House of Commons
CANADA

Subcommittee on Parliamentary Privilege of the Standing Committee on Procedure and House Affairs

SPRV • NUMBER 002 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Tuesday, November 16, 2004

Chair

The Honourable Judi Longfield

Subcommittee on Parliamentary Privilege of the Standing Committee on Procedure and House Affairs

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● (1105)

[*English*]

The Chair (Hon. Judi Longfield (Whitby—Oshawa, Lib.)): I call the meeting to order.

Good morning, ladies and gentlemen, and welcome to the second meeting of the subcommittee on parliamentary privilege. We have two witnesses today, and I know we all have a good number of questions.

Without further delay, I see Mr. Walsh at the end of the table. You're on.

Mr. Rob Walsh (Law Clerk and Parliamentary Counsel, House of Commons): Thank you, Madam Chair.

Let me first point out, Madam Chair, that I have provided to the clerk of the committee the English and French versions of the presentation I made to the public accounts committee last week, as well as another document headed "Waiver of Privilege", in both official languages. It is available for distribution to committee members if you so permit, Madam Chair.

The Chair: I think that is happening as you speak.

Mr. Rob Walsh: Okay.

At the beginning, I would like to basically summarize what it is I said to the public accounts committee, in the sense that, at that time, I felt it was appropriate that I place the public accounts committee in context. At that time, it was only a few days after receiving the message through counsel from Mr. Justice Gomery that he wanted the House to consider whether it could waive its privileges in the present situation. I thought it appropriate to set the context for the public accounts committee, the issue before that committee being, in my view, whether it would have any objection were the testimony of its witnesses to be made available to the Gomery commission by the House, it being the committee that had, as it were, a proprietary interest in the question.

As my statement indicates, I described what I thought to be an interface between law and politics, in that the legal proceedings of the commission were up against the parliamentary political and democratic proceedings of the House. That has implications, obviously, where the two might be in conflict, and arguably met their resolution in article 9 of the English Bill of Rights of 1689.

The privilege in question today, namely the freedom of speech in parliamentary proceedings, is founded on article 9 of the Bill of Rights 1689, 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.

This article, which has been described by many courts and parliamentarians throughout the Commonwealth as the single most important parliamentary privilege, established the constitutional independence of the English House of Commons from the Crown. Since then, parliaments have carefully guarded their independence from the courts and the Crown, as represented by the executive branch of government.

[*Translation*]

This privilege—freedom of speech—is the cornerstone of the independence of the House of Commons in any parliamentary system of government based on the British model, such as ours here in Canada.

[*English*]

Last month, at the opening of Parliament for the 38th time since Confederation, the Speaker of the House, addressing Her Excellency the Governor General on behalf of all members of Parliament, publicly claimed

> ...their undoubted rights and privileges, especially that they may have freedom of speech in their debates, access to Her Excellency's person at all seasonable times, and that their proceedings may receive from Her Excellency the most favourable construction....

[*Translation*]

It is worth noting that the only privilege specifically mentioned in this traditional proceeding is freedom of speech.

[*English*]

On October 14, 2004, counsel for one of the interested parties before the Commission of Inquiry into the Sponsorship Program and Advertising Activities of the Government of Canada advised the commissioner that it was his intention to use transcripts of the public accounts committee for the purpose of cross-examining witnesses before the commission of inquiry. Counsel argued that the privileges of the House did not preclude the use of committee transcripts for the purpose of cross-examination to impeach the credibility of a witness.

In the alternative, the suggestion was made that the commissioner could ask that the House of Commons waive its privileges. The commissioner asked counsel representing the House of Commons to determine whether the House was prepared to waive its privileges.

[*Translation*]

This subcommittee is now being asked to decide whether the House should do so or whether it should instead insist that its privileges be respected.

[*English*]

The question is whether or not witnesses before parliamentary committees, and not only members of Parliament, are protected by the privileges of the House of Commons. The short legal answer, in my view, is that they are protected.

[*Translation*]

The privileges of the House of Commons in Canada are those possessed by the British House at Confederation, that is, in 1867. In 1818, the British House of Commons, when confronted with the question of protection of witnesses, unanimously resolved as follows:

[*English*]

"That all witnesses examined before this House, or any Committee thereof, are entitled to the protection of this House in respect of anything that may be said by them in their evidence."

There is the further legal question of what exactly this privilege, freedom of speech, protects against. For a number of years prior to the 1990s there was some debate as to whether the protection for members and witnesses only protected them from civil lawsuits or criminal charges or whether the protection was much broader. In this regard, I would draw your attention to a ruling of the judicial committee of the Privy Council, a committee of the House of Lords in the United Kingdom, in the Prebble case, decided in 1994. This case had its origins in New Zealand. Although Canadians can no longer bring appeals before it, this court is still considered one of the leading authorities on matters of common law and such matters as parliamentary privilege.

● (1110)

[*Translation*]

In this case, the Judicial Committee was considering the extent of the privilege provided by Article 9 of the Bill of Rights, 1689, and in particular the argument that the protection afforded by Article 9 only applied to legal liabilities.

[*English*]

I'm quoting the judicial committee here:

> This view discounts the basic concept underlying article 9, viz. the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore, he would not have the confidence the privilege is designed to protect.

[*Translation*]

Moreover, to allow it to be suggested in cross-examination or submission that a member or witness was lying to the House could lead to exactly the conflict between courts and Parliament which the wider principle of non-intervention is designed to avoid.

[*English*]

The judicial committee concluded:

> For these reasons...their Lordships are of the view that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception such as exists...in relation to perjury....

[*Translation*]

At least in the opinion of the Law Lords of the Judicial Committee of the Privy Council, sitting in London, England, the birthplace of parliamentary privileges, the long-standing parliamentary privilege of freedom of speech, confirmed in writing by the Bill of Rights, 1689, was still very much alive in 1994, and, in my view, applies to the proceedings of the Gomery Commission of Inquiry.

[*English*]

The question before this committee, Madam Chair, is whether in the present circumstance the House of Commons should insist on its privileges or permit a limited exception.

[*Translation*]

On two occasions, the Canadian House of Commons has chosen not to insist on its privileges; once in 1892, and again in 1978. In 1892, it was the Connolly case.

[*English*]

In the late 1880s, Thomas McGreevy, member of Parliament, was alleged to have abused his position by taking bribes and offering to use his influence with regard to certain contracts. The matter was referred to the House Committee on Privileges and Elections. During the committee hearings, the evidence apparently implicated a company of which Mr. Connolly was a principal. During the committee hearings, member of Parliament McGreevy was asked about his relationship with Mr. Connolly and he refused to answer.

Mr. McGreevy was expelled from the House and charges of conspiracy were contemplated against both Mr. Connolly and Mr. McGreevy. In order to obtain the warrant needed to formally charge Messrs. Connolly and McGreevy, the crown prosecutor filed transcripts of the privileges and elections committee with the magistrate. The magistrate refused to consider the transcripts on the basis that the evidence was protected by parliamentary privilege.

[*Translation*]

On a judicial review of the magistrate's decision, the Ontario High Court of Justice upheld the decision of the magistrate. The Court also indicated that the House of Commons could choose to waive the privilege in question.

[*English*]

On April 12, 1892, the House of Commons resolved to allow the evidence to go before the magistrate. The House of Commons also stated that in allowing this limited use, it was not giving up any of its privileges.

[*Translation*]

In 1978, the case involved the proceedings of a commission of inquiry, as we have today.

● (1115)

[*English*]

The House Standing Committee on Justice and Legal Affairs had held hearings into alleged wrongdoings by members of the RCMP. In the course of its proceedings, certain witnesses requested and were granted permission to testify in camera. Some months later a commission of inquiry was established to investigate. In the course of the inquiry, the commission requested access to the tapes and transcripts of the in-camera testimony given to the House of Commons committee. On December 14, 1978, the House of Commons ordered, and I quote from the journals record, that the "committee be authorized to make such evidence adduced in camera available to the Commission of Inquiry...under such terms as may be established by the Committee".

[*Translation*]

The House committee was concerned about releasing its evidence in the face of the assurances it gave to witnesses that they would be able to testify in camera. The committee wrote to each of the witnesses and obtained the written permission of each witness to allow their testimony to be examined by the commission. On receiving the permission of the witnesses, the committee sent the transcripts to the commission on condition that the transcripts be examined in camera and that immediately after examination the transcripts were returned to the committee forthwith. It should be noted that the committee was only authorizing the commission to examine the transcripts in camera and that any other or further use by the commission would have to be the subject of further requests.

[*English*]

Canada is not the first country in the Commonwealth to receive requests to use committee transcripts in legal proceedings. As noted in my summary document on the waiver of privilege, which I believe has been distributed to members, Madam Chair, the United Kingdom, Australia, and New Zealand have all had to examine this question.

In England in 1996, a member of Parliament wanted to use comments he had made in the House to defend himself in a legal action. In Australia, the problem also arose in the context of a public inquiry, one chaired by three judges, that also wanted to use evidence from a parliamentary committee. In the Australian case, the Speakers of both Houses of Parliament refused to allow the evidence to be used, basing their decisions on article 9 of the Bill of Rights of 1689. The commissioners were not happy with this decision, though they respected the privileges of each House. In their report, the commissioners noted that as a result of the position taken by the two Houses, there may have been some relevant evidence that was not available to the commission that it would have liked to have been able to consider.

In each of these three jurisdictions, England, Australia, and New Zealand, the issue turned on the meaning and application of article 9 of the Bill of Rights of 1689. In each country the matter was referred to the appropriate House committee that usually dealt with parliamentary privilege.

[*Translation*]

In all three instances, the committees concluded that the privilege provided by Article 9 cannot, or ought not, in the absence of clear authority to the contrary, to be waived. On a perusal of the reports of the parliamentary committees in those jurisdictions, one finds as many as five reasons why they insisted on their privileges.

[*English*]

First, 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, cannot be waived.

Second, to allow waiver by a simple majority, the question could be open to abuse by a majority at the expense of a minority or a single member.

Third, a waiver could stifle free speech, since at the time someone is speaking, they will not know whether at some future date the protections of the privileges of the House will not be withdrawn.

Fourth, a waiver could lead to further and more frequent requests for waivers.

Finally, the provisions of article 9 do not only constitutionally grant the right of free speech to the House but also constitutionally restrict the jurisdiction of courts and other places. It is not certain that the House alone, by waiving its privileges, can enlarge the constitutionally circumscribed jurisdiction of the courts.

[*Translation*]

In the end, this committee must decide whether or not the parliamentary privilege of free speech, and the protection this privilege provides to the House and committee proceedings, based on Article 9 of the Bill of Rights, 1689, must continue to apply in order to protect witnesses before House committees and, in particular, those who appeared before the Standing Committee on Public Accounts.

This committee might conclude that an exception is warranted in this case.

● (1120)

[*English*]

In addressing the issue before it, Madam Chair, the committee has a choice to make, and it is not one simply of privilege or no privilege; in my view, it's more complicated that this. The committee might recommend that the privilege be affirmed without exception, and the commissioner, Mr. Justice Gomery, on November 22 might take a different view. If this were to happen, where the privileges of the House, having been affirmed by the House after careful consideration of the matter, were not respected, the House of Commons, in my view, must be prepared to defend its privileges in the courts, if necessary.

To this end, Madam Chair, I recommend that this committee include among its recommendations the recommendation that the Speaker be authorized to take whatever steps, including retaining legal counsel, as he may consider necessary for the purpose. A privilege asserted but not defended when challenged will soon be a privilege in name only, and mere posture.

[*Translation*]

In the event that this committee believes that it is better that the House of Commons not insist on its privilege in this case, the committee should be clear in its report on the extent of the exception it is prepared to allow.

[*English*]

The concern ought to be that the privileges of the House of Commons, its members and the witnesses appearing before House committees—past, present, and future—not be compromised any more than is necessary in the specific circumstances of this case, and only for the intended limited purpose raised before the commission.

That concludes my comments, Madam Chair.

The Chair: Thank you, Mr. Walsh.

We'll move to questioning. I'm going to suggest five-minute rounds, starting with Mr. Reynolds.

Mr. John Reynolds (West Vancouver—Sunshine Coast—Sea to Sky Country, CPC): Thank you, and thank you very much, Mr. Walsh.

Would it be safe to say that if the decision is made not to waive privilege in this case, and Justice Gomery decides in the case of one or more witnesses that evidence from the public accounts committee can be used by him, there'd be a legal challenge that would have the effect of tying up these proceedings for a considerable amount of time?

Mr. Rob Walsh: I cannot confidently estimate whether the process you're contemplating, Mr. Reynolds, would in fact tie up the commission's proceedings. That's something the commissioner obviously would have to consider. It could well be that the commissioner has other duties or tasks that he could proceed with while these other legal questions were being resolved. Perhaps there are other witnesses who counsel doesn't expect to ever want to subject to cross-examination, or witnesses who weren't witnesses before the public accounts committee, and in respect of whom there would be no privilege issue.

So I can't say whether in fact the proceedings would be delayed were those legal proceedings you described to take place.

Mr. John Reynolds: Nevertheless, if this committee were to decide not to waiver, and he decided to go ahead, we would obviously have to...or you're recommending that we would then take steps and go into court to prevent him from using any of these documents with these witnesses. So it certainly would crimp his style somewhat.

Mr. Rob Walsh: I hesitate to comment on what the impact would be on his proceedings, as that is a matter for him to determine in his good judgment.

Mr. John Reynolds: Okay.

In your notes on page 5 you say that:

> On April 12, 1892, the House of Commons resolved to allow the evidence to go before the magistrate. The House of Commons also stated that in allowing this limited use it was not giving up any of its privileges.

So in that case, the House of Commons decided to allow evidence from the House of Commons to go.

Would you agree with me that this could be considered a very special case—the one we're talking about right now—and as long as the terms of the waiver are very precise and limited, this will not necessarily set any general precedent for the future? This committee could be very precise in what it told Justice Gomery and how he could use these things, because it's been done in the past.

Mr. Rob Walsh: To respond to the first part of the member's question, Madam Chair, I would hope that any exception to the privilege would be a special case and treated as such, not only as to the exceptional nature of the circumstances but also that it would not create a precedent.

I think the second part of the member's question, Madam Chair, went to the powers of the House to delimit the terms and ambit of any permission. Yes, I believe the House could do that, and it's my view, insofar as all legal proceedings are bound by the law of parliamentary privilege, that these proceedings would also be bound by the limits set down by the House in granting an exception.

● (1125)

Mr. John Reynolds: So in a case where the government and opposition parties have agreed that Justice Gomery is the person who should be deciding this case and giving us a report...whatever happens from that, whether it's police action or whatever, we all want to get to the bottom of the issue.

It seems to me here we have a case where witnesses testified before a parliamentary committee, and it would seem now their testimony before Justice Gomery is totally different. Yes, we could bring them back and charge them with perjury, but I don't think we all want to become judges and juries. Would it not be better for us as parliamentarians to allow Justice Gomery—or the lawyers—to compare this testimony so that he can get to the bottom of the issue and to provide this information to him in a precise way so that it really doesn't affect our privilege?

It's out in the public anyway, and I think that's where I'm having a problem. My constituent sees the evidence; it's already been given. He sees the evidence before Gomery; there's a different story there. And we're trying to protect some privilege that the average Canadian just doesn't understand and we're protecting some witness who may be lying.

Is there not some way you can give us advice that we can use to provide Justice Gomery the freedom to get to the bottom of the issue and let him be the one to decide this issue, rather than wasting a lot more time of our public accounts committee?

Mr. Rob Walsh: Madam Chair, I recognize that this concept of parliamentary privilege is not readily comprehensible in general public discussion, although I would argue that as soon as a member of the public were presented with appearing before a parliamentary committee, that person would fast understand what parliamentary privilege is about, and for understandable reasons.

With regard to the comment of the member regarding getting to the bottom of matters and looking at the testimony of particular persons who it may be perceived, rightly or wrongly, are giving different testimony before the commission now from what they gave to the committee some time ago, it may be an attractive avenue to enable Mr. Justice Gomery and his proceedings to determine whether a given witness was or was not, is or is not telling the truth. To the extent that this proceeding is narrowly limited in its purpose to that particular individual, it may have merit. However, as some of the reports from other jurisdictions indicate, the problem with a situation such as we have here is the larger ramifications, the ramifications for other witnesses as to the same being done to them.

Don't forget, Madam Chair, it could well be the case that in many instances the witness in question has a very ready explanation for why the testimony is different later from what it was earlier before the committee. Let's not forget that a committee of the House is an entirely different proceeding, both in terms of how it's run and its atmosphere and its objectives, from what is the case with a judicial inquiry run by a judge under conventional rules of natural justice.

So there could be some ready explanations that a given witness might have as to why his or her testimony later is different from what it was before, and arguably they should be afforded an opportunity to do that, but it's the larger ramifications, Madam Chair, that have concerned other jurisdictions, where they've contemplated allowing an exception to the privilege.

The Chair: Mr. Guimond.

[*Translation*]

Mr. Michel Guimond (Montmorency—Charlevoix—Haute-Côte-Nord, BQ): Thank you, Madam Chair. Thank you, Mr. Walsh.

In his questions, Mr. Reynolds referred to a possible resolution of the House or a report adopted by our subcommittee calling on Justice Gomery to deal with this issue as a priority.

Correct me if I'm wrong, but Justice Gomery is free to set his own agenda. Justice Gomery has full independence in relation to the House of Commons. We can make any type of request of him but when it comes to his commission, he may decide as he pleases. It is desirable to avoid any interference on the part of the House of Commons, is it not?

Mr. Rob Walsh: Madam Chair, in theory, the member is correct in saying that it is Justice Gomery who decides about sittings and procedure. Nonetheless, we should keep in mind section 5 of the Parliament of Canada Act. Mr. Gomery is required to comply with the act in general as well as with specific laws. Section 5 requires all judges to take into account rules on parliamentary privileges. True, he does have control over sittings and procedure but he must respect provisions of the law that apply to all legal processes, including section 5, that clearly stipulates:

> 5. 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.

The application is therefore quite clear.

● (1130)

Mr. Michel Guimond: Mr. Walsh, I am sure that you have studied the mandate of the Gomery Commission as well as the act governing commissions of inquiry such as the Gomery Commission. I would like to return to a particular point, it may be that I missed something. Let us suppose that Mr. Guité's testimony contradicts previous testimony that he gave to the Standing Committee on Public Accounts and that a misunderstanding or a dispute leads us to a judicial process. Would Justice Gomery be in a position to make a decision setting the matter aside and continue to hear other persons? It would be far too easy to bring the Gomery Commission to a standstill, waiting until 2007 or 2008 for a Supreme Court decision on the matter without getting to the bottom of the subject the Gomery Commission was set up to investigate. In your opinion, would he have the power to set the matter aside...?

Mr. Rob Walsh: Briefly, yes.

Mr. Michel Guimond: I was present at the Standing Committee on Public Accounts. You followed the hearings in February, March and April. I remember that the Conservative chair of the Standing Committee on Public Accounts, John Williams, made use of the procedure of swearing in witnesses before the parliamentary committees. You agree that this is an unusual procedure, isn't it?

Mr. Rob Walsh: Yes.

Mr. Michel Guimond: Were the preliminary remarks made by Chair Williams himself or the clerk to each of the witnesses also an unusual procedure?

Mr. Rob Walsh: Yes.

Mr. Michel Guimond: We almost get the impression that we are heading toward a sort of impasse that will inevitably lead to legal action. On the other hand, if we decide to lift the parliamentary privilege, Mr. Guité's lawyer will be able to say that his client obtained guarantees from the Standing Committee on Public Accounts and that he intends to take legal action in order to have his right respected. In the case of the McDonald Commission in 1978, each of the witnesses were asked whether they agreed to have their privilege waived and there was unanimous agreement.

Mr. Rob Walsh: That is correct. Mr. Guité himself or his lawyer could undertake legal action to defend the rights granted to him by Parliament, in view of the fact that the witness himself was given parliamentary protection.

Mr. Michel Guimond: I recognize your wisdom and your prudence. In your comments, you set out a number of possibilities for us. You do not necessarily recommend a particular course of action. However, aside from the Connolly affair and the McDonald Commission, you will agree that in this particular case lifting the parliamentary privilege would create a precedent that could apply next year, three or five years from now, in any one of our 22 parliamentary committees or with respect to any comment made by a member in the House. It would be possible to adopt a resolution of the House stating that a particular member made malicious comments resulting in the decision to take away his parliamentary privilege. By agreeing to give up a parliamentary privilege, one is creating a very dangerous precedent.

Mr. Rob Walsh: That is correct. In the legal area, if a ruling has already been made by the court, the next court will make the same ruling. It is called a precedent. Generally speaking, according to the rules of practice the courts must follow precedent. However, in other areas, there are no precedents. That is the situation we are grappling with, since we have not promised to repeat the same thing later on if the same situation were to arise again.

In reality, given human nature, if you have done something once, it becomes a lot easier to do it again and again.

● (1135)

[*English*]

The Chair: At this point we're over the time. I'm going to have to move on to Madame Boivin.

[*Translation*]

Ms. Françoise Boivin (Gatineau, Lib.): Good morning, Mr. Walsh.

I would like to clarify certain concepts we are currently debating in this public meeting. As you know, the House of Commons will have to make a legal decision which will have many political consequences. We know that all eyes are on us and everyone is waiting for the outcome of our debate.

Based of what I recently heard, some members of certain political parties believe that the notion of privilege is there only to protect people when they are speaking the truth. I would like to know whether privilege also applies when people are lying, or making defamatory or racist remarks which, for instance, violate the Charter of Rights and Freedoms.

Does privilege only apply to certain situations deemed acceptable, or is it truly a blanket privilege, regardless of what a person says in the House or in a place where the business of the House is being carried out?

Mr. Rob Walsh: Madam Chair, there are two limits on freedom of speech, namely perjury and contempt of the House. For instance, if the Standing Committee on Public Accounts determines that a witness lied, which is tantamount to contempt, the committee would report to the House of Commons. It would state that the person was found in contempt and ask the House of Commons to decide whether or not, in fact, contempt occurred. It is not up to the committee but to the House to decide whether that indeed was the case.

On the other hand, perjury is a legal issue which falls under criminal law. It is up to the Attorney General to decide whether there is enough evidence to accuse someone of perjury. You could say that parliamentary privilege does not give witnesses the right to lie. Witnesses have the obligation to tell the truth when they appear before a committee. The problem is to decide which statements are true and which are not. In the case at hand, the lawyers pleading before the Gomery Commission of Inquiry want to be able to determine the truthfulness of the testimony.

Ms. Françoise Boivin: Well, it is basically a vicious circle. As we speak, no one can say that someone has lied before the Standing Committee on Public Accounts. Is that correct?

Mr. Rob Walsh: The problem is that it is up to the House of Commons to decide whether a witness has lied; it is not for anyone else to decide.

There is another legal problem. In the case of two consecutive processes, if you compare the testimony a person has given in the second process with what that person said in the first process, and if there are discrepancies or contradictions, who can say whether that person told the truth in the first or in the second process?

If I recall correctly, under the law, what a person says the second time around is deemed to be truthful, and not what was said the first time. However, if it is established that the person lied during the second process, it means that what that person said the first time around was truthful. That is inevitable. You cannot assess the truthfulness of a statement the second time around without assessing what was originally said. In my opinion, parliamentary privilege protects the testimony given before a parliamentary committee from review by another authority.

● (1140)

Ms. Françoise Boivin: As far as the two exceptions you mentioned regarding the waiving of privilege are concerned, am I wrong in assuming that they are very different from the case at hand?

Mr. Rob Walsh: Yes, it is different. We are not dealing with contempt or perjury here.

[*English*]

The Chair: Okay.

Mr. Godin.

[*Translation*]

Mr. Yvon Godin (Acadie—Bathurst, NDP): Thank you, Madam Chair.

Thank you, Mr. Walsh, for being here and for shedding light on certain issues for us.

As a lawyer, can you tell me whether there are different types of lies? Are there two different definitions of what a lie is?

M. Rob Walsh: No, but it is sometimes a complex issue.

Mr. Yvon Godin: I know. That's why we're here.

If the chairman, Mr. John Williams, a Conservative member of Parliament and chair of the Standing Committee on Public Accounts, tells a witness that the witness is protected by parliamentary privilege, but that then the privilege is waived, could he not be accused of having lied?

Mr. Rob Walsh: No. But if, at some later point in time, it became obvious that he had made a mistake in the sense that...

Mr. Yvon Godin: No, excuse me, Mr. Walsh. If the chairman tells a witness that that witness is protected by parliamentary privilege and that it will not be waived without the witness' permission, but the witness is eventually stripped of that immunity, would the chairman not have lied to the witness?

Mr. Rob Walsh: It depends on what you mean by “lie”. I don't like that question, Madam Chair.

Mr. Yvon Godin: I feel the same way. What I don't like, for instance, is what my colleague Mr. Reynolds said and which is quoted in today's *Ottawa Citizen*:

[*English*]

"We didn't say we would protect them from lying."

[*Translation*]

The story is full of lies. I agree with Ms. Boivin when she says that as far as the testimony given by witnesses before the committee is concerned, it's a matter of interpretation.

Mr.Walsh, perhaps you can solve my problem. You gave Mr. Guimond a very clear answer when you said that in 1978, the witnesses had agreed. In my opinion, if a witness agrees, there is no problem.

However, in this case, we are also trying to protect the reputation of members of Parliament. If I ask one of my constituents to testify before a committee of the House of Commons and promise this person that the testimony will be given in camera and that it will be protected, and if then Parliament waives the witness' privilege, it is Parliament's reputation which is at stake.

Mr. Rob Walsh: Madam Chair, I think that the issue the member is talking about is credibility. That's a different matter altogether.

[*English*]

The Chair: Okay, Mr. Reynolds has a point of order.

Mr. John Reynolds: On a point of order, Madam Chair, just so we're correct here, none of the information we're talking about here is in camera. It's all in public. It is already in the newspapers. So it's not that we're talking about any information that is behind closed doors. I just want to make that clear.

The Chair: Okay.

Mr. John Reynolds: None of the in camera evidence is under dispute. This is material that has already been in the newspapers and has been published and is open to the public.

Mr. Yvon Godin: Okay, but just on that point of order, though, on the privilege, you're still protected if you're in camera or out of camera. Am I right?

The Chair: We're talking about the privilege, as opposed to whether the information is made public or not.

Mr. Yvon Godin: Yes, and I just want to be sure that the privilege in camera stands.

Mr. John Reynolds: That's right. I just want to make clear that what we're talking about, though, is all in public, in the public forum, right now.

Mr. Yvon Godin: Okay, I just want to make sure we're clear too.

The Chair: Okay.

[*Translation*]

Mr. Yvon Godin: As far as the reputation of the House of Commons is concerned, I believe that there has to be between Parliament, its members and citizens a pact whereby witnesses don't need to bring a lawyer every time they appear before a committee. Normally, in the area of law, even if the person has committed a murder, that person has the right to remain silent until he or she speaks to a lawyer. That's how our legal system works in Canada.

In the case at hand, you'd be trying to get something through the back door.

Mr. Rob Walsh: No. If I understood your question correctly, Mr. Godin, I'm afraid that if privilege is waived and if the testimony given by witnesses before the committee is used elsewhere, witnesses would start appearing before committees accompanied by their lawyers.

We can promise a witness that his or her testimony will be protected, but that witness may then retort that privilege was nevertheless waived several months or years ago and that is why the witness may be afraid that one day he or she will be cross-examined on the testimony given before a committee, which is why the witness shows up with a lawyer to advise the witness on his or her legal rights, because parliamentary privilege would not really be guaranteed anymore.

● (1145)

Mr. Yvon Godin: We should examine the matter in more depth. We are talking about a big deal, because $250 million was spent of which $100 million disappeared, and Canadians want answers. Canadians have other concerns as well. Sometimes, in murder cases, a witness will make a deal whereby he provides names in exchange for five years in jail, rather than 15. It's part of the system. Once the accused has revealed the names, he is not then told that he will still get 15 years in jail. Do you agree with me that this is a matter of credibility?

Mr. Rob Walsh: Yes.

[*English*]

The Chair: Before I go to Mr. Reynolds, would Mr. Guité have any legal recourse if his privileges were revoked?

Mr. Rob Walsh: I would think that Mr. Guité could take proceedings for a judicial review of the decision suspending his privileges, for the purpose of reversing that decision by Mr. Justice Gomery. In a similar fashion, the House of Commons could do the same thing, following a decision of Mr. Justice Gomery.

The Chair: Okay. In a parliamentary committee, can a witness refuse to respond to a direct question?

Mr. Rob Walsh: No. Witnesses are obliged to answer all questions put to them by a parliamentary committee. The penalty, if you like, for refusing to answer is that the committee could report the witness to the House for purposes of contempt.

The Chair: Okay. Good. Thank you.

Mr. Reynolds.

Mr. John Reynolds: Thank you, Madam Chair.

I agree with my colleague that we're getting into a bit of a vicious circle here. It's a very tough situation.

I want to get into page four of your statement to us. It says: “Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception such as exists...in relation to perjury...”.You said something to us: Is the second evidence correct, or is the first evidence correct? How do you find out? It makes it difficult. How do you decide truthfulness?

You mentioned a previous case where they permitted limited exceptions in these areas. In this case, it would seem to me that if Mr. Guité—we'll take him as an example—said to the public accounts committee that he saw Mr. Gagliano once or twice a month, and now his story has changed and he is seeing him, whenever that is, obviously a lot more than that, there is perjury somewhere.

It would seem to me to be much better to let Justice Gomery—the government has appointed Justice Gomery—get to the bottom of the issue. If we're going to get to the bottom of the issue, I don't want the public accounts committee bringing witnesses back after this inquiry is over saying they committed perjury. It would be much better if we found a limited way to allow the justice to examine the transcripts legally—he obviously sees them, and that's the issue here—and to ask that question in his inquiry, so that Parliament gets an answer from the commissioner that tells us, yes, people committed perjury before the committee. Obviously, when it's over, he's going to make his recommendations as to what should be police investigations or parliamentary recommendations and other things.

It would certainly seem to me, Mr. Walsh, that this is not a trial and it's not a civil suit. We have examples where people were on trial or in civil suits in the past. This is parliamentary; it's looking into an issue now that government has seen fit to put it before a commissioner to get to the bottom of it. He is working for us, as well as all Canadians, to get to the bottom of this issue. Why would we try to interfere with the right of that commission by using our parliamentary privilege?

If a witness lied to us, let the justice decide whether he lied. I don't want a bunch of parliamentarians deciding that. How can we do this in such a way that it protects our privilege but lets Justice Gomery get the job done? This government and all parties agreed to this inquiry to get to the bottom of the issue.

Mr. Rob Walsh: Madam Chair, this is a very important question that the member raises.

I don't wish to comment on the testimony of any particular witness, but let me first suggest that, as someone who was a trial lawyer for a number of years before coming into this area of law, it's surprising the number of explanations that can be given for why testimony later is different from testimony before. Lying is only one of a number of possible explanations. So I would hesitate to suggest that the inconsistencies between testimony necessarily reflect the telling of an untruth.

The second point, Madam Chair, is that Mr. Justice Gomery, even were he allowed to have the testimony of the parliamentary committee used before his proceedings, is not there to determine that the witness before him lied before this committee. I doubt he would even try to do so. Clearly, whether someone lied before this committee has to be studied very closely relative to the committee's proceedings, not by someone sitting somewhere else some months later looking at words on a piece of paper and deciding that on an earlier occasion, in an entirely different context, the witness lied.

The parliamentary testimony is sought so that they can simply challenge witnesses to determine credibility—do I really believe this witness, or should I doubt the truth or the accuracy of what the witness is saying? The process is not one of trying to prove anyone a liar. The question is to try to determine what weight should be given to a given witness' testimony in light of prior inconsistencies. The testimony before this committee itself will not be determined to be either true or false directly by the Gomery inquiry, although the implication might be that it was false if in fact he accepted contradictory testimony given before the commission. That's an implication, but it certainly would not be a finding on his part that the testimony before this committee was itself false at the time it was given.

● (1150)

Mr. John Reynolds: One short question.

Would you agree with me then that if they can't follow up because we don't allow them to have the testimony, they can't get their job done completely?

Mr. Rob Walsh: It's a neat question, Madam Chair, as to what extent the purpose of the inquiry is impaired by the unavailability of the testimony here before this committee for purposes of challenging the credibility of witnesses.

Personally, I find it difficult to assume that the testimony before this committee is essential to the Gomery inquiry properly carrying out its inquiry. That's my judgment. I could be wrong in that. I find it hard to believe that what was said before this committee, with all the circumstances of a parliamentary committee coming into mind, is really that important an instrument. I venture to say that the credibility of a witness who is on the stand as long as some of those witnesses are can be challenged in the course of that testimony, because it's very hard, if you're not telling the truth, to hang it all together over a long period of time, believe me. Counsel with some skills can probably show inconsistency of a kind that would go to the credibility of a witness without even getting near parliamentary testimony.

The Chair: Thank you, Mr. Walsh.

Mr. Guimond.

[*Translation*]

Mr. Michel Guimond: Thank you, Madam Chair.

With regard to the question I asked you a little earlier about Judge Gomery's power to conduct his inquiry despite the fact that there is a criminal trial underway, I would like to know whether you have any personal knowledge of the following. Judge Gomery has apparently decided not to hear from certain witnesses who have been charged with criminal offences. He has already done so. He has already said that since the objective of his inquiry was not lay criminal charges, he would not follow that line of questioning. He has done so, hasn't he?

Mr. Rob Walsh: I believe that Judge Gomery decided that the contracts involved in the criminal prosecution of Mr. Guité were beyond the reach of the inquiry. There will be no questions concerning the contracts that are part of the criminal trial of Mr. Guité. I believe this was the decision taken by Mr. Gomery.

Mr. Michel Guimond: Thank you.

[*English*]

The Chair: Thank you.

Madame Boivin.

[*Translation*]

Ms. Françoise Boivin: Am I mistaken when I say that Mr. Pelletier and Mr. Gagliano's lawyers, for instance, may try to prove that there are discrepancies in Mr. Guité's testimony by means other than referral to his testimony before the Public Accounts Committee? The idea would be to attack his credibility. We all know how lawyers operate.

I'll ask you my other question right away in case I don't have time later on, because it is important to me. Has anyone already asked Mr. Guité whether he would agree to having his parliamentary privilege waived? Has a formal request already been made of Mr. Guité? Is it possible to get a direct answer to that question?

● (1155)

Mr. Rob Walsh: Madam Chair, the only formal request I am aware of is the one which is before the Standing Committee on Public Accounts. Mr. Guité's lawyer appeared and objected to waiving his client's parliamentary privilege.

Ms. Françoise Boivin: How would you answer my first question? Would there be any other way of proving that there were discrepancies?

Mr. Rob Walsh: I believe so. However, it's difficult to give a specific answer without really knowing what's going on in the process. I have not studied every contract, every detail, or all of the 10 million documents which the committee has in its possession or which have been given to the commission of inquiry by the government. I imagine that there are other ways of doing that, but it's much easier if you have a transcription of sworn evidence.

Ms. Françoise Boivin: It's easier.

Mr. Rob Walsh: It's very easy: “Sir, you stated this. Why did you say that? A few months ago, you said one thing and now you're saying something else.” It's very easy. Sometimes it's very difficult for the witness to explain why he said something. It's hard.

Ms. Françoise Boivin: Do I have any time left?

[*English*]

The Chair: You were out and you have about a minute left.

Mr. Godin.

[*Translation*]

Mr. Yvon Godin: When you were asked the question earlier, we heard that it was not up to Parliament to decide whether the witness had perjured himself, but that the responsibility lay with us. We cannot refuse to assume our responsibilities. If we believe that someone has not told the truth in testimony before a committee, we can call that person back. That is part of our procedure. It is not up to the court or a commission to do that. It is up to us; it is our responsibility. We would not be going too far if we called the witness back before the committee.

Mr. Rob Walsh: If I understand you correctly, Mr. Godin, you are talking about the parliamentary process to deal with contempt. In the case of perjury, the Crown is involved because it is an offence under the Criminal Code. It is up to the Attorney General to decide whether there is enough evidence available to get...

Mr. Yvon Godin: But it is up to us to make the request.

Mr. Rob Walsh: Yes, a formal request is made to the Attorney General.

Mr. Yvon Godin: Exactly.

Mr. Rob Walsh: It is a matter for the Attorney General. He may decide that there is not enough evidence. But contempt is different. The meaning of contempt, the determination that an act constitutes contempt, etc., all come under the House of Commons.

Mr. Yvon Godin: So we can call the witness back and tell him that what he told the committee is different from what he said in public and ask him to explain.

Mr. Rob Walsh: That is up to you.

Mr. Yvon Godin: Fine. But there is nothing...

Mr. Rob Walsh: It is up to the parliamentarians to ask the person...

Mr. Yvon Godin: In the parliamentary system, there is nothing extraordinary about doing that. Perhaps it has never been done because we have never reached that point, but if we are at that point, we should be expected to assume our responsibility in applying the parliamentary procedure.

Mr. Rob Walsh: In my opinion, yes.

Mr. Yvon Godin: Thank you very much.

[*English*]

The Chair: Thank you.

I appreciate the time you've taken, Mr. Walsh.

Just before we move to the next witness, I wanted to indicate that Mr. Gomery doesn't work for us. He doesn't take direction from Parliament. It's an independent inquiry. I think Mr. Reynolds may have suggested that he was our arm, that he did what we asked him to do. He's been given a task, and independent of—

Mr. John Reynolds: I didn't suggest he was an arm at all. I said we all agreed that this commission be set up, period. He's independent and does his own thing.

The Chair: Right. I want the record to reflect that.

Mr. Rob Walsh: Let me address that question very quickly, Madam Chair.

The commission of inquiry is an agent, if you like—and I don't mean that in any pejorative sense—of the executive government. It's the government that sets up the commission of inquiry, under the Inquiries Act, to search into a given matter—in this case, the sponsorship affair. He is independent. And it doesn't need to be a judge who is appointed, but often it is a judge to give assurance, publicly, that the commissioner will be independent. The commissioner is expected, with the experience and knowledge of a judge, to apply the usual rules of natural justice, a fair hearing, and so on.

This goes back to the whole question of parliamentary privilege and the autonomy of the Parliament and legislative branch vis-à-vis the Crown, or the executive branch, and this goes to the question the House has to face in the context of another case currently before the Supreme Court of Canada, involving the Human Rights Act. The House is not against human rights; the House is against the legal proceedings available under the Human Rights Act where a crown agency, the Canadian Human Rights Commission, can investigate, can demand production of documents, can subpoena people. Privilege of the House is all about assuring the autonomy and independence of the House so that it can take care of its internal affairs without the Crown or any agent of the Crown interfering. That case is not about human rights, although some people mistakenly think so; it's about protecting the privileges of the House against the incursions made possible under various statutes for other purposes.

So also there are powers the commissioner of inquiry has under the Inquiries Act for the obvious purposes, which the member, Mr. Reynolds, obviously indicates we all agree with. Those powers are there for a very good purpose. But at the same time, the privileges of the House are there for a very good purpose. The Bill of Rights is designed to say you do your thing, and we do ours, and we'll just leave each other alone, all right? That's basically what privilege is all about—don't mess with us and we won't mess with you—because there isn't any neat way of reconciling these two interests, apart from saying that's what the Bill of Rights of 1689 is all about.

● (1200)

The Chair: All right.

Mr. John Reynolds: Madam Chairman, Parliament has waived those rights a couple of times.

Mr. Yvon Godin: With the permission of the witnesses.

I have a point of order. I just want to make sure.

The Chair: Yes, on a point of order.

Mr. Yvon Godin: I want to be clear on that. It was waived, but under the permission of the witnesses.

The Chair: In one case.

Mr. Yvon Godin: In one case. Permission of the witnesses, which is very important to note.

The Chair: So that we don't keep going on, I'm going to thank Mr. Walsh, and we're going to suspend momentarily, awaiting our second witness.

● (11202)

(Pause)

● (1205)

The Chair: Ladies and gentlemen, we will reconvene.

I would like to welcome our second witness this morning, Joseph Maingot, who is the author of *Parliamentary Privilege in Canada*.

Welcome to the committee, Mr. Maingot. We look forward to your words to us today, which will be followed by a round of questioning from the members of the committee. Without further ado, we're anxious to hear from you.

Mr. J.P. Joseph Maingot (author of "Parliamentary Privilege in Canada", As Individual): Thank you, Madam Chairman. It's always an honour and a privilege to appear before a committee of the House of Commons, or of the other place.

[*Translation*]

I will make my remarks mainly in English. However, if you ask me questions in French, I will be able to answer you.

[*English*]

I suppose you don't want to start at the beginning, because that goes too far back. I'll probably start with article 9 of the Bill of Rights of 1689 in England. That was after, of course, a long battle over the years, which cost a lot of people their heads, including speakers. So starting off with article 9, it says, “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.”

A few years later, Blackstone, one of the big authors on law, put it this way: “that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere”. This is from Blackstone's commentaries, which started with his first edition in 1778.

Article 9 talks about, among other things, the freedom of speech. Freedom of speech is inseparable from Parliament. It is inherent in its constitution. It's part of the Constitution there and part of the Constitution here, but it's a law. We're all told that if you want to change a law in Canada you need three things: you need the House of Commons, the Senate, and Parliament. So a resolution of the House to make changes in a law doesn't change the law. It may save someone from being in contempt of Parliament, but it doesn't change the law.

If you do something in a way that doesn't change the law and puts someone in jeopardy, I don't think that was the intention of the drafters of the Bill of Rights. For that matter, privilege was an immunity and was provided, first of all, to protect the members from the Crown, from the king. And in criminal law it's the king versus so-and-so. Subsequently, when they were able to print the material, they were protected from third parties for what they said outside.

This matter, as you were probably told—forgive me for repeating—was debated 112 years ago, in 1892. In that particular case, Connolly, I find it interesting that in debate the Minister of Justice at that time said that privilege is not a right of the witness, but a privilege that belongs to the House.

On the other side of the debate, they said:

> ...but the House ought to be equally careful in determining that no man who has been compelled to give evidence against himself in the committee should be convicted by that evidence in a court of law. If we do not put in that proviso we strike a vital blow at all parliamentary inquiry. What is the sense of the House referring such a matter to a committee and hauling witnesses before a committee from all parts of the country when if the witnesses give evidence which may incriminate themselves, that evidence may be used against them in a court of law? The great surety we have for eliciting the truth, and the whole truth, in matters before our committees is that the witnesses know, and parliamentary law lays it down as a certainty, that, if they give that evidence, they will be protected against any use of that evidence in a court of law as far they are concerned.

● (1210)

And then Wilfrid Laurier said:

> In taking the proposed action we are violating law and justice, which has always been maintained in all British courts, namely, that no one brought before Parliament shall incriminate himself. If we depart from that rule we must introduce another rule. The hon. member...said, that if we adopt the system suggested there will be difficulty subsequently in obtaining evidence before this Parliament.... The resolution provides that the whole of the evidence given by any of these parties shall be used against them at the trial. I submit that such a course is in violation of the principles of justice and equity, and especially British justice, and is altogether antagonistic to British law, to criminal law, to civil law as we understand it in this country, and to the express will in Parliament. Of course, if the Government decide otherwise, they must assume responsibility for their action. At all events, I must protest that we have in this resolution a deviation from the well-known rule, that anything which is spoken on the floor of Parliament or before a committee of Parliament at a public investigation for the sake of truth, which is receiving a severe blow to-day....

The interesting thing is that, among other things, this is the role of the government. The government was pushing for this prosecution. Well, 350 years ago, in the trial of Strafford, John Pym apparently said they were eroding the traditional legal balance in the Constitution—that the legislature is there to legislate, the crown is there to prosecute, the courts are there to uphold the law, to be the guardian of rights, the guardian of the Constitution. That was another aspect of that case.

When that case came to trial, it demonstrated the deference that the courts have towards the legislature. As a matter of fact, that deference is uniform. For example, in the case of Nova Scotia, dealing with the Canadian Charter, the chief justice said this:

> Our democratic government consists of several branches—the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

There was another case, in the Court of Appeal of Ontario, where the court used the lovely expression, “we have truckled too long with the assumed privileges of Parliament”. That was back in about 1878.

So we go up to this case here, and what happened in this particular case is that they passed the resolution. A county court judge sitting as a magistrate was concerned about using that evidence and in natural deference it went to the court of appeal. The court there said that in spite of that resolution, they had no power to grant a mandamus to the judge directing him to receive such evidence. In other words, they said they didn't have jurisdiction; it's as simple as that.

But one of the judges, Rose.... I know the name Rose from when I was at law school; it was a big name, a quite extraordinary judge. He was one of those persons with quite an education; I think he was a lawyer, a doctor, and an engineer...one of those unusual persons. He concurred with the decision and said that it was up to the magistrate to accept the evidence. In the court of appeal, Rose said:

> I do not see how any question can arise as to the abuse of the privileges of Parliament in endeavouring to make use of this evidence, if the proper holding is that by the resolution of the committee, adopted by the House, Parliament directed the institution of the present proceedings upon the evidence taken before the committee.

● (1215)

He was in the minority. The other judges said they didn't have jurisdiction, but this lower court judge had the opinion of Rose and he admitted the evidence on the resumption of proceedings. So the only time there's an exception to article 9 is by another law.

As concerns perjury, I may be wrong, but I seem to recall reading that when those interesting divorce proceedings from Newfoundland and from Quebec were heard in the Senate, there was some concern about the truthfulness of some of the detectives. That may be the reason they brought in the legislation to provide that, yes, the proceedings of the House of Commons have immunity, privilege, but because of perjury and contradictory statements, they brought in an amendment to the Criminal Code to provide an exception to that. They did that by law, not by resolution.

Furthermore, if this came to pass with a resolution, the person would be unprotected. The courts would then look at that and say, “Whatever the House does that affects a person's rights inside, we don't have jurisdiction, but if it affects the rights of a person outside, we have jurisdiction to deal with the course and cause of action.” So in my view, a resolution like that would be illegal, because the present law of freedom of speech is part of the Constitution.

Under the charter, in section 13, a person may not be compelled to speak to incriminate himself, but a person may still be questioned if the purpose is to impeach what he said. But you can't do that with respect to what is said in Parliament. That's sacrosanct. It's a matter that is, of course, historical and it's the law. To change the law, you have to do so by act of Parliament.

Perhaps I should leave it there, Madam Chairman.

The Chair: Thank you very much. I'm certain you'll have plenty of opportunity to expand on any of those. I suspect there will be some questions.

Mr. Reynolds.

● (1220)

Mr. John Reynolds: Thank you very much.

Mr. Maingot, thank you very much for being here.

As you know, on two occasions the Canadian House of Commons has chosen not to insist on its privileges, in 1892 and 1978. Would you agree that we have the right as Parliament to supply information from a parliamentary committee to Justice Gomery if we so choose?

Mr. J.P. Joseph Maingot: Any information that's open, that's available to the public, wouldn't be any particular problem, but whatever is said and done in Parliament can't be questioned elsewhere. But with respect to documents, counsel has its ways of obtaining the information it needs in support of its case or otherwise, and these documents that are available to the House of Commons were available to others also, so you'd get them elsewhere than from the House.

Mr. John Reynolds: The fact is that all these documents are out in the public venue now, but they need our permission to use them. They've asked, and that's what we're here discussing. Can we give them...?

I'm asking you the question. Do you agree that we have the right to meet that request and turn those documents over, to waive the privilege? We've done it twice before, in 1892 and 1978, for whatever the reason was that they thought at that time. But if we make a decision here that....

I go back to what I think was the Prebble case in 1994, in which the justice said, “Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception such as exists...in relation to perjury....” That's really what these lawyers are getting at. They want to be able to question people before Justice Gomery on evidence they've given before, and I guess to show they're maybe not telling the truth in one place or the other.

So the question I'm asking you is just on the basic legalities. Since it has happened twice before, do you agree that we could do it again if this committee decided to make a recommendation to the House of Commons that this testimony given to the public accounts committee be turned over to Justice Gomery? Do we have the right to do that?

Mr. J.P. Joseph Maingot: If it were a case of perjury or contradictory evidence, the exception is there and it can be used. Otherwise, if that material is in the public domain, that would be the avenue for the lawyers.

There are other exceptions apart from perjury. There's an exception in the Parliament of Canada Act dealing with an informer penalty. There are also exceptions in the sense that members of Parliament can't have a contract with the government. If you had such information while they were a sitting member of Parliament, that would be fair game, it seems to me. In that case, it would just be a question of whether the person was a member of Parliament, and the other evidence would be whether they had a contract with the government. In the case of the former actions, it's to establish that they were a member and voted when they were disqualified to vote. That's fairly straightforward.

But the mantle of immunity includes everything that permitted the House to have a witness at its disposal and to make that person at ease, because of the privilege, to speak openly and honestly and to provide the documents openly and honestly. That's the way I put it.

Mr. John Reynolds: Fine.

The Chair: Monsieur Guimond or Madame Picard? No?

Madame Boivin.

Ms. Françoise Boivin: I just want to be sure of what I just heard, in the sense that, in this case.... Are you familiar with the case at hand that we have to decide?

● (1225)

Mr. J.P. Joseph Maingot: I think so. It's a question of whether you want to relieve a witness who appeared before the House of his immunity.

Ms. Françoise Boivin: Or waive, let's say, and permit the commission to.... But with what you answered to Mr. Reynolds' question on the two previous cases, did I understand it correctly? You said that if the testimony is open to the public, which was the case in the *Comité des comptes publics*...Mr. Guité testified, and everybody saw it on TV from coast to coast to coast. Are you saying there's no privilege at that time?

Mr. J.P. Joseph Maingot: No, I'm not saying that. I'm saying—

Ms. Françoise Boivin: Okay, then just clarify this, because I thought that's what you said.

Mr. J.P. Joseph Maingot: I'm saying the documents are available elsewhere. The committee asked for them. A court could also ask for these documents from their source.

Ms. Françoise Boivin: I heard today that some members might be of the position that we should let Justice Gomery go find the whole truth and really give him all the tools to get to the bottom line. Isn't it a way, though, to kind of...?

[*Translation*]

I will say it in French so that I get the terms right. Would it not be a legal abdication or even an admission that the committees of the House are basically irrelevant?

Mr. J.P. Joseph Maingot: They are certainly relevant for public policy. The idea is from [*Editor's Note: Inaudible]* a Superior Court judge. The rules governing testimony and evidence are set aside because your role here is in the realm of public policy. It is a bit different. You are certainly relevant, but that relevancy is to the public and the House of Commons. Criminal court is different. The court has a special role and means tailored to reach its ends.

Ms. Françoise Boivin: Thank you.

[*English*]

The Chair: Monsieur Godin.

[*Translation*]

Mr. Yvon Godin: Mr. Maingot, I am pleased to welcome you to our committee. You started off your remarks by saying that it was an honour and a privilege for you to be here. What constitutes privilege in your mind?

Mr. J.P. Joseph Maingot: You mean parliamentary privilege?

Mr. Yvon Godin: Privilege. You said:

[*English*]

It's an honour and a privilege to be here. What is your definition of a privilege?

Mr. J.P. Joseph Maingot: Privilege, or privileged people, are privileged because of their knowledge, privileged because of their wealth, privileged because of where they're sitting, but then there's parliamentary privilege, which is to permit the House to carry on its job without obstruction.

[*Translation*]

Mr. Yvon Godin: Your remarks really focused on privilege in the House. For parliamentarians, would it not be a concern for the House to give someone the privilege...? As members of Parliament, we have privilege.

Before I got involved in politics, when a member of Parliament or a minister rose in the House and asked someone to repeat what he or she had just said, but outside the House, I thought that the minister was looking to fight the person. In fact, if what was said was repeated outside the House, the person could be taken to court. So the privilege that we enjoy is complete privilege. Parliament and politicians tell Canadians who appear before parliamentary committees that they will be protected by House of Commons privilege. The House is a special place in Ottawa that represents all of Canada, and that privilege is enjoyed by any citizen who appears. We tell witnesses that they do not need a lawyer, that they are free to speak their mind, etc. Would it not be dangerous for Canadians and anyone testifying before a committee if we change the whole political context in the Parliament of Canada by removing privilege? I am not talking about a case where someone is told that he will be appearing before a committee the following week and that privilege will not apply. At least, we would be dealing honestly with the person and he would know what to expect. I am talking about cases where witnesses might be told that their comments would not be repeated outside the committee room and would not be used in other courts, and then privilege was removed later.

● (1230)

Mr. J.P. Joseph Maingot: Privilege cannot be withdrawn. If someone is required to appear before a committee, he or she cannot be told in advance that privilege will not apply.

Mr. Yvon Godin: If the testimony has already been heard, can privilege be removed two years later?

Mr. J.P. Joseph Maingot: No. The only way to change the law is to enact a new law.

Mr. Yvon Godin: But in that case, the credibility of parliamentarians might go down the drain, as we say.

Mr. J.P. Joseph Maingot: That is a separate issue. If you are going to allow that, why not do it for others?

Mr. Yvon Godin: Let us talk about 1978. Is there not a difference? In 1978, privilege was removed because the witnesses had agreed voluntarily for the documents to be used in another court. That is different from what we want to do without the witnesses' permission.

Mr. J.P. Joseph Maingot: Something happened in 1978?

Mr. Yvon Godin: There have been two cases in which privilege was removed: in 1892 and 1978. In 1978, it was the McDonald Commission. I am sorry, but you may not have been aware of this.

[*English*]

Mr. John Reynolds: It was 1994.

The Chair: It was waived in 1978, but that was after the persons involved gave their consent to have it waived. The only other one was in 1892, and that was done without consent. Connolly and McDonald: Connolly was the one where it was waived without consent and McDonald where it was waived with consent.

[*Translation*]

Mr. J.P. Joseph Maingot: Naturally, I remember the McDonald Commission. I read about it at the time. I was not involved—

Mr. Yvon Godin: That is fine, Mr. Maingot. It was said earlier that the witnesses had voluntarily consented to—

Mr. J.P. Joseph Maingot: Yes, I see that here.

Mr. Yvon Godin: There is no problem there. If the witnesses agree, everyone agrees. However, there is a difference between the two.

Mr. J.P. Joseph Maingot: Yes, it gives the impression that the witnesses were prepared to say the same thing in public.

Mr. Yvon Godin: Mr. Maingot, when a privilege of this kind is given, as Ms. Boivin put it so well, it is not just because the witness is expected to stick to the truth; it is a matter of how the testimony will be interpreted. Any manner of things may be said. It is another thing to prove whether something is a lie. People coming to testify before a committee must be sure that their testimony will not be used in another court or commission. Is that not how privilege is defined?

Mr. J.P. Joseph Maingot: Immunity or privilege. That is correct, except if the person agrees to make the same statements elsewhere, in public. A witness may lie to the House of Commons, which is the most important place in the country, where all the elected representatives of the people sit. It is a very historic place. The idea is to put witnesses appearing before committees at ease because they know that what they say will stay there and that no one, except the House itself, will be able to take them to court on the basis of that testimony. The House can find someone guilty of contempt. The member may have to come back before the committee.

Mr. Yvon Godin: Or the witness.

● (1235)

Mr. J.P. Joseph Maingot: Or the witness. If the committee feels that there has been contempt, the person can be sent to prison. That is a possibility. What that person has said elsewhere can be used against him or her.

Mr. Yvon Godin: You were saying earlier, and I would like to hear you reconfirm this, that the Gomery Commission or the commissioner had all the power and tools necessary to achieve its ends. There are lawyers for all the parties, etc. Normally, when someone somewhere has not told the truth, it will be difficult to maintain that story in the face of questioning by a group of lawyers. The commission does not need the testimony given before the committee in order to fulfil its responsibilities. The commission is not a criminal court that will hand down a ruling. Its role is to get to the facts.

Mr. J.P. Joseph Maingot: It is up to the lawyers to decide what they can do and what they cannot do. I have read in the papers that Mr. Justice Gomery had said that he needed the testimony given here. However, under the law, as I have already mentioned, it is not as simple as that. But I cannot say that Mr. Gomery can get his work done without the benefit of what happened here in the House.

[*English*]

The Chair: Thank you.

Mr. Reynolds.

Mr. John Reynolds: My question is a follow-up to where you said they could get the results without using what happened in the House of Commons. Nobody is being prosecuted here. This is an inquiry set up by the government to find out what happened in the sponsorship scandal. Were they in contempt of Parliament? We don't know that yet. We're hearing evidence that might indicate they may be.

Certainly my feeling and that of my party is that Justice Gomery is probably the best person to decide this issue. As you said, all the information he is seeking permission to use is already out in the public domain. It has been on television, it has been on radio.

Do you have any problem...? It has not happened often that things in Parliament...that's why there are people like yourself who write about this. Perhaps they don't happen very often, but precedents are set. There were two precedents, in 1892 and 1978, where Parliament gave up its privileges to allow something to take place.

In this situation, we have Justice Gomery appointed by the government but with the support of all parties, because we want to get to the bottom of this issue, trying to come up with a report that will say what happened in the sponsorship scandal. No prosecutions. That will be up to other people, the RCMP and others, to look at those reports and decide whether they should proceed with anything in that area.

So after looking at all this evidence and meeting the request from Justice Gomery that he should be allowed to have the documents that are already in the public venue, we would only be doing what other parliaments have done. Is that correct?

Mr. J.P. Joseph Maingot: Well, the Gomery inquiry has one particular role, and the criminal courts have another role.

You mentioned the two earlier precedents. In 1892 the courts said they didn't have jurisdiction—if you want to use the evidence, the judge said okay. The McDonald commission is a little different. The person there was prepared to say the same thing publicly he said before the committee in camera. So it's a little different there.

You're asking why shouldn't Justice Gomery have all the evidence available. That's another matter. That has, in a sense, nothing to do with the House of Commons. That's a separate matter. The House of Commons does things according to its rules, according to the Constitution. It would be mixing up, in a sense, the constitutional role of the two. The witnesses are usually protected when they come in for purposes of legislation, because the House's constitutional role is to legislate. So witnesses are protected. They bring evidence with respect to that, but also with respect to contempt matters.

Then the role of the executive, with respect to prosecuting, includes something like the Gomery commission. That's the role of the executive, which stepped in to say we're going to examine it this way.

Sure, I guess the Gomery commission would like to have all the help they can get—any court, anybody would like it, whatever they're doing. But there are certain rules to protect people, to protect institutions, to protect our way of life. And as I see it, that's what's taking place here. You have two different forums, two different purposes. The House of Commons is concerned that no one has been in contempt, the concern that the public policy hasn't been eroded by the acts of people, whereas in the criminal courts, it's a matter of whether you've broken the law.

● (1240)

Mr. John Reynolds: Do we have the right as parliamentarians to waive that privilege?

Mr. J.P. Joseph Maingot: You have the right to pass a law, yes. It's part of the law. Article 9 is part of the law of Canada. It was said in the Supreme Court of Canada; it's part of the law of Canada.

Mr. John Reynolds: In the other two cases they didn't pass a law to waive the privilege. Parliament waived the privilege—they didn't pass a law to do that.

Mr. J.P. Joseph Maingot: Well, if Parliament didn't, the House of Commons did. The House of Commons did in 1892. And the courts said, well, we don't have jurisdiction to deal with that, but if you want to use it, okay. And what that did is it saved them from contempt.

Mr. John Reynolds: But that's my question. Do we have the right as parliamentarians to waive the privilege, just as they did in 1892 and 1978?

Mr. J.P. Joseph Maingot: Well, I would say in my view it would be illegal.

Mr. John Reynolds: So they broke the law in those two years when they did what they did, in your opinion?

Mr. J.P. Joseph Maingot: In my opinion, they were wrong in 1892.

The Chair: Thank you.

Madame Boivin.

[*Translation*]

Ms. Françoise Boivin: No, thank you. I think that will do.

[*English*]

The Chair: Okay.

Monsieur Godin, unless it's extremely important, I'm going to—

Mr. Yvon Godin: Well, why not?

The Chair: Well, I just—

Mr. Yvon Godin: Are we not having the same—

The Chair: Well, I don't think we're here to—

Mr. Yvon Godin: No, you were ready to go to the Liberal Party to raise a question. Why not?

The Chair: And she didn't.

Okay, but it will be a very short period. This is the third round for you.

Mr. Yvon Godin: Yes, but you were giving a third round to the Liberals. Why not?

The Chair: Go ahead, Mr. Godin. Go ahead.

Mr. Yvon Godin: Thank you.

Mr. Reynolds said that's it's already in the public domain, the public knows about it, and all that, so it's not that bad, because everybody knows about it. Well, it's the same thing with the members of Parliament in question period: CPAC is on, all the media are there, you can read it in the newspaper the next day, but they still cannot use it in court. The public knows about almost everything we do here; it's just that we're protected from having to deal with it in an outside court.

Mr. J.P. Joseph Maingot: It's just that it can't be questioned. What is said in court is used all the time to determine the constitutional pivot, but you're not questioning it; you can't question what was said in the House of Commons. If somebody stands up and says you were wrong...well, they can say you were wrong, but if they question it in such a way that it represents contempt of the House—

Mr. Yvon Godin: But even if the public knows about it, the question still is that you cannot be questioned. That's the privilege, right?

Mr. J.P. Joseph Maingot: Yes, that's right. No one can sue you for what you said. You can't be charged in court for what you said.

Mr. Yvon Godin: And be used in court with a document...or use the document without us passing a law to do it.

Mr. J.P. Joseph Maingot: That's right.

Mr. Yvon Godin: Thank you.

The Chair: Mr. Maingot, we appreciate your being here. I know you'll be following the rest of the proceedings very carefully. Thank you.

The meeting is adjourned.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

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