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Chair

Mr. John Williams

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● (1535)

[*English*]

The Chair (Mr. John Williams (Edmonton—St. Albert, CPC)): Good afternoon, ladies and gentlemen.

The orders of the day are pursuant to Standing Order 108(3)(g), chapter 3, the sponsorship program; chapter 4, advertising activities; and chapter 5, management of public opinion research of the November 2003 report of the Auditor General of Canada referred to the committee on February 10, 2004, privilege, powers, and immunities of the House of Commons.

Our witnesses today will be appearing not all together but one at a time or as groups at a time. First, from the House of Commons, is Mr. Rob Walsh, the law clerk and parliamentary counsel. As individuals we have Ms. Catherine Beagan Flood, counsel to the House of Commons at the Commission of Inquiry into the Sponsorship Program and Advertising Activities; Mr. Guy Pratte, counsel to Jean Pelletier, Commission of Inquiry into the Sponsorship Program and Advertising Activities; Mr. Pierre Fournier, counsel to the Honourable Alfonso Gagliano, Commission of Inquiry into the Sponsorship Program and Advertising Activities; and Mr. Richard Auger, counsel to Charles Guité, Commission of Inquiry into the Sponsorship Program and Advertising Activities. From the Department of Justice we have Mr. Warren J. Newman, general counsel, constitutional and administrative law. And that is it.

As I mentioned, first of all we're going to start off with a statement by Ms. Catherine Beagan Flood, who will in essence, I understand, convey to this committee the remarks of Mr. Justice Gomery and others at the commission of inquiry regarding this issue of House of Commons privilege. That will be followed by Mr. Guy Pratte, who I understand will be speaking also on behalf of Mr. Pierre Fournier. Because they pretty well have the same story, I didn't think there would be a need to have it replicated. Mr. Richard Auger, counsel to Mr. Guité, who I understand hasn't arrived at this point in time, may be coming forward to present his arguments. That will be followed by Mr. Warren Newman from the Department of Justice.

In essence, this is for us to hear the arguments. We don't want to get into legalese. We're parliamentarians. This is not a legal argument. This is a parliamentarian argument. They're going to be presenting their positions.

I would hope that while there may be one or two questions, the questions will be to further elicit information. As I mentioned yesterday at the steering committee, there will be no questions of seeking advice or opinion from these people, even though they are lawyers, because they're not our lawyers. Mr. Walsh, who will be appearing as a witness later on, will be available to answer and ask questions, if you want a legal opinion of the law clerk. I would hope that you would restrict your questions at the beginning to elicit additional facts, if you don't feel you're in command of all the facts.

The other thing I would like to say, since this is on the record, as you all know, is that we refrain from talking about the Gomery commission—it is the commission of inquiry—and that we also recognize the commissioner as Mr. Justice Gomery, or Mr. Justice Gomery the commissioner, or the commissioner, so we maintain the decorum of the room.

As I think we know, or as Ms. Beagan Flood is going to advise us, the issue before us is the powers, privileges, and immunities of the House of Commons.

So without further ado, I will turn it over to you, Ms. Beagan Flood, for an opening statement. The floor is yours.

Ms. Catherine Beagan Flood (Counsel to the House of Commons, Commission of Inquiry into the Sponsorship Program and Advertising Activities, As Individual): Thank you. Good afternoon, Mr. Chairman. Good afternoon, members of the committee.

I understand that I have been invited to appear before this committee to formally relay to the committee the request made by Justice Gomery, as commissioner of the Commission of Inquiry into the Sponsorship Program and Advertising Activities, that the House of Commons consider whether it is prepared to waive its parliamentary privilege with respect to the testimony given by witnesses before this committee.

To give just a little bit of background to my involvement in this issue, I was retained on October 17, after notice was given to me as counsel for the House of Commons, of the fact that counsel for Jean Pelletier had advised the commission that he wanted to be able to use transcripts from the hearing before this committee in the course of his cross-examination of witnesses before the Gomery commission. So the commission counsel gave formal notice, as he believed the House of Commons might want to make legal submissions on that issue, and indicated that if the House of Commons did want to make such submissions, they should be made the next morning before the Gomery commission.

I was retained by the House of Commons to appear before the commission essentially as *amicus curiae*, which is a friend of the court. That is someone who doesn't take a position on the factual matters that are before the commission, but instead someone who makes legal submissions to assist the commission in deciding some legal principle, and here that legal principle was the scope of the parliamentary privileges of the House of Commons.

I've handed out to the members of the committee an excerpt from a decision of the judicial committee of the Privy Council that summarizes very succinctly what that privilege is. I don't intend to go into any legal arguments, but I understand this has been passed out. I simply want to refer to that as something that gives a bit of a summary of the kinds of submissions I made before Justice Gomery.

On last Monday, October 25, Justice Gomery gave the counsel who wished to be able to use the testimony of this committee an opportunity to present their case to him. He heard submissions from counsel for Jean Pelletier, counsel for the Right Honourable Jean Chrétien. Those submissions were also supported by counsel for the Honourable Alfonso Gagliano, although no additional submissions were made by him.

Those counsel all took the position that it would not be a breach of parliamentary privilege for them to challenge the truthfulness of a witness before the commission of inquiry by pointing out inconsistencies between the evidence that this witness had given before this committee and statements that he or she made in evidence before the commission of inquiry.

In the alternative, Mr. Pratte, on behalf of Jean Pelletier in particular, submitted that if the commissioner agreed with the legal arguments I had presented on behalf of the House of Commons that parliamentary privilege did apply in these circumstances, or if the commissioner thought the legal conclusion was somewhat unclear, he submitted that what the commissioner should do was to ask the House to waive that privilege.

Sylvain Lussier, who represented the Attorney General of Canada, also suggested that the commissioner might want to petition the House of Commons to waive the privilege. However, he suggested that the commissioner might want to wait until a specific circumstance had arisen—a circumstance in which there was a particular witness who was being presented with allegedly inconsistent statements—and then make the request for waiver at that time.

After hearing from all counsel who had been asked to make submissions or who had asked to make submissions on the privilege issue, Justice Gomery requested that I discuss further with my client, the House of Commons, whether the House would be prepared to waive its privileges if a situation were to arise before him in which counsel seek to use the transcripts of this committee to challenge the credibility or truthfulness of a witness who seems to have made inconsistent statements in evidence before the commission of inquiry as compared to the statements made before this committee.

● (1540)

I reminded the commissioner that such a waiver would require a resolution of the House of Commons. In light of that, the commissioner asked that I discuss the issue of waiver with the House of Commons immediately, as he was concerned that there might be significant delays if the possibility of waiver were not considered until a specific circumstance arose in which there was a witness who was alleged to have made prior inconsistent statements.

Now I know that much of what Justice Gomery said in the commission of inquiry has been read before this committee, and I don't intend to repeat that, unless you would like me to refer to that again. I did want to mention that there was a further reference, which I'm not sure is before the committee yet.

At page 4626 of the transcripts of the commission, which was the very ending of that day of hearings, the commissioner said:

> I wonder if there couldn't be some discussion of that possibility [of waiver] with your client immediately to obviate unnecessary delays at a later stage. But we are talking always about a theoretical possibility and that is a difficulty.

He's referring there to the fact that this issue might never arise. It's possible that there may not be a circumstance in which there is an alleged inconsistency.

Then he went on to say:

> Still, I would like it very much if you at least could broach the subject with your client with a view to finding out the intensity with which they insist upon their privilege in this case.

And that is what brings me here, to relay to this committee the request from Justice Gomery that the House consider whether it is prepared to waive its freedom of speech if a situation arises in which there are alleged inconsistencies between a statement made by a witness before this committee and evidence given by the same witness before the Gomery commission.

I understand that this committee is considering whether it should make any report or recommendation to the House with respect to this issue. I'm subject to the questions of the committee.

● (1545)

The Chair: Thank you very much, Ms. Beagan Flood.

She's made the situation quite clear. Mr. Justice Gomery would like us to consider this matter and it's currently before us. I wouldn't want to spend too much time at this point because the debate will be with other witnesses.

Mr. Tonks.

Mr. Alan Tonks (York South—Weston): May I ask a question of clarification? The witness just said the question was whether the House is prepared to waive freedom of speech. Was that the correct enunciation? How is freedom of speech and waiving parliamentary privilege the same?

The Chair: Now you're getting into legal parts of the bill, the Bill of Rights 1689, which talks about the freedom of speech.

Could you quote that little segment, Mr. Walsh, to answer Mr. Tonks, because this phrase comes from the Bill of Rights 1689?

Mr. Rob Walsh (Law Clerk and Parliamentary Counsel, House of Commons): Mr. Chairman, the language of article 9 in English is as follows:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament;

The Chair: Thank you.

Mr. Fitzpatrick.

Mr. Brian Fitzpatrick (Prince Albert, CPC): I can understand the logic behind this sort of thing if you're talking about actual parliamentarians, because we have to have the separation of state or the legislative from the judicial branch and all that sort of thing. I'm wondering whether this is not a stretch when you're talking about a witness.

The Chair: Mr. Fitzpatrick, I said at the beginning you are not going to ask opinions of these witnesses. When you want opinions, Mr. Walsh will be before the committee later on. That question is out of order.

Mr. Carr.

Mr. Gary Carr (Halton, Lib.): A quick question. You mentioned that Mr. Justice Gomery wanted to wait in anticipation of something arising. From his standpoint, what would be the reason in trying to get it now as opposed to waiting when it actually arises?

Ms. Catherine Beagan Flood: I think there were a couple of reasons that he expressed. One was that if the commission or if the House of Commons were to wait until the situation actually arose, there could be some delay in making a determination, because obviously this committee is considering this issue and may report and make a recommendation to the House. The House will then consider it. The House may have a debate about that or the House may refer the matter back to this committee or to another committee to consider it. He was concerned that the proceedings before him could be delayed for days or even weeks while this matter is being considered before the House of Commons.

He did also say that it seems very likely that the issue will arise before him. It's been raised by a number of counsel, who of course know what was said before this committee and know what is likely to be said before the commission. So given the likelihood that it will arise and the delay that is likely to be caused if one were to wait for a concrete circumstance, my understanding is that those are the reasons he asked that it be considered ahead of it actually arising.

Mr. Gary Carr: One quick follow-up.

The Chair: Very briefly.

Mr. Gary Carr: Just in terms of the timing, as you know, this House won't be sitting after Christmas. What is your timing if we don't get anything done by Christmas? What is the schedule of the commission? When are they meeting next? Do you know?

The Chair: I'll allow the question as to what is the schedule of the commission. If the House doesn't make up its mind, the House doesn't make up its mind.

Mr. Gary Carr: Mr. Chair, I know what is happening.

The Chair: I know. What's the schedule of the commission?

Mr. Gary Carr: That's why I'm asking based on ours. The question is, what is happening with the schedule of the inquiry?

The Chair: Mr. Walsh.

Mr. Rob Walsh: In fairness to Ms. Beagan Flood, she's not here on behalf of the commission. She may have some information on that, but she's not in any position to inform this committee about what may or may not be the schedule of the commission of inquiry.

The Chair: Okay.

Mr. Lastewka, followed by Mr. Christopherson.

Hon. Walt Lastewka (St. Catharines, Lib.): Thank you, Mr. Chair. I have one short question.

Is this a procedural matter, where the commissioner has asked concerning the privilege and then it's reported back to him? Is he seeking to get definition and then it's just a matter of protocol? Or is he actually asking the question such that he would like to get more information or be allowed more information? Is it a procedural thing that we have to go this way?

● (1550)

The Chair: I think I'll speak for the House of Commons that Mr. Justice Gomery has requested that the House of Commons consider. We're now in the process of consideration, and our processes have now kicked in as to how we will arrive at a decision. That decision will then get conveyed back, I presume, to Mr. Justice Gomery.

Do you want to fill in from the other side, Ms. Beagan Flood?

Ms. Catherine Beagan Flood: Perhaps I should just clarify something. What happened before Justice Gomery is that a specific request has been made to him that counsel be allowed to use transcripts. So he's being asked to rule as a legal matter whether that can be done before him or not. He has decided not to rule on that question yet. It hasn't actually arisen in a specific factual circumstance. He has not ruled on that question yet, but he has asked the House of Commons to consider whether it is prepared to waive its privileges, in which case he would never have to decide that legal question as a result of the waiver. So he is actually requesting a waiver itself as opposed to more clarification.

The Chair: Mr. Christopherson.

Mr. David Christopherson (Hamilton Centre, NDP): Thank you very much, Mr. Chair, and thank you very much, Ms. Beagan Flood, for a good presentation.

Just to clarify, the issue of the amount of time taken—and this is meant to be a shortcut, if possible, for the commissioner, as I see it. The commissioner made some remarks regarding what he may or may not do if we do not lift privilege, and if I understand it correctly, that could lead us into a whole procedure too. Could you clarify so we understand the context of what Mr. Justice Gomery has said he may do or may consider doing if we did not acquiesce to this request?

Ms. Catherine Beagan Flood: Of course, for that I'll just go back to the transcripts of what Justice Gomery actually said. I'm afraid it's a bit of a long passage, but perhaps it is important.

The Chair: This is the passage I read into the record before.

Ms. Catherine Beagan Flood: This is the passage that the chair read into the record before.

The Chair: Do you want it read again, Mr. Christopherson?

Mr. David Christopherson: I would, please, simply because I think it's important that everybody understand that we may be into a lengthy process regardless of how we rule.

The Chair: Okay. It has been circulated to all members in a written format as well.

Let me just ask this, a straw poll. Is the consensus of the meeting that you want it read back in for your own edification? You're all reasonably happy with it.

I think we can dispense, Mr. Christopherson.

Mr. David Christopherson: Can I get a short summary then, on the record, of this discussion? Not everybody's up to speed on this, and it's really important to understand where we may or may not be heading here. Would you allow that?

The Chair: Yes.

Ms. Beagan Flood, do you have the statement starting with the commissioner saying, "I have been thinking about why the House of Commons has given you the mandate"?

Ms. Catherine Beagan Flood: I do.

The Chair: So why don't you start reading from there, and you might as well read all the way down, the full statement, again.

Ms. Catherine Beagan Flood: Read through the whole statement?

The Chair: Yes, you might as well.

Ms. Catherine Beagan Flood: Thank you. The commissioner's statement was:

> I have been thinking about why the House of Commons has given you the mandatethat it has given to you, and I am no more entitled than anybody else to inquire into the motivations of theHouse of Commons. They have the motivations that they have. But I can't inquire into it but I can speculate,and for the life of me, I can't understand why they have invoked their privilege.
>
> I would think, with due respect for your client and with respect for the House of Commons, that the Houseof Commons would want to encourage the inquiry that is taking place before this commission. That theHouse of Commons, as I have already mentioned, through its Public Accounts Committee, was making thesame kind of inquiry that we are making here, and I would think that they would want to facilitate and evenencourage this inquiry. If you read statements made by prominent politicians, at least some of them thinkthat what is occurring here is a healthy thing; that it is desirable that witnesses should be heard and that thetruth should be uncovered.
>
> So why would they want to inhibit the normal process of cross-examination that would take place,including questioning about prior inconsistent statements by invoking their privilege? I am puzzled by that.I am puzzled about why you—they are—if they are seeking to defend their privileges because they want tomake sure that no precedent is set and so on, then it seems to me they can better protect their —avoid anunfavourable precedent by waiving their privilege and not putting me in the difficult position of having todecide whether or not to apply the privilege to the present circumstances. Do you follow me?
>
> If I am forced to make a decision, I may make it one way or I may make it another way, and don't ask menow which way I would decide because I don't even know. But what I am saying to you is that the House ofCommons, if it is trying to preserve the integrity of its immunity, might be better served by waiving itsprivilege in this particular instance and avoiding an unfavourable decision.
>
> So I'm going to ask you—because it is not my intention to make a decision. I am persuaded by Me Lussierand Me Doody and by, I think, Mr. Pratte—I am persuaded by all of them that there is no urgency that Imake a decision on this difficult question immediately and I am not going to. I have listened to thearguments. I'm going to preserve the authorities that have been given to me preciously and I am going tohope that the issue doesn't arise. But if the issue does arise, then I think that I have a problem and withrespect, your client has a problem, because the problem is that I have to reach a decision and the decisionmight be favourable to your point of view and it might not. If I make a decision which is unfavourable toyour point of view, we may be involved in a long and tedious and costly litigation until the higher courtshave decided who is right. But in the meantime, I wonder if the objectives of this inquiry are not impededand I wonder if the House of Commons really wants those objectives to be impeded.
>
> So I am going to suggest to you, with respect, that you discuss this question further with your client with aview to determining if your client would be prepared to waive its privilege should the issue arise here. Iunderstand the importance of the immunity and of the privilege. I am just saying that the immunity or theprivilege is to some extent put at risk if I am forced to make a decision.
>
> So then maybe you could give some thought in consultation with your clients to that. Maybe we can avoidthe problem.

● (1555)

The Chair: Okay, Mr. Christopherson?

Mr. David Christopherson: Yes, Mr. Chairman. Thank you very much.

The Chair: Thank you very much, Ms. Beagan Flood, for your presentation.

I'm now going to call forward Mr. Pratte, who is also speaking on behalf of Mr. Fournier and I believe is also speaking on behalf of Mr. Peter Doody, who is counsel for Mr. Chrétien at the commission.

But before I start, I forgot at the opening of the meeting to give you a summary of the documentation that has been circulated to all members before the meeting started. First of all, you have all received the letters of invitation to appear before the committee on Tuesday, November 2, that were sent out to the people who are here today.

Second, you have also received an article written by the Right Honourable Beverley McLachlin, Chief Justice of the Supreme Court of Canada, regarding reflections on the autonomy of Parliament, which is an article published in the *Canadian Parliamentary Review.*

Third, you've also received extracts from the Commission of Inquiry into the Sponsorship Program and Advertising Activities from Monday, October 25, 2004. These were extracts, by and large, giving the documented text where the lawyers present actually requested Mr. Justice Gomery to deal with this issue.

Fourth, you've also received from the clerk testimony read by me regarding the remarks of Mr. Justice John Gomery in response to the remarks of Catherine Beagan Flood, counsel to the House of Commons, commission of inquiry, which again has just been read a second time.

And fifth, you've also received a letter from Mr. Peter Doody, who says he's unable to be here today; however, Mr. Pratte may speak on his behalf.

Before you start, Mr. Pratte, I would just ask for your confirmation that you are speaking on behalf of Mr. Pierre Fournier, Mr. Peter Doody, and yourself.

Mr. Guy Pratte (Counsel to Jean Pelletier, Commission of Inquiry into the Sponsorship Program and Advertising Activities, As Individual): I can certainly confirm the latter. I don't represent, of course, either Mr. Chrétien or Mr. Gagliano, but I understand that they agree with my position, and on that basis they allowed me to lead.

The Chair: I'm not asking about Mr. Chrétien or Mr. Gagliano. I'm talking about Mr. Fournier and Mr. Doody.

● (1600)

Mr. Guy Pratte: Yes, but they represent those people and they agree with my position, so they allowed me to speak.

The Chair: Okay, that's good. You may proceed.

Mr. Guy Pratte: Thank you very much, Mr. Chairman, for inviting me to briefly address this committee on the reasons why Mr. Pelletier and the others who agree with his position believe there is no prohibition in Canadian constitutional law on referring to any transcript of a witness before a committee or the House for the purposes of assisting a public commission of inquiry in ascertaining the truth.

I accept right at the outset that matters of parliamentary privilege—while to some of us they may sound somewhat arcane sometimes—are vitally important to the health of our democracy and our parliamentary constitution. But I submit that equally important is the institution of the royal commission of inquiry, or what we now know as the public inquiry, which in fact goes back in British law to the Middle Ages. The first inquiries act in Canada was passed in 1867.

My position is that in a public inquiry, like any trial in any court in this country, having access to prior statements made in other fora, including courts or anywhere else, can be a very important tool to ascertain the truth. It's important because it may assist the trier of fact, in this case the commissioner, in deciding on the credibility of witnesses. It's also important, out of fairness, to the witnesses. I'll come back to that in a moment.

If one were just looking at what one could do to assist Commissioner Gomery in his task, one would want him to have access to all prior statements made by witnesses on relevant matters wherever they were made, including before your committee.

The issue I come to, very briefly, is this. As a matter of Canadian law, do the privileges of the House necessarily trump the interests and general rules governing public inquiries and prohibit Justice Gomery from making any reference to what everyone else can, everywhere in Canada, when they're going to judge, if they need to, the credibility of witnesses? That is the issue.

I want to make two points, Mr. Chairman. First of all, I will address in law why I say referring to what witnesses may have told you would not be a breach of privilege, and then I will address the issue of waiver, because the rationale for the privilege is material to both issues.

First, as a matter of law, Ms. Beagan Flood is a brilliant lawyer—and I've told her this before—but I disagree with her position on the law for these three reasons. First of all, the intention of the Bill of Rights 1688-89, if you read its language and its historical context, cannot on its face be thought to have been intended to prohibit any reference to comments made by a witness so as to impede the work of a public inquiry. I refer you...and I won't read it, but Justice Gomery at transcript pages 4613-14 set out quite clearly what the context was in 1689. That's my first point.

The second point is that in 1867, when Confederation was created, we incorporated the British law, as it was in respect of parliamentary privilege at that time, and although the privilege had expanded to protect members, for example, from libel suits or from decisions or operations of the House being reviewed by the courts, there isn't a single case or decision at the time the British law was incorporated into Canadian law saying you cannot make reference to a statement of a witness in a context such as this. That's how the law came into Canada. At that time there was no prohibition.

