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● (1105)

[*English*]

The Chair (Mr. Peter Adams (Peterborough, Lib.)): Colleagues, if we could begin.... One of our colleagues is on his way here.

The order of the day is pursuant to the order of reference of Friday, February 6, 2004, the question of privilege relating to members being compelled to attend court. This is the item we will be dealing with today.

I thought it would be useful for me to bring you up to date on a couple of things. First of all, on our business from last time, our subcommittee on riding boundaries is established and they will be meeting. It appears they will need two or three meetings to complete the post-mortem report on the procedure used to re-establish the riding boundaries.

The report to the House on televising of committees was tabled and concurred in.

The report to the House amending the provisional standing orders with respect to private members' business so that those standing orders reflect the change in the number of official parties in the House was tabled and concurred in.

Also, a letter from this committee has gone to the House leaders, asking them whether they are in fact going to deal with the matter of the hanging provisional standing orders for private members' business. Your direction to me was to wait and see, and if they're going to do it, we won't do anything. If they do not deal with it, we will be dealing with that matter.

One of the matters we dealt with last time and that we're going to deal with is the change in the way we deal with the estimates and things like that. I'd like to draw your attention to something that you've already received in your offices. There's going to be a special program presented by the Library of Parliament. You all received this material, but I will pass this around. It's called “The Estimates: How they work and how to make them work for you”, a special program for parliamentarians, presented by the Library of Parliament. I notice there are various people who will be panellists, including Bill Corbett, the Clerk of the House of Commons, who is one of our witnesses today. So I recommend this to you. It's Wednesday, February 18, from four to seven, in Room 237 of the Centre Block.

I understand, Thomas, that we are going to send a letter to members of the committee reminding them of that, given our interest in the estimates.

If we could proceed to the matter before us, before I introduce our even more distinguished guest than we realized, I would point out to you that we have, from some time ago, from June, and you all have it now, preliminary notes on the privilege of members with respect to court appearances. You all have copies of that.

Also, in your offices you received this binder. At the moment, we don't have extra copies here. You're quite welcome to borrow mine if you wish, but there will be extra copies here soon. This is a briefing book for the members of the standing committee regarding the question of privilege referred on March 6, 2004. I see some of you have it with you; for others, it is in your offices.

Colleagues, I want to thank our witnesses today, and it is my privilege to introduce them to you. We have William Corbett, who is the Clerk of the House of Commons, as we know, and Rob Walsh, who is the Law Clerk and Parliamentary Counsel. They advise the House of Commons and us, and I'm sure all sorts of other people, on matters such as this question of privilege that is before us.

I welcome you both, gentlemen, very much indeed. I understand that there is a short statement. I would be very grateful if you'd proceed, and then we'll move on to questions and answers in the usual way.

Mr. William Corbett (Clerk, House of Commons): Thank you very much, Mr. Chairman.

I would like to thank the committee for inviting me to appear today.

I have a short presentation that I would like to make to the committee, but first, with the committee's permission, I think I'd like to ask Rob Walsh, our Law Clerk and Parliamentary Counsel, to give you an update on the status of the two court cases that led to the original question of privilege that is before you today.

I would turn it over, with your permission, Mr. Chairman, to Rob.

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

The two cases in question we can for convenience call the Telezone case, involving Mr. Manley in his capacity as Minister of Industry at the material time, and the other is what we refer to as the Ainsworth case, the Ainsworth Lumber Co. in an action against Mr. Paul Martin in his capacity as Minister of Finance and also against the Attorney General of Canada.

As it happened, you may recall, in May of last year we learned of the Telezone decision of the Ontario Superior Court, which held that the parliamentary privilege of members of Parliament of not having to testify applied only when the House was actually sitting and didn't even apply when the House was taking a week off. The court found the House to be on vacation on those days when it wasn't seen to be sitting. This was a less than welcome characterization of the schedule of the House, but nonetheless that brought on a point of order in the House. Within a few days, as it happened—2003 was quite a busy year for parliamentary privilege in the courts—we had a case out of British Columbia, the Ainsworth case, and another point of privilege arose on that and was joined with the Telezone point of privilege. The two were made the subject of a ruling by the Speaker and the matter was referred to this committee.

Telezone is a case where Mr. Manley is not a party to the action. The defendant in the action is the Attorney General of Canada. In legal actions the defendant typically has to produce a witness to be what is called "discovered", to be available in a small room to answer questions of the opposing counsel relating to matters at issue in the action. Typically, the defendant party will say that Joe Schmo is the guy who knows everything and he is the guy you ought to talk to. That may, in many cases, be fine, but in some cases the plaintiff may say he doesn't want Joe Schmo, he wants another guy because he knows more about what goes on and he wants him to be produced. The defendant party may say no. It is yes, no, yes, no. You're now going to court, and you ask the judge what will be the outcome. The judge makes a decision.

The issue was that the plaintiff, the Telezone company, wanted Mr. Manley to be made available for discovery purposes. This was not well received by the defendant, the Attorney General of Canada. It was opposed on application at the court and the court made its ruling that he must be available and he must testify. That is the ruling I mentioned earlier.

The House, as such, was not involved in those proceedings but became involved once we learned about this and instructed counsel, on behalf of the House and on behalf of Mr. Manley, member of Parliament, to address the issue of parliamentary privilege, which, in my view, had not been properly addressed in the court in the first instance. That went forward.

That later was decided by the Ontario Court of Appeