer, but I haven't practised for years, so I'm not familiar with that.

From a procedural point of view, it's not something that I think the Speaker would hear about until something had gone seriously wrong.

**Mr. Bob Delaney:** I'd like to read you a quote here. It goes as follows: "The minister is under no obligation"—

**Mr. John Yakabuski:** On a point of order.

**The Chair (Mr. Shafiq Qadri):** Point of order, Mr. Yakabuski.

**Mr. John Yakabuski:** You'll have to rule on whether this is a point of order. The member indicated that the minister had made an offer to the committee. We dispute that and we'd like to have some clarification. Can you give us a date from Hansard as to when the minister made that offer to the committee?

**The Chair (Mr. Shafiq Qadri):** Mr. Yakabuski, that's considered in the realm of a dispute over the facts and is not officially a point of order. Once again, I'd invite you to pursue that in the chamber.

Mr. Delaney?

**Mr. Bob Delaney:** Thank you.

My last question, sir: I'd like to read a quote from you. "The minister is under no obligation to resign for something a civil servant alone has done. This was never what ministerial responsibility meant ... the doctrine of ministerial responsibility, therefore, cannot always mean that a minister must resign for everything that goes wrong in his department."

Does that sound—

**Mr. Peter Milliken, PC:** Who said that?

**Mr. Bob Delaney:** It was, in fact, Mr. Leone in his PhD thesis.

**Mr. Peter Milliken, PC:** Oh, sorry. I thought you were quoting me. I thought that's what you said.

**Mr. Bob Delaney:** Oh, no. it's not your quote, sir; it's Mr. Leone's in his PhD thesis from McMaster University. Would you agree with Mr. Leone on that statement?

**Mr. Peter Milliken, PC:** I guess so.

**Mr. Bob Delaney:** All right. I think we're done. Thank you very much, Mr. Milliken. You've been a good sport and we really do appreciate your having come in, particularly on such short notice and without having the time to be fully briefed on the matter. Thank you so much for your attendance this morning.

**Mr. Peter Milliken, PC:** A pleasure to be here. Thank you.

**The Chair (Mr. Shafiq Qadri):** I just thank you, Mr. Delaney. I'd also like to thank all members of the committee for beginning this testimony, and especially to you, Speaker Milliken. We are honoured by your presence. I'm sure the committee has benefited from your deliberations.

**Mr. Peter Milliken, PC:** Thank you, Mr. Chairman.

**Mr. Rob Leone:** Point of order.

**The Chair (Mr. Shafiq Qadri):** Mr. Leone, point of order.

**Mr. Rob Leone:** I do have to correct the record, because if Mr. Delaney actually finished reading my dissertation, he'd know that misleading the House is actually a resignable offence.

**The Chair (Mr. Shafiq Qadri):** I'm not really sure what kind of point that is, Mr. Leone, but I'll pass the podium to Mr. Tabuns.

**Mr. Peter Tabuns:** Yes, I'd like to move a motion, Mr. Chair, and I will provide copies to the Clerk for circulation to the committee.

**The Chair (Mr. Shafiq Qadri):** Sure. As we're providing that, we'll have you read the motion.

I should also just advise committee members that though we're technically to go till 10:15, we will adjourn after the motion presentation and then reconvene at that time, Tuesday, March 19 at 8:30 a.m., to pursue our next line of testimony. I would, in that spirit, also—

**Mr. Peter Tabuns:** Well, listen to my motion and then make that statement.

**The Chair (Mr. Shafiq Qadri):** Please go ahead.

**Mr. Peter Tabuns:** I move that in addition to the committee schedule agreed to on March 5, 2013, the Standing Committee on Justice Policy meet on Wednesday, March 13, 2013 from 9:30 a.m. to 11:00 a.m. to hear witnesses and to consider the matter of the Speaker's finding of a prima facie case of privilege, in the tendering, planning, commissioning, cancellation and relocation of the Mississauga and Oakville gas plants.

**The Chair (Mr. Shafiq Qadri):** Though your motion is in order, Mr. Tabuns, I just remind the committee that the subcommittee decision was to sit only during sessional days, meaning when Parliament itself is sitting.

**Mr. Peter Tabuns:** That may have been the subcommittee's recommendation, but this committee can make its own decisions.

**The Chair (Mr. Shafiq Qadri):** The motion is now under discussion. The floor is open for discussion. Mr. Delaney?

**Mr. Bob Delaney:** Chair, what's the point of this?

**Mr. Peter Tabuns:** If I may speak to that.

**The Chair (Mr. Shafiq Qadri):** Yes, Mr. Tabuns.

**Mr. Peter Tabuns:** To allow us to move forward on this, Mr. Chair. Time is available. We have a lot before us. Members of the committee are available, and I believe we need to continue.

**The Chair (Mr. Shafiq Qadri):** Mr. Tabuns, I appreciate the pursuit that you're exercising here of the committee's deliberations. Your comment that all committee members are available is probably incorrect, but in any case—Mr. Bisson?

**Mr. Gilles Bisson:** No, no. I'm just—

**The Chair (Mr. Shafiq Qadri):** Is there any further discussion on this motion?

**Mr. Bob Delaney:** Chair, does the committee have the flexibility to meet on a day on which the committee is not normally scheduled? And this is in constituency week, when most of us at this point have already made plans.

**The Chair (Mr. Shafiq Qadri):** Agreed.

Mr. Bisson?

**Mr. Gilles Bisson:** Well, no; disagreed. First of all, the committee can meet at the call of the Chair, as per the order of the House, and this committee will decide when it wants to meet and how it wants to meet.

The other point I would make is that it's not without precedent that committees meet during constituency weeks. For example, the finance committee will be meeting next week in order to do pre-budget consultation. This is not anything new and strange.

**The Chair (Mr. Shafiq Qadri):** Thank you.

Are there any further comments before we—

**Mr. Rob Leone:** Call the question, Chair.

**The Chair (Mr. Shafiq Qadri):** All right. The motion that Mr. Tabuns has presented is now before the floor. All in favour? All opposed? Carried.

This committee will therefore reconvene Wednesday, March 13, at 9:30 a.m.

The committee is adjourned.

*The committee adjourned at 1006.*



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