Third, from 1867 to today, there isn't a single case in Canada binding on any court in Canada or anyone that says you cannot make a reference to a statement by a witness before a parliamentary committee in any court in the land or any public inquiry. There is some law in other parts of the Commonwealth, and it's conflicting. The tendency in Canada has been, over the last 25 years in fact, to refer to the House often, for example, to statements made in the House, to ascertain in a courtroom the purpose of legislation. That has not been deemed to be an infringement of privilege. As a matter of law, I say in Canada there is absolutely no prohibition or violation of your privilege.

● (1605)

I turn lastly to the issue of waiver. The commissioner indicated, and the passage was read to you, that he may or may not rule in favour of the privilege issue. In my view, whichever way he would go, it's the rationale of the use of those statements in connection with and in relation to your privilege that has to be considered fundamentally when you decide whether you would or should like to waive it.

The purpose of referring to prior statements, and allegedly prior inconsistent statements, is always the same in any court. It's to help the trier of fact or the decider in the context in which it's sought to be made reference to prior statements to assess the credibility of the witness, to explain an apparent inconsistency. That's the first purpose. The other is in fact to be fair to the witness. If there is an apparent inconsistency out there in the public domain, he or she ought to be able to explain it, and 95% of the time those inconsistencies are more apparent than real, and the witness can explain what he or she meant to say.

In both cases, that exercise that every courtroom and almost every administrative tribunal in this land is always permitted to engage in helps the decider of fact come to a correct decision. The rationale for using those statements is in the interest of the search for truth. That's why it might be helpful to Commissioner Gomery. But I say—and that's my last significant point on the waiver—it's not inconsistent with the work of your committee. The concern was raised by Ms. Beagan Flood that if there was no privilege, or if there was a waiver, it would impede the work of this committee, that witnesses would feel maybe unwilling to come before you. I respond to that in quite the contrary.

First, if a witness thinks he or she may later be confronted with an inconsistent statement, they're much more likely to be truthful before you as anywhere else.

Second, if that were a true concern, then it would affect all courts. Whenever someone went to court and said, well, I'm afraid that if I go to court, five years from now I might be criticized with an inconsistent statement.... That doesn't relieve anybody, anywhere, from being subjected to that possible criticism.

Finally, in any event, that concern cannot be valid because your law allows prosecutions for perjury before you, so that is already hanging over every person's head who comes before you. It's quite the opposite, in my respectful submission. The prospect of future contradiction and the need to explain a future inconsistency will enhance the quality of the testimony that will be before you, as it will before Commissioner Gomery. So the raison d'être of invoking, on the one hand, a resort to prior inconsistent statements speaks in favour of using them before Justice Gomery, and the concern that it might impede your work, in my respectful submission, is simply not valid.

I conclude this way, sir, and I hope I'm not exceeding my time; I don't think I am. Mr. Pelletier asked me to make these submissions before Commissioner Gomery, and I'm here making them in summary form before you, because he believed that the most complete picture of all the relevant facts should be before Justice Gomery, not only in respect of prior inconsistent statements, but all the facts. Part of that is to have access, if need be, to your record, which is probably one of the more comprehensive records in terms of all the witnesses you heard in the spring, I believe, in 2004.

So I say that it serves the interests of the commission of inquiry without in any way impeding the work of your committee to allow this use, if need be, as Ms. Beagan Flood explained, to resort to prior inconsistent statements. It may never arise, but the commissioner is trying to anticipate any need for that, without in any way hurting Parliament.

Otherwise, here's the situation of Commissioner Gomery. He is in a vacuum. He's the only person who cannot make some judgment by comparing what he saw on television in the spring when people were before you and what he hears every day this fall. He's the only person who can't officially put two and two together. Yet he's the only person who is formally tasked with finding the facts in the context of a public inquiry.

● (1610)

The effect of Ms. Beagan Flood's submissions in law that the privilege would be breached is to put Commissioner Gomery in this vacuum that he has to close his mind to what happened before you. He's the only person who is under that constraint. I say to you that it would be virtually impossible to explain to a Canadian why that should be so. If you think in law that Ms. Beagan Flood is right, then I urge you to consider waiving the privilege for the narrow circumstances of this inquiry.

I'm very grateful, Mr. Chairman, for the invitation and opportunity to speak to you.

The Chair: Thank you very much, Mr. Pratte.

Mr. Murphy, please.

Hon. Shawn Murphy (Charlottetown, Lib.): Thank you very much, Mr. Chairman.

I have a couple of questions for the witness. First of all, thank you very much for your submission. You indicated that there is no precedent out there in the common law, either in this jurisdiction or other common-law jurisdictions, to support the privilege being granted to a witness. Is there any precedent out there that—

The Chair: Mr. Murphy, I said at the beginning that you're here to understand Mr. Pratte's request and not to discuss the legalities of the request. We'll have Mr. Walsh for that later on. I prefer that you defer that question to Mr. Walsh.

Mr. Pratte has presented his argument as to why we should consider this waiver. He's not our lawyer, and I don't think we should be seeking to elucidate and embellish his position.

Hon. Shawn Murphy: I have another question then, Mr. Chairman.

I hope I'm not being viewed as being in any way restrictive to the powers of the Gomery commission, but the parliamentary privilege is certainly a very important aspect of this assembly. It didn't come to us lightly and I don't think it should be thrown away lightly.

In your last two sentences you talked about the public. We had witnesses come before us and they came under certain understandings and certain assurances. The assurances they received, which I thought to be correct at the time and I still do, were that the parliamentary privilege was there. Whether you like it or not, that's certainly my understanding of it. What is your thinking of an assembly like this committee—and this committee, of course, can make the decisions made by the House of Commons—and the House of Commons making a retroactive decision that's contrary to the understanding and assurances that were given those witnesses some six or seven months ago? Is that not troublesome?

Mr. Guy Pratte: On your first point, I don't want to address a question of law; I want to address a question of fact. There is no decision in Canada that supports, in my view, Ms. Beagan Flood's position. As I said, there is conflicting authority in the rest of the Commonwealth. So that's a matter of fact.

On your second question on the waiver, my response is twofold. First of all, if I'm right as a matter of law, then it's unfortunate, but the extension of the privilege is something.... For the narrow purposes I'm talking about, because I'm not attacking parliamentary privilege in general, and Justice Gomery is talking about, if I'm right as a matter of law, then what was extended to these witnesses could not be, because it wasn't there to be given.

Secondly, the extension of those privileges, if they existed, could not be understood by the witness to protect him or her against any attack upon their credit, because they could always be sued for perjury. I would submit to you that being confronted with an inconsistent prior statement is a lot less painful. To my mind, in practice there is no threat to the witness.

Thirdly, if a witness feels victimized, then it's for that person to request that protection and say to Justice Gomery, well, I know there's no privilege, or the privilege has been waived, but I have been offered this and I want to rely on that. Justice Gomery can rule on the justice of the request. Some people may just say, I actually don't invoke that.

My answer to you, sir, would be let's not presume in advance that all the witnesses, if they understood the waiver had been given or there was no privilege.... They might be quite willing to say, I don't have a problem referring to my prior evidence.

● (1615)

The Chair: Thank you, but it's the House of Commons privilege that was the debate here, not the privilege of the witnesses.

I have Mr. Holland, Mr. Carr, Mr. Christopherson, Mr. Sauvageau, and Mr. Fitzpatrick.

Mr. Holland.

Mr. Mark Holland (Ajax—Pickering, Lib.): I'm interested in exploring the last point a little bit more so that I have a clearer understanding of the position you bring to us, both your own opinion and that of your client.

You made reference in your comments to utilizing statements by members in the House of Commons, drawing the analogy of that to this. You made reference to other judicial processes and people making testimony there, and this particular instance. Is there a recognition that there is a difference? In your testimony there's almost a parallel being drawn as if there's no difference between the two processes. This committee, in parliamentary process and privilege, does not create something that is overly litigious and filled with lawyers, but has a situation where we say to people, you come, you give testimony before this committee, and it's not going to be used against you in another process. That is our commitment, our word, our bond. How do you reconcile the analogy you draw with the fact that we gave our word and commitment to people that they would be able to give testimony in this process without having it used against them?

The other question is.... I'll let you respond to that first.

The Chair: He already responded to that, Mr. Holland, in saying that if we didn't have it, it wasn't ours to give away in the first place. I'm trying to ask people to be as brief and concise as possible.

Mr. Mark Holland: I understand that, but I want to be clear that this is the position. Whether or not I agree with the position is another matter, but I want to be clear that this is the position.

Mr. Guy Pratte: I'm here to address whether or not there is a privilege and whether it should be waived. I made my points on that, sir. In terms of whether if you don't have the privilege then it would be unfair to withdraw the undertaking you referred to, I think that depends on the witnesses. If the person says I don't have a problem with you waiving it because you didn't have it to give to me in the first place, or I don't have a problem with being confronted with this, then it's the end of it. What you're worried about is the unfairness to the person to which you gave it. If that person says they have no problem, then it's a non-issue.

Mr. Mark Holland: No, not to get into a debate, I'm not so much concerned about that as I am concerned about its impact upon future processes and the legitimacy with which people view the commitments of this committee.

The question I would have, though, to gain a clearer understanding of where you're coming from, is if the truth could be achieved through.... Let's say you were to take our argument at its face, which is that we're concerned about the invasion of parliamentary privilege. Would you not agree, or would your client not agree, that the truth could be achieved fundamentally the same way through further questioning of these witnesses before the commission of inquiry without having to endanger our processes and the credibility of our future processes?

Mr. Guy Pratte: That's a very good question. My answer to that is the commission of inquiry should have all the tools that any other court would have to get to the truth. In this case I fear that there may be circumstances where precluding the commissioner from having access to a whole bank of directly relevant evidence could very well impede his search for truth. In other words, there may be no other way to get to it. We don't know that for certain, and I don't think Ms. Beagan Flood disagrees with that.

The general rule in any court—and remember, all courts are there to find the facts, find the truth—is that all courts always have access to all prior statements to ensure that they have all the tools they might need. What the position of the House would result in is that we know there's a whole bank of directly relevant information, and that would be offside. If you put that offside, all I say is you're taking an important tool out of the kit. Maybe there will be other ways to get to it, but one thing is for sure, you've reduced the chances.

The Chair: Don't you acknowledge that in many cases in a court of law there are whole banks of evidence that are sometimes disallowed by the trial judge because certain conditions haven't been met? Therefore, your argument that you are entitled to everything, and anything that's on the public record is there for you to ask for, is not exactly the way it always happens in a court of law.

● (1620)

Mr. Guy Pratte: I was speaking, sir—and again thank you for the question—to the general rule that you can refer to prior inconsistent statements, and to that rule there is no exception, except the one you are invoking.

The Chair: Okay.

Mr. Carr, followed by Mr. Christopherson, Mr. Sauvageau, and Mr. Fitzpatrick.

Mr. Gary Carr: Thank you very much for your presentation.

As you pointed out, Mr. Justice Gomery said that this situation may never arise. The only ones who know whether it will arise are the counsel for people. We're here debating this, obviously, but I'm wondering, is this going to become an issue? Do you plan to raise it?

Mr. Guy Pratte: Actually, I don't the know the answer to that question. It always depends on what all the witnesses will say. If there's never an ostensible contradiction, you never use it.

You see, in practice, we would never have that debate; every lawyer would assume that, if need be, they could refer to prior statements. It only arose because I mentioned it in passing, and then Ms. Beagan Flood arrived the next day to make the argument—the brilliant argument, I might add—that she made.

I don't think anyone is planning anything, but as I say, it's important; if in the middle of a cross-examination you want to refer to that, it would be useful to know what the answer is.

The Chair: So it's hypothetical at this point in time.

Mr. Guy Pratte: As everyone acknowledged, including the commissioner.

The Chair: Okay.

Mr. Christopherson.

Mr. David Christopherson: Thank you, Chair.

I appreciate very much your civility. I wish my opponents who disagree with me thought I was brilliant.

I want to just follow up on a couple of things. First, I think you're going to have a real problem convincing us that the privilege doesn't exist, and for a number of reasons, not the least of which is the fact that Mr. Justice Gomery has asked whether we would waive the privilege. Obviously he believes we have that privilege, which is bestowed upon all witnesses who come before Parliament.

There also are two precedents, as you well know, one in the 19th century and one in the last century, both I think relating to criminal trials directly where the House of Commons did consider waiver. There has to be a privilege for them to consider, and they did. To my understanding, every Parliament since has assumed it's there. So you have a big hill to climb on that one.

I'll just mention a couple of other things and let you answer all of them.

I'd appreciate your thoughts on the effect on this committee and the House of Commons if we did acquiesce to that request, along the lines of—

The Chair: Mr. Christopherson, that is—

Mr. David Christopherson: No, no, I'm not asking his legal opinion on our decision, Chair; I'm asking his opinion on the ability of this committee to continue in the future, given that he has a different opinion from our counsel's.

The Chair: That's very good, Mr. Christopherson, and you may ask that of Mr. Walsh. You're not going to ask it of Mr. Pratte.

Mr. David Christopherson: But I want to know what he thinks. He and Mr. Walsh make different arguments.

The Chair: He's making his argument. He will stay with his argument. He's here to make the request for us to consider the issue of waiving privilege. Mr. Walsh will answer the questions regarding how it affects our capacity to—

Mr. David Christopherson: I'll tell you what; you listen carefully, word for word, and when I'm out of order, you step in.

Right now when witnesses come forward they don't need lawyers, and to the best of my knowledge, they're urged not to bring lawyers. This is not a legal hearing. It's meant to be a parliamentary discussion among elected people who may or may not be lawyers. Somebody's brought in to give evidence of one sort or another. So we will lose a lot, and turn this into a very different forum—we'd just become a different kind of court—if that happens. I would like to know your thoughts on how that would affect our ability in the future to have witnesses come forward, which, by the way, you may or may not be involved in.

Finally, I share the concern raised—and you're going to hear us talk about this a lot—that the word of Parliament was given. That is the word of the nation. Above and beyond the government, Parliament speaks for Canadians. The word of Parliament was given to these witnesses. Just from a common sense point of view, how do we stand back and say we are now going to rip away, for whatever reason, that right we gave them ?

How would Canadians ever have—I know it sounds kind of funny to say this—faith in their Parliament again? At a very serious and fundamental level, we're saying, "You can come and say what you want here. Nothing will happen. We need to hear, because we're parliamentarians." Then six months later we're turning around and saying, "We've changed our minds. We're now going to let everything you said be used in whatever way we deem appropriate, and you're just going to have to live with it."

Your thoughts would be appreciated.

● (1625)

The Chair: The middle part is out of order, but the last part and the first part you may answer.

Mr. Guy Pratte: You may have to help me on what was in the middle, at the top, or at the end.

On the first point, I respectfully would say to you that it is incorrect to suggest that Justice Gomery thinks there is a privilege. The reason for asking you to waive it, as Ms. Beagan Flood has related, is as a precaution. He has clearly indicated that he might rule there isn't a privilege. It's only procedurally, to try to have it become a non-issue, that he's asked you. You cannot assume from his request—he made it crystal clear—that he believes necessarily there is a privilege. He said he didn't know what he would decide were he forced to decide on that issue. In fact, and you can ask Ms. Beagan Flood about this later, I would say he clearly signalled that he might rule against Parliament on that.

In terms of the two cases, I'm not sure which ones you're referring to, but I'm quite confident in saying that there's not a single legal case in this country directly on point as to whether it's appropriate or not to refer to statements made in the House...or by a witness, or in a committee. There was only one case in the whole Commonwealth, and that was in Australia. It ruled that the privilege did not apply. It was overruled later on.

Your last point—I hope that's the end and not the middle, Mr. Chairman—referred to the effect of waiving privilege and how you reconcile that with your duty to the witnesses and the public. I guess I would say two things. Witnesses who come before you may not always be accompanied by lawyers, but they're always subject to the charges of perjury—always. They know when they come here that they might face serious legal proceedings. My point is that to be confronted with a prior inconsistent statement is a lot less serious, so in practice it really is not a real concern.

Second, in my respectful submission, I think you'll have a lot tougher job explaining to the Canadians who you represent that the commission of inquiry might be denied access to this when it might be helpful, and when the commissioner is telling you he'd like to have access to it, than having to explain why you might waive the privilege.

The Chair: I distributed this to all members of the committee, but I'm not sure you've had a chance to read it. It is an article in the *Canadian Parliamentary Review* of spring 2004, entitled "Reflections on the Autonomy of Parliament" . Mr. Pratte may want to hear this.

This is the final part of what the Right Honourable Beverley McLachlin, Chief Justice of the Supreme Court, had to say in the article:

> Just as the courts must respect parliamentary privilege and freedom from interference in the parliamentary decision-making process, Parliament, parliamentarians and members of the executive must respect the judicial process and judicial independence. The result is a regime of mutual respect, which serves to further the ideals of justice, democracy and the rule of law to which we all, legislators and judges alike, are committed.

It's a four-page article, and I would recommend it to all members. It's been distributed in both languages.

[*Translation*]

You have the floor, Mr. Sauvageau.

Mr. Benoît Sauvageau (Repentigny, BQ): I'd like to welcome Mr. Pratte to our committee.

My first question is directed to you, Mr. Chairman. Will you be speaking after each Member has had his or her turn, or will you be slotted into the rotation?

[*English*]

The Chair: This is a round table. I'm trying to maintain order. I'm trying to give everybody the opportunity to speak. I mentioned at the committee meeting yesterday that I would intervene to make sure the questions were factually addressed. Opinions will be addressed to Mr. Walsh when he comes up later.

At this point in time, yes, the chair can always intervene when he so desires.

[*Translation*]

Mr. Benoît Sauvageau: As Vice-Chair, may I speak half as many times as you during this roundtable?

[*English*]

The Chair: I'm afraid you can't, no.

[*Translation*]

Mr. Benoît Sauvageau: Our relationship is getting friendlier by the minute.

Welcome, Mr. Pratte and thank you for coming. If I understand correctly, you represent Mr. Pelletier and, while you're not Mr. Gagliano's counsel, you also represent Mr. Fournier, who is Mr. Gagliano's attorney. Do you represent a third party as well?

● (1630)

Mr. Guy Pratte: No. Counsel for Mr. Gagliano and for Mr. Chrétien, who were also invited, agree on my position. Therefore, there is no need for them to restate it.

Mr. Benoît Sauvageau: Summing up then, you maintain that while you do not object to the existence of parliamentary privilege as such, if some of the witnesses who testified in camera ask to have their testimony, and only their testimony, made public, the committee should acquiesce to that request. Have I understood you correctly, or am I mistaken?

Mr. Guy Pratte: There are two issues to consider, Mr. Sauvageau. Firstly, it's not a question of being either for or against privilege. All I'm saying is that privilege does not extend to statements by witnesses to this committee being used by the Gomery Commission. No one can invoke privilege to refuse to answer questions before Commissioner Gomery, because privilege does not exist, in so far as this very restricted purpose is concerned.

Secondly, if you disagree with me and feel that privilege does apply in this particular instance, then the House can waive privilege and issue a resolution whereby for the purposes of the Gomery Commission, it will not invoke privilege in the case of testimony given. It will then be up to Commissioner Gomery to decide how he will use the testimony provided.

Mr. Benoît Sauvageau: One could also argue that privilege applies, but that witnesses who enjoyed privilege and who now wish to waive it, persons such as Mr. Pelletier, Mr. Gagliano and Mr. Chrétien, could in fact do so, as I understand it. You maintain that privilege does not apply under the circumstances.

Mr. Guy Pratte: I am not here to discuss the law with you. However, counsel for the House of Commons stated that it was not up to the witnesses, but rather up to Parliament, to waive privilege. The witnesses cannot make that decision. If privilege does not apply or if Parliament decides to waive it, then all that remains is the obligation mentioned. The witness can waive the obligation, but he cannot waive privilege, if it applies. Only Parliament can do that.

Mr. Benoît Sauvageau: It's stated here that the purpose of the committee meeting in camera was precisely to ensure that the testimony heard would not be used for other purposes. It was not a matter of privilege, but rather something that was agreed to.

Mr. Guy Pratte: I"m not sure what you're reading, Mr. Sauvageau. I was under the impression that the testimony given in 2004 was public. I'm not sure what in camera proceedings you're talking about.

The privilege I'm referring to here is the privilege cited by Ms. Beagan Flood, who maintains that no reference can be made to any testimony given before the Public Accounts Committee, whether given in camera or in public. I think that's taking it too far. While she may be correct in stating that only Parliament can waive privilege, with all due respect, I would have to say that Parliament should give some thought to doing just that. Clearly,the right to waive privilege rests with Parliament, not with the witnesses.

Mr. Benoît Sauvageau: Thank you.

The Chair: Thank you very much.

[*English*]

Mr. Fitzpatrick, please.

Mr. Brian Fitzpatrick: I just want to clarify your position.

Is it in order, Mr. Chair, to get a clarification of this gentleman's position?

The Chair: A recap?

Mr. Brian Fitzpatrick: Yes.

If I understand you correctly, sir, you are saying there's a long-standing rule or principle about people giving statements, and there are lots of protections on those statements in subsequent proceedings. But there is also an exception to protections that we have in our British system, and it is that if you make inconsistent statements, then you can be cross-examined on those statements at a future hearing.

If I'm understanding you correctly, when it comes to the privilege of the House and so on, it's your position that this long-standing rule also applies to proceedings in the House. It really isn't a matter that gets to the heart of privilege, it's just the way things are. Would that be a—

Mr. Guy Pratte: No. On the general rule you referred to, you're quite correct. I'm saying there is no exception to the rule.

Ms. Beagan Flood is basically arguing for an exception to the rule in respect of statements made here. I'm saying that does not exist in Canadian law. There is no place where you can make statements and can never be called to account for them, including this place.

This has nothing to do with statements by members in Parliament for which they might be sued for libel. That's a completely different question, and clearly it's a matter of privilege.

● (1635)

Mr. Brian Fitzpatrick: This is witnesses in proceedings.

Mr. Guy Pratte: That's right. That's a matter of privilege, and that's what the 1689 bill's section 9, which was read earlier, was meant to address.

Mr. Brian Fitzpatrick: And if I understand you correctly on the position of Justice Gomery, he would much prefer—

The Chair: We can't ask the witness his opinion of what Mr. Gomery would say.

Mr. Brian Fitzpatrick: I'll ask this gentleman for his opinion then.

Just so I understand your position, if Parliament—the inconsistent statements and things to be cross-examined—would waive the privilege just for that limited argument, it would remove a whole lot of uncertainty and potential unnecessary litigation and so on from the scene. Is that your position?

Mr. Guy Pratte: I can answer that as a matter of fact. That's why I made my argument on law. As Ms. Beagan Flood related, as a precaution I then asked Justice Gomery to ask you to waive it if he didn't want to decide the issue. I was one of the people to say that to save time and to make the situation clear if you think there's a privilege or you're uncertain, maybe Commissioner Gomery should ask the House to waive its privilege. I believe that's how Ms. Beagan Flood explained it, that's what happened as a matter of fact, and that's my position.

The Chair: Thank you very much, Mr. Fitzpatrick.

I just have a quick question, Mr. Pratte. You made reference to the fact that you do not believe privilege exists for witnesses appearing before this committee or before any parliamentary committee. Are you aware, in the history of Canada, of where the testimony before a parliamentary committee has been used in a court of law?

Mr. Guy Pratte: Yes. For example, committee hearings on legislation, both in the House and in committees, are consistently used by the courts to derive the intent of legislation. Secondly, there is a case that was in Ms. Beagan Flood's brief. A court allowed an accused individual, at trial, to refer to statements made by the Speaker or to letters made by the Speaker for the purpose of ascertaining his state of mind.

So there is certainly some use, sir. Has the issue of impeachment arisen in this country? The answer to that is no. It has arisen in one other court that I know of—

The Chair: That was the answer I was looking for. Yes, the debate on law is part of it, of course, but it's not what people say that is under examination. It's the intent of the legislation that may be argued in court, but people's testimony is not being challenged in a court of law. You're not aware of it ever being challenged in a court of law?

Mr. Guy Pratte: In this country, either way, no.

The Chair: And you also confirm that this is a hypothetical request at this point in time, because you don't have an issue with the testimony. In essence, you just want it in your back pocket to have it in case you need it.

Mr. Guy Pratte: I didn't raise it directly; your counsel made the objection. But you're quite right, sir, that the issue may never arise.

The Chair: All right. Thank you, Mr. Pratte. I'm going to excuse you.

I'm now going to bring forward Mr. Richard Auger, counsel for Mr. Charles Guité, who contacted us this morning.

Mr. Auger, I understand you have been at the commission of inquiry today. Am I correct in saying that, Mr. Auger?

Mr. Richard Auger (Counsel to Charles Guité, Commission of Inquiry into the Sponsorship Program and Advertising Activities, As Individual): I was working on the commission of inquiry today.

The Chair: The reason I ask is that when you telephoned the clerk about the opportunity to appear before us, I asked the clerk to have you send us an e-mail to confirm that in writing. Have you been able to send us an e-mail confirming your desire to appear before us?

Mr. Richard Auger: I have not. I can confirm that I met with commission counsel throughout the afternoon and had to come directly here.

The Chair: Perhaps you can send us an e-mail tomorrow.

Mr. Richard Auger: I certainly will, and I apologize for that.

The Chair: All right.

Can you tell us your arguments, please, on this particular issue that's under debate?

Mr. Richard Auger: I really only have two points.

As you know, Michael Edelson and I are representing Mr. Guité. The first point is that Mr. Edelson and I support Ms. Beagan Flood's position and oppose Mr. Pratte's view, for two reasons. One reason is that parliamentary privilege is absolute, and that reason is consistent with the concerns Mr. Edelson raised and brought to Mr. Walsh's attention in March 2004.

Quite frankly, the point has already been made this afternoon by many of the people at the table for the obvious concern that Mr. Edelson raised. It was a specific request as to whether or not Mr. Guité could be afforded protection under section 5 of the Canada Evidence Act. It falls under the umbrella of the points that have already been made.

The purpose in Mr. Edelson's request for that was whether or not there would be assurances received from the committee that the testimony would not be used at some later date for whatever purpose. Mr. Edelson came away with the impression that such an assurance was granted. In fact, there was correspondence in March 2004 confirming the assurance and effectively saying the privilege was absolute.

That's really the only point I wanted to convey this afternoon. As I said, the point has already been made, and it's not only a point that applies to Mr. Guité. It also applies to many other witnesses. How do you now retroactively undo this assurance that has been made?

I don't need to tell you about the purpose of certain protections, including the one under section 5 of the Canada Evidence Act or indeed parliamentary privilege protection. That purpose is the opportunity for committees, courts, and tribunals to hear full and frank testimony. In my respectful submission, that's the real problem. This is an example, and that's why I bring it to you today. In Mr. Guité's case, his counsel at the time was given assurance that privilege would apply and that the transcripts would not be used at a later date.

Just as a practical matter, in terms of the timing, Justice Gomery's commission of inquiry has been now proceeding for almost two months. It also would present a practical problem should there be some form of a waiver. Many witnesses have already testified. Do we now go back and change the rules or then have their testimony revisited at the inquiry?

So in my submission, Ms. Beagan Flood's position is proper. I invite you to consider that. That's really the only point I wanted to make.

● (1640)

The Chair: I have Mr. Murphy, Mr. Sauvageau, Mr. Carr, Mr. Christopherson, and Mr. Fitzpatrick.

Again, if you can, keep your questions and answers brief, because time is moving on.

Mr. Murphy.

Hon. Shawn Murphy: Mr. Chairman, I'll be very brief.

Mr. Auger, you've testified that your client received not only oral assurances but written correspondence from this committee, setting out the privileges that would be applied to him.

Mr. Richard Auger: I believe there was correspondence between Mr. Walsh and Mr. Edelson in March 2004. The point I was making is that Mr. Edelson had raised that concern.

Hon. Shawn Murphy: I assume you do not have copies of that correspondence with you now.

Mr. Richard Auger: I do not have copies, unfortunately. I can arrange to have copies delivered if it assists—

Hon. Shawn Murphy: I'd ask that the correspondence, if it does exist—and I assume it does—be circulated to all members of the committee.

The Chair: Since he wrote the letter, we'll have the law clerk pass it on to the clerk, who will do the distribution.

You're relieved of that obligation, Mr. Auger.

Mr. Richard Auger: Thank you.

[*Translation*]

The Chair: You have the floor, Mr. Sauvageau.

Mr. Benoît Sauvageau: Mr. Auger, you acknowledge that parliamentary privilege does apply and that you do not want it waived. I would remind you that when Mr. Guité testified before the committee in 2002, Mr. Walsh stated, and I quote:

> I don't know that I need to reiterate beyond that to say to you, Mr. Guité, on behalf of the committee, and your counsel, that you enjoy the protections of the law of Parliament, which assure you that your testimony here today is not available for other purposes, but only for the benefit of this committee.

You stated that if the House decided to waive this privilege, it would be withdrawing the undertaking given in committee by Mr. Walsh on July 9, 2002. If I understood you correctly, that is in fact what you said.

Furthermore, you said that looking ahead...

● (1645)

[*English*]

The Chair: Perhaps we'll get the answer to the first question, Mr. Sauvageau.

Mr. Richard Auger: That's correct, and other people have already indicated this afternoon problems to the effect that it would impede the work of the committee and that assurances that were given are then somehow withdrawn retroactively.

[*Translation*]

The Chair: You may put your second question, Mr. Sauvageau.

Mr. Benoît Sauvageau: I've forgotten what I was about to ask, Mr. Chairman. It's not important. It will come to me later.

[*English*]

The Chair: All right. I'll try to keep it down to one round, but I will allow you a second intervention since I broke your train of thought.

Mr. Carr, please.

Mr. Gary Carr: Thank you very much.

My question relates to what happens next. It's my understanding that for your client there will be criminal charges as well. On the same principle as what they're asking for in the inquiry, could that potentially be the same argument used during a criminal trial as well?

The Chair: Let me intervene here and ask the law clerk. This is a question about what would happen. This is a request by Mr. Justice Gomery for a waiver for the commission. If we waive it for the commission, does that mean it can be introduced in a court of law too, or would a court have to make the same request? Or if Mr. Justice Gomery rules against the House and says there is no privilege or the privilege has to be waived in this case, can it then be applied to a court of law too?

Mr. Rob Walsh: Mr. Chairman, the matter before this committee relates only to Mr. Justice Gomery's inquiry, and any so-called waiver the House would provide would, I expect, be limited to those proceedings. However, I believe the member's question to Mr. Auger relates to whether Mr. Auger's client may have concerns of his own.

Mr. Gary Carr: That's why I'm asking.

Mr. Rob Walsh: I'm just saying the question seems to me to relate to Mr. Auger's client's concerns as opposed to—

The Chair: However, if we were to decide not to waive the waiver, if the courts were to say—

Mr. Gary Carr: With respect, Mr. Chair, I'd like to hear from the lawyer, not you. I asked for his opinion. Otherwise, we may as well not have him here.

The Chair: No, we're not going to get a legal opinion from these gentlemen.

Mr. Gary Carr: I'm not asking for a legal opinion.

The Chair: I'll let you ask the question.

Mr. Gary Carr: It's his client, and I'm asking him if the same principles can apply. I wouldn't be asking if his client wasn't charged.

The Chair: Mr. Auger.

Mr. Gary Carr: He is the lawyer for somebody who has been charged.

Mr. Richard Auger: As I understand the question, does the problem continue not only at the commission of inquiry but at the criminal court level? I have two responses. One is that it's speculative for me to comment. Respectfully, it would be inappropriate for me to comment on what could occur in a criminal trial. Secondly, the theory of—

The Chair: We'll just stop for a second. Mr. Auger has dropped his earpiece. I'm sure he needs it, because the acoustics in this room are awful.

Can you hear us now, Mr. Auger?

Mr. Richard Auger: Yes, thank you very much.

I don't know if I've answered the question. My response was that in terms of the criminal case it would be speculative for me to comment on what could occur in terms of cross-examinations and what evidence may be used at trial. As people have indicated today, there are many courts and tribunals that proceed, and evidence is excluded for whatever reason. Testimony and transcripts may not be used for whatever reason, so I feel the area you're asking about is a little bit in a vacuum in terms of—

● (1650)

The Chair: We'll stop there.

Mr. Fitzpatrick, Mr. Christopherson, and Monsieur Sauvageau.

Mr. Brian Fitzpatrick: I'm trying to understand your position, Mr. Auger. You come to a parliamentary committee with a witness and say that somehow you're being misled. I'm trying to figure out what kind of advice is given to a witness.

It seems to me it's fairly clear. You can say to them, “Anything you say in these proceedings cannot be used as evidence to go after you in a criminal proceeding or to find some civil liability”. But you have to understand, sir, it's well understood in our system of law that if you don't tell the truth, or if you say something that is seriously out of line with what you're going to say later, you're going to be challenged on that. That's a long-standing rule in our system.

I don't think any witness coming here with legal counsel would not understand that. I'm sure Mr. Guité would have understood that point as well, if he had been told, “If you don't tell the truth here, you can look at perjury charges”.

I'm not necessarily buying into your argument that there's some serious injustice happening here if Parliament decides to allow this testimony to be used for purposes of cross-examination, to test the witness for inconsistencies they've given. I'm just trying to find out where the serious misleading of witnesses is with your position here.

Mr. Richard Auger: I don't know that it's misleading. In my respectful submission, if witnesses have been told, whether or not there's any later or subsequent allegation of an inconsistency, that's not the issue. On its face, if a witness appears before a committee or a tribunal and has given an assurance that whatever they say would never be used at a later date, and if you were to agree that's not only the assurance but that's how you would apply—

Mr. Brian Fitzpatrick: Are you saying they don't understand that if they don't tell the truth in here they can be looking at perjury problems?

The Chair: Let me just see if I can interject here. Before all the witnesses this spring—or, I believe, most of them—I stated:

> ...the refusal to answer questions or failure to reply truthfully may give rise to a charge of contempt of the House, whether the witness has been sworn in or not. In addition, witnesses who lie under oath may be charged with perjury.

That was read before all witnesses.

[*Translation*]

You may put your second question, Mr. Sauvageau.

Mr. Benoît Sauvageau: Mr. Auger, I remember what I wanted to ask you.

As I recall, you said that the rules could be changed down the road if that's what was decided following discussions and negotiations. However, you object to any such decision being applied retroactively. If witnesses gave testimony before the committee and were assured, through the Law Clerk and Parliamentary Counsel, that parliamentary privilege applied to them, then no one, for example the Gomery Commission, should be allowed to use their testimony against them, because of that parliamentary privilege.

Is that in fact your position?

[*English*]

Mr. Richard Auger: Correct.

[*Translation*]

Mr. Benoît Sauvageau: You've given us a clear answer. Thank you.

[*English*]

The Chair: Mr. Christopherson, I should have asked you before Mr. Sauvageau. I apologize.

Mr. David Christopherson: That's not a problem, Chair. Thank you.

Actually, my question was answered. It was a follow-up for a copy of the correspondence, because I think that's new. I was not aware that such a letter had been issued. It certainly strengthens the hand of the House of Commons' counsel.

Thank you.

The Chair: Mr. Auger, you're excused.

I will now ask Mr. Newman, general counsel from the Department of Justice, to come forward.

Mr. Newman, you are speaking on behalf of the Department of Justice.

Mr. Warren Newman (General Counsel, Constitutional and Administrative Law, Department of Justice): Yes, I am, Mr. Chair, and I thank you for having extended this invitation to the department.

I want to expedite matters here. I'm glad there was already a statement at the beginning that none of us are here to give legal advice. It is in my opening disclaimer that I'm really here as a senior official with the department who pretends to have expertise in the area of constitutional law. My goal is to assist the committee with some general propositions that might be of benefit to committee members in relation to, first, the law of parliamentary privilege in Canada; and second, I have a couple of words to say on the issue of waiver.

So if I may begin, I propose to simply set out several legal propositions. I do not propose to elaborate upon them, given the fact that you don't want to engage today, as I understand it, in a thorough debate of these issues. That I can well understand. But I will set out these propositions, and if you do have questions, I'll be happy to entertain them.

Canada, as we all know, is supposed to have "a Constitution similar in Principle to that of the United Kingdom"—so it says in the preamble to the Constitution Act, 1867. In the New Brunswick Broadcasting decision of the Supreme Court of Canada in 1993, Chief Justice Lamer and Justice McLachlin—now Chief Justice McLachlin—decided that article 9 of the English Bill of Rights of 1689 could be directly transplanted to Canada, and that "similar in principle" does not mean "identical". That is a proposition we should bear in mind.

What the Supreme Court of Canada said in the New Brunswick Broadcasting decision was that the broad principles underlying article 9, rather than the specific provisions of that section, were incorporated through the preamble to the Constitution Act, 1867.

This suggests, in my view, that recent New Zealand and Australian case law...in the case of Australian legislation, the Australian Parliamentary Privileges Act of 1987, which purports to set out or to elaborate on the specific provisions of article 9, should be approached with great caution in Canada. In fact, I have provided the clerk with a decision of three judges of the Queensland Court of Appeal entitled Laurance v. Katter, which dates from 1996 and is after the decision in Prebble of 1995, the excerpt of which you've received, in which the judges upheld the Australian parliamentary privileges legislation, but made several statements saying that this legislation seemed to go well beyond article 9 of the Bill of Rights, and I quote, "does not merely reproduce the law as it was understood to be under Art 9 of the Bill of Rights".

The governing provision in Canadian constitutional law concerning the privileges of the Senate and the House of Commons is in section 18 of the Constitution Act, 1867. Now that's a provision; it's not a principle, and it's not the preamble. That's the specific provision directed to privileges and immunities. Section 18 confers upon the Parliament of Canada—and by the Parliament of Canada I mean the Queen acting with the Senate and the House of Commons, not simply the houses—the legislative power to define by act of Parliament the privileges, immunities, and powers of the Senate and the House of Commons.

Parliament has exercised that power through the Parliament of Canada Act. Section 4 of that act provides that the Senate, the House of Commons, and their members have such and the like privileges, immunities, and powers as those enjoyed by the U.K. House of Commons in 1867.

Now it seems clear that the privileges of the United Kingdom House of Commons extended to ban the use in subsequent criminal and possibly civil proceedings before the law courts of statements by members of Parliament or evidence given by witnesses in the House so as not to subject them to criminal or civil liability.

● (1655)

We've talked about, or I've heard talk about, whether the privilege is absolute and how far it extends. Certainly, neither the United Kingdom nor the Canadian House of Commons now asserts a privilege over the introduction of Hansard reports of parliamentary debates in court proceedings to assist in determining legislative history and parliamentary intent.

For example, and I've circulated this through the clerk, in excerpts from the Supreme Court's decision in Morgentaler in 1993, where the Supreme Court of Canada determined, largely on the basis of statements made in the Legislative Assembly of Nova Scotia, that the real intention of the legislature was to enact a criminal law rather than a law relating to medical services in the province, they very much relied on the statements made in the House to determine what the real intention was of the legislature. There are many other examples one could give.

The question is whether for you the privileges and immunities enjoyed by the British Commons included protection from the use, before commissions of inquiry, of statements in Parliament or evidence given before parliamentary committees, or the use of such evidence in any proceedings, not for the purpose of incriminating the witness but to demonstrate the existence of prior and possibly contradictory testimony. That, I submit to you, is an open question in law, and one that, as you know, counsel have submitted to Commissioner Gomery that he ought not to decide in the abstract without an appropriate and concrete factual context.

Now I turn to the option of waiver by the House. On the assumption that the privileges of the House of Commons of Canada do extend to situations like that faced by the Gomery commission, it is my view, on behalf of the Department of Justice, that it is open to this committee to report and recommend a motion to the House that it resolve to waive its privilege in these particular circumstances, that is, to tailor the waiver to the circumstances. As you've heard earlier, the House of Commons has occasionally waived its privilege in the past, notably in respect of criminal proceedings.

The Gomery commission is not a court of law that can decide guilt or innocence, but instead is a fact-finding body, a commission of inquiry empowered to make recommendations of policy. The commissioner is specifically directed, by the order in council under the Inquiries Act setting out his terms of reference, “to perform his duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization”. Thus, certain safeguards are already in place by the very terms of reference of the commission.

As I stated at the outset, and you stated as well, our role is not to give legal advice to the committee but simply to provide it with some nuances and some propositions as to the state of law in Canada. The issue of waiver, I think, is essentially a political one, to be decided by the members of this committee, and ultimately the House. It would be beyond our role to purport to advise the committee on whether it should pursue that course of action as an option.

Reasonable arguments of public law and policy can be, and have been, made on all sides of the issue of parliamentary privilege. As I understand Commissioner Gomery's invitation to this committee and to the House, it is to consider, without necessarily having to decide the issue in a legal context, waiving the privilege should one suppose that this privilege exists and extends as far as it is being claimed to have extended.

Those are in sum, Mr. Chair, the gist of my remarks, unless you have any questions.

● (1700)

The Chair: Yes, I have one question, Mr. Newman. You started off your intervention by quoting the New Brunswick Broadcasting case versus the Speaker of the Nova Scotia Assembly.

[*Translation*]

Mr. Benoît Sauvageau: On a point of order, Mr. Chairman.

May I respectfully ask you to enforce the rules agreed to by the government respecting the order of questioning, if committee members have no objections, to ensure a fair and equitable questioning order. Could you put the question to colleagues?

[*English*]

The Chair: We're having a round table discussion at this point in time, Mr. Sauvageau. The question I have—and I've listened to your questions and everybody else's—is a question about a factual statement that Mr. Newman made.

Mr. Newman, as I said, regarding the New Brunswick Broadcasting case, you said that Mr. Chief Justice Lamer and the current Chief Justice, Ms. Beverley McLachlin, agreed. Now, I'm reading from this article that was published in the *Canadian Parliamentary Review*, and I'll just quote, “On one view, that of Chief Justice Lamer, the *Charter* applied”. Later on it says “the majority, for whom I wrote....” This would suggest that Chief Justice Lamer and Chief Justice McLachlin were on two sides of the issue, but you said they were on the same side. Is that correct?

● (1705)

Mr. Warren Newman: That's correct. They were on the same side of this issue; that is, they both specifically considered and specifically rejected a specific argument that through the preamble of the Constitution Act of 1867, through the British North America Act, was incorporated article 9 of the English Bill of Rights.

In the excerpts, which I've circulated to you, at page 353 you will see Chief Justice Lamer's rejection of that argument, where he sets it out quite clearly. I've side-barred the passage for you on page 353. I suppose you don't need me to read it into the record. You can read it yourself.

The Chair: I'm just trying to find out, to square off in my mind why, according to this article, they were on two sides of the agenda. You're saying they were together.

Mr. Warren Newman: They were together on this issue, sir, with respect. They differed as to their approach to how parliamentary privilege should be invoked, because Chief Justice Lamer went on to disagree with a third argument that was put forward, which was that if the provision doesn't come in, maybe the constitutional principles do, and the constitutional principles would have force of law in Canada. He is troubled by that contention on the basis that we essentially have a written constitution in Canada.

The current Chief Justice McLachlin, if you look at page 374 of these excerpts, says very clearly—in fact, she says it is clear. This I will quote, if I may. It's quite short.

> In respect of the second argument, it is clear that, absent specific reference, the wording of the preamble should not be understood to refer to a specific article of the English Bill of Rights.

She goes on to say, “This is not to say that the principles underlying article 9...do not form part of our law”, but there is no incorporation of article 9 of the Bill of Rights as a specific provision.

I've heard it asserted in a number of fora recently that we should be looking carefully to what other jurisdictions have done with respect to the application of article 9. All I'm drawing to your attention in both of these excerpts is that the court has concluded, both in—it's hard to call it the majority opinion—the plurality opinion of Justice McLachlin and in the concurring opinion of Chief Justice Lamer, that there is no direct incorporation in the Constitution of Canada of article 9 of the English Bill of Rights.

What has come through in the preamble, both of them suggest on the basis of another submission made to that court, is the underlying principle. All the judges I have cited in these excerpts, and that includes Chief Justice Lamer, Mr. Justice LaForest, and Justice McLachlin, say it comes in through the preamble because we have a constitution similar in principle to that of the United Kingdom. But similar in principle does not mean identical.

On that basis, I simply suggest that we cannot transpose, without looking carefully at what we're doing, recent British and Commonwealth jurisprudence, and certainly not without more Australian legislation in this area.

The Chair: Well, I'm not a lawyer and I'm not going to get into a legal debate. I shouldn't be quoting the Chief Justice, but again in this article she does go on to say:

> This Constitution

—the Canadian Constitution—

> includes the parliamentary privileges that “have historically been recognized as necessary to the proper functioning of our legislative bodies”.

Mr. Warren Newman: Right.

The Chair: I'm not going to get into a legal argument.

Mr. Warren Newman: There's no disagreement with us on that point, Mr. Chairman.

The Chair: Okay.

Mr. Fitzpatrick.

Mr. Brian Fitzpatrick: You're saying that the judges have said that you can't take this article 9 and just apply it to Canadian law, but the underlying principle applies. What in the world is this underlying principle?

Mr. Warren Newman: That is why I say I think, with respect, we have to treat the whole area with caution.

● (1710)

Mr. Brian Fitzpatrick: What is that principle?

Mr. Warren Newman: Well, the principle, as you've heard it expressed before, is freedom of speech. It arose in a context where the Stuart monarchy, through the courts, which it controlled at the time, were regularly threatening parliamentarians. There were all sorts of issues, as you know, as to whether even anything in Parliament should be reported. In fact, for the longest time there was a ban on Hansard, anything being done in Parliament, in the houses of Parliament, to protect the activities of parliamentarians.

Really, article 9 and the whole of the English Bill of Rights are the culmination of the supremacy of Parliament as opposed to the supremacy of the monarchy. But when we say that principle is imported into Canadian law, that's a broad principle. We have to look at how we substantiate it in specific instances.

What I am saying to you is that when we really look at parliamentary privileges applying to the Senate and the House of Commons, you have to look to section 18 of the Constitution Act, 1867. That's an express provision that gives Parliament the power to legislate the privileges of the Senate, the House of Commons, and its members. It has done so through section 4 of the Parliament of Canada Act with reference to those privileges as they existed in 1867.

It's always open to Parliament to enact legislation along the lines of the Australian Parliamentary Privileges Act, but it hasn't done so to date.

The Chair: We're going to cut it off there because we'll get into some legal stuff, and maybe it's beyond my comprehension.

We're going to excuse you, Mr. Newman. We thank you for coming forward.

Mr. Christopherson, I didn't have you on the list.

Mr. David Christopherson: I think you did, but that's okay.

The Chair: No, the clerk says you were not on the list.

Mr. David Christopherson: Okay, then I guess I'm on the list now, sir.

The Chair: You're on the list now.

Mr. David Christopherson: Thank you very much.

Thank you very much for your presentation, Mr. Newman.

I have two questions. One—and it's just a question of law—if the House of Commons waives or if Mr. Justice Gomery decides to trump or override or set aside and uses, for prior inconsistent statement purposes, testimony from this committee into his inquiry, the criminal courts would, if nothing else has changed, if Mr. Justice Gomery hasn't set any kind of major precedent.... For the sake of argument, if there's a criminal court case going on and they determine that the privilege of the House of Commons means they can't get at the transcripts from this committee, but they were introduced into the inquiry, would the criminal court case have the same reluctance or inability to use those transcripts? Or would they then be...and I don't know the right terms so I'm just going to say filtered? Laundered is the wrong word, but you know what I mean. They've gone through a transition from here to that place. Does that then make them eligible to be used in a court without the question of parliamentary privilege?

Mr. Warren Newman: There is some speculation involved in that question. I'm more of a constitutional lawyer than a criminal lawyer. I could get off the hook on it that way, I guess. But what I would say is that one must always bear in mind the purpose of a commission of inquiry. It is not, despite the fact that there is a sitting judge, clothed with the powers of a superior court, and counsel are there to assist witnesses. At the front end, it's very much a quasi-judicial process, but at the back end it does not decide issues of law in the sense of guilt, culpability, criminal or civil liability, and that's very clear, as I say, on the face of the terms of reference. I think there are different considerations involved in terms of Mr. Justice Gomery coming before this committee, so to speak, with this issue and a criminal court or criminal proceedings.

The Chair: Thank you, Mr. Newman.

Mr. David Christopherson: Mr. Chairman, I had two questions. That was one.

The second one is very brief. You mentioned there was something that was an open question in law, and it had to do, I believe, with the issue of prior inconsistent statements. Other things were clear, but there was something about that; whether or not that was protected specifically or not was an open question in law. You made that reference. I wrote it down and I just want you to clarify it.

Mr. Warren Newman: Yes. The open question, I think, is twofold. One, does the privilege of the House of Commons in Canada extend as far as to encompass anything that happens before commissions of inquiry? In other words, if you hark back to the principle behind article 9 of the Bill of Rights, it dealt with courts or other places. You were not to impeach what went on in Parliament before a court or another place. Well, is a commission of inquiry another place in the contemplation of article 9 as we should understand it? That's an open question, I think.

● (1715)

Mr. David Christopherson: There are no precedents.

Mr. Warren Newman: There are precedents, but as another counsel said, they are conflicting precedents.

The Chair: We're going to stop it right there since it is an open question.

Thank you, Mr. Newman.

We're going to now hear from Mr. Walsh, the law clerk. I think what we'll try to do, if we can wrap this up, is we will start our deliberations on Thursday, because there will be no time for that today.

Mr. Walsh is the law clerk and parliamentary counsel and has been with us all through the sponsorship inquiry all spring, and now here we are in the fall. He is our legal counsel, and therefore after his opening statements we will have a round table discussion amongst ourselves. The time allocation will not apply. Mr. Walsh would prefer that the discussion be amongst ourselves rather than just interactive with him. After his statement, he will move back up to his position as assisting the chair.

Mr. Walsh, the floor is yours.

Mr. Rob Walsh: Thank you, Mr. Chairman.

This chair is quite warm—

Some hon. members: Oh, oh!

Mr. Rob Walsh: —as I find myself taking it. I hope that's a good sign.

Mr. Chairman, I have prepared some remarks for the committee, and I will get to those in a moment, but I am and have been concerned, as you know, for some time that the committee's deliberations might be pre-empted by a bunch of lawyers making legal arguments. While that's always, I'm sure members would agree, terribly edifying, it may however not serve your purposes as well as we lawyers think it should. So I defer to you and recognize outright—as do my colleagues of the bar here as well, as they have said—that the question before you is one for you and the House ultimately to decide and not a legal question to be decided much like a court of law would.

I want to initially, if I may, respond to some of the comments just made. The first one I particularly want to note is that Mr. Newman made reference to the decision regarding New Brunswick Broadcasting. That was a decision of the Supreme Court of Canada involving the Nova Scotia Legislative Assembly. I don't want to quote Mr. Newman unfairly, because on further study, when I read his testimony, perhaps it will all make better sense than it does to me at the moment.

That case involved the Nova Scotia Legislative Assembly, and it doesn't have its constitutional powers through section 18 of the 1867 act, which is the one we are talking about with regard to this federal House of Commons. So at this point I can't go on to say how that might make a difference, but I think it's important to note that that decision involved the provincial legislative assembly. The House of Commons joined in that action and certainly made its submissions.

I also note that with regard to the Bill of Rights, Mr. Newman made the point that it's the underlying principles that apply, and I would agree that we are really talking about the underlying principles here. I never would mean to say that the Bill of Rights, word for word, is part of the law of Canada, although I note that in the constitutional reference of 1981 the Supreme Court of Canada at one point says reference may appropriately be made to article 9 of the Bill of Rights of 1689, undoubtedly enforced as part of the law of Canada, which provides that:

> ...proceedings in Parliament ought not to be impeached orquestioned in any court or place out of Parliament.

I think what I want to talk to this committee about is the perspective I offer you as parliamentary counsel, as opposed to legal counsel concerned about the interests of my client in the commission of inquiry.

Waiver has been mentioned, and I want to raise a few points with you regarding the 1892 and 1978 cases. Those cases happened, certainly. There was testimony of the House that was made available for the purposes of court proceedings. I don't think there's time now to go into them in great detail, but I can provide more information on those to committee members if you wish. Suffice it to say, they were very limited and specific to situations that were addressed in those two cases.

There is an example, going to the other parts of the Commonwealth, where this question of the use of materials from parliamentary proceedings before commissions of inquiries came up. In 1992 a commission of inquiry wished to use transcripts of committee testimony—a situation very close to what we're dealing with here—and counsel for the commission in Australia made a request of both houses of Parliament to waive article 9 of the Bill of Rights. Both houses rejected that request because they were not certain they could waive this constitutional right. The commission of inquiry—composed of three judges, by the way, not just one—respected the position of both houses and continued its inquiry, noting the decision of the houses and adding that this may have the effect that some evidence would not be available to the inquiry.

New Zealand and the United Kingdom have faced similar issues in the context of defamation cases, where members of the House wished to use their own words spoken in the House to defend themselves, and the courts have not allowed them to do so in deference to article 9.

There's also discussion amongst some Commonwealth parliamentary committees—your colleagues in other parliamentary systems of government—about this idea of waiver: in the United Kingdom in 1999, Australia in 1995, and New Zealand in 1994. Again, I'm not going to go into great detail here, but it's interesting to consider one of the reasons those parliamentarians felt ought to be considered for not waiving the privilege. One was that the provisions of article 9 are a matter of public importance and were enacted for the protection of the public interest, and, absent statutory amendment, they cannot be waived. They thought that to allow waiver by a simple majority could be open to abuse by a majority against a minority in the House or against a single member. They thought waivers could stifle free speech: anytime someone is speaking, they will never know whether at some future date they will have the protection they think they have today. A waiver could lead to further waivers.

● (1720)

Second, there's the rather nice legal argument articulated that perhaps to waive article 9 is not constitutionally available in the sense that it's not available to this House to expand the jurisdiction of the courts. In other words, the jurisdiction of the court is defined, arguably, by article 9, in effect saying “You don't go there”. So there's a limit to the court's jurisdiction.

Can the House enlarge that jurisdiction by setting aside the waiver? I don't form any opinion to this committee about this, Mr. Chair. I just point out that other parliamentarians have found these considerations worth thinking about relative to the question of waiving—the point being that maybe the privilege is not waiveable, or not one that lends itself to being waived.

It's an interesting point of view these parliamentarians have. I would like to offer some thoughts from the perspective of a parliamentary counsel. I have my prepared remarks with the committee clerk. If the committee clerk wishes to distribute these remarks, they are available in English and French. I will be delivering them in a bilingual form.

The Chair: We'll have them distributed now, Mr. Walsh.

Oh, they have been distributed.

Mr. Rob Walsh: Sorry, I wasn't aware.

As the parliamentary counsel here, I'm tasked with advising my clients, the elected members of Parliament, on the legal context in which the matter before them arises for their consideration.

What we have here, in my view, is an interface of law and politics; that is to say, an interface between political, parliamentary proceedings on the one hand and legal, quasi-judicial proceedings on the other.

The House of Commons, as an elected house of Parliament, has a political, democratic mandate for its proceedings, with all that this entails in terms of political accountability and partisan interest. The commission of inquiry, an appointed body, has an apolitical, legal mandate for its proceedings, with all that this entails in terms of legal formalities and a rigorous, inquisitorial process.

In my view, it is important to acknowledge the different values that underlie these quite different proceedings.

[*Translation*]

For its mandate, the House of Commons is supported by democratic values, while the Inquiry is supported by legal values. Both are protected by our Constitution and both operate under the umbrella value of the rule of law but the differences between them in their underlying values are profound, indeed fundamental.

The democratic values supporting the function of the House of Commons include popular representation through elections, exclusive control of its own proceedings and an untrammelled freedom of speech in its debates and proceedings, whether in the House or in one of its committees, such as this committee meeting here today. This includes freedom for witnesses before committees to express themselves fully without fear of legal consequences.

● (1725)

[*English*]

Without this freedom of debate, the views of Canadians on the issues of the day would not be fully heard, as they must be if our democracy is to be meaningful. The debates in the House of Commons and its committees are where the democratic life of Canadians, at the federal level, is acted out between elections, for better or for worse.

The legal values supporting the function of a commission of inquiry include the representation of interested parties through legal counsel and the application of the principles of natural justice by which each interested party is afforded ample opportunity to challenge testimony given before the commission where the interests of the interested party may be adversely affected. This challenge function is usually done through cross-examination of witnesses, where counsel seeks to diminish the evidentiary weight that might otherwise be given to the testimony of that witness.

[*Translation*]

Our parliamentary system of government, as you all know, has its genesis in Britain. Relations between the King of England and the House of Commons came to a difficult passage in the late 17th century where the traditional, all-powerful authority of the King came up against emerging democratic forces represented by the House of Commons. I needn't review this political history here as I expect the members of this committee are largely familiar with it.

The end result was the *Bill of Rights* of 1689, formally titled:

[*English*]

"An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown".

[*Translation*]

This statute has ever since been treated as part of the famously unwritten Constitution of England.

[*English*]

The "Rights and Liberties of the Subject", as set out in the Bill of Rights of 1689, did away with the imposition of taxes by royal prerogative. Thereafter, this could only be done by Parliament. Ever since, this has been a fundamental power entrusted to the House of Commons in both England and here in Canada.

As well, the King could no longer maintain a standing army without the consent of Parliament. The election of members of Parliament was to be free. Excessive bail and fines were not to be imposed, nor cruel and unusual punishments inflicted.

Then there was article 9, which reads as follows:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

By this provision, the conflict between the democratic mandate of the House of Commons and the legal powers of the King and his courts, Mr. Chairman, were reconciled. The proceedings in the houses of Parliament were not to be questioned anywhere, period, including, and especially, in the courts.

[*Translation*]

The Bill of Rights, 1689 was reaffirmed in Canada when it became part of the constitutional law of Canada through the Preamble and section 18 of the Constitution Act, 1867 and section 1 of the Parliament of Canada Act of 1868, now section 4.

The proceedings of the House of Commons and its committees are constitutionally protected, Mr. Chairman, not for mere political purposes but to ensure that the public interest is properly served through free and open debates.

[*English*]

There is another provision of our laws that should be noted in this connection, Mr. Chairman. I don't know how it was overlooked by the counsel we heard earlier this afternoon. This is section 5 of the Parliament of Canada Act, which reads as follows:

> The privileges, immunities and powers held, enjoyed and exercised in accordance with section 4 are part of the general and public law of Canada and it is not necessary to plead them but they shall, in all courts in Canada, and by and before all judges, be taken notice of judicially.

This provision obliges judges to be cognizant of the powers, immunities, and privileges of Parliament without them needing to be mentioned in order to be considered. They are always applicable.

Section 5, in my view, is designed to support the autonomy and dignity of the houses of Parliament, and to reaffirm that they are not to be subordinated to the courts or their proceedings, which would be the case if they must defend their proceedings in court.

[*Translation*]

Notwithstanding section 5 of the Parliament of Canada Act, Mr. Justice Gomery, at the close of the October 25 hearing on this matter, announced that he would not at that time decide on the application of parliamentary privilege because he didn't want to decide this question in the abstract.

Instead, he preferred to wait for the circumstance to arise in his proceedings where privilege might apply, in which case he would then call upon the House of Commons to send its lawyer back to the Commission to plead its case for the application of parliamentary privilege.

● (1730)

[*English*]

The House and its members might well take umbrage at this in view of the terms of article 9 of the Bill of Rights of 1689 and sections 4 and 5 of our Parliament of Canada Act, that it is to be summoned by one of the Crown's appointed judges to plead its position. In my view, the present circumstance is the very situation that section 5 of the Parliament of Canada Act is designed to address. As a matter of law, the House did not need to attend before the commission of inquiry for its privileges to apply.

It is indeed disappointing that the commissioner, having the benefit of a comprehensive and informative presentation on the law of parliamentary privilege, would put the onus on the House of Commons to defend its privileges in the inquiry proceedings—that is, to justify application of its privileges to those proceedings. This is contrary to the constitutional separation of powers in our parliamentary system of government. In my view, some might see this as an affront to the constitutional standing of Parliament.

I sent legal counsel to the commission of inquiry, on very short notice, to assist the commissioner, as an amicus curiae, or friend of the court, to remind the commissioner of the constitutional law of parliamentary privilege lest he make a legal error to which the House might later take exception and that might give rise to a public controversy of the kind now arising, which, in turn, might give rise to further legal proceedings.

Mr. Justice Gomery said he found the House's intervention puzzling and one that seemed designed to impede his proceedings. He said that he was not allowed to question the motivation behind the intervention of the House of Commons but he could speculate, and then proceeded to do so. I fail to see his distinction when he proceeds to speculate that the House of Commons was seeking to impede his proceedings. This was never the intent, and I'm sure this would not ever be the intent of any member of Parliament on either side of the House.

[*Translation*]

Commissions of inquiry, established under the Inquiries Act, have the powers of a court to summon and enforce the attendance of witnesses and to compel them to give evidence. Clearly, a commission of inquiry, for purposes of parliamentary privilege, must be treated as equivalent to a court of law, although it is a creature of the executive branch of government and is not serving a judicial function in the usual sense of that term.

In my view, there can be no doubt that Article 9 of the Bill of Rights Act, 1689 applies and that parliamentary privilege applies to the Inquiry proceedings. The privileges of the House of Commons ought never to be at risk in a legal proceeding, as Mr. Justice Gomery has said they now are in his proceedings.

[*English*]

The question for the House, if this matter ever comes before the House, will be whether this was an occasion where the House ought not to insist on its constitutional privileges. This is a question for the House, and the House alone, to decide.

The question for this committee in particular, in view of the fact that it is the testimony of witnesses before this committee that is sought to be used at the inquiry and in view of the assurances that this committee gave to its witnesses at its hearings last spring, is whether this committee would have any objection to allowing this testimony to be used by legal counsel at the inquiry. Further to this is whether any such objection might apply only to the testimony of witnesses who have already testified or only to the testimony of witnesses who have not yet testified.

Finally, I wish to draw to the committee's attention the comment found in the 1999 report of the joint committee of the House of Commons and House of Lords in Britain—Mr. Newman, I believe, made mention of the Queensland Court of Appeal decision—after the Prebble case.

After that Queensland decision in 1999, the joint committee in Britain—

The Chair: Who in the room left their cellphone on?

Ms. Catherine Beagan Flood: I apologize for that. I thought security had turned it off, but they turned it back on again.

The Chair: Mr. Walsh, sorry to interrupt.

Mr. Rob Walsh: This joint committee in Britain, in its report to their houses, recommended that Parliament should confirm as a general principle the traditional view of article 9, that it is a blanket prohibition on the examination of parliamentary proceedings in court. The prohibition applies whether or not legal liability would arise.

It is true that commissions of inquiry are not charged with finding liability. They are charged with finding the facts. But in my view it's naive to suppose that proceedings before that commission of inquiry aren't very much of public interest, and indeed of interest to other persons charged with advancing other legal proceedings.

While Mr. Guité may have concerns about what use may be made, in later proceedings, of his testimony before the inquiry, similarly, witnesses before this committee, although many of them may have no basis whatsoever to be concerned about any possible criminal proceedings against them, nonetheless may be concerned about the use of their testimony in subsequent proceedings in one form or another. Arguably, they came before this committee on the assurance that they didn't have anything to worry about.

However, all of that said, it's not my place to advise you as to what you should do about this, Mr. Chairman. It's a parliamentary question. I have no opinion on....

Voices: Oh, oh!

Mr. Rob Walsh: I think I have tried to bring to the committee's attention considerations that I as parliamentary counsel think you ought to be aware of with respect to the legal context in which you find yourselves.

Thank you, Mr. Chairman.

● (1735)

The Chair: Thank you, Mr. Walsh.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Hear, hear!

The Chair: Mr. Lee, I think I would agree with your statement, by the sounds of it.

Our time for adjournment has arrived. Therefore, we will not be expressing an opinion on this issue today.

For Thursday, at 3:30 in the afternoon, we have on the agenda a report from the steering committee to be debated. I'm going to take the first half-hour on Thursday to deal with the steering committee. That will be in camera. At 4 o'clock we will move into a public meeting to start our debate. I have Mr. Holland, Mr. Murphy, and Mr. Lastewka as the first questioners on Thursday.

This meeting is adjourned.

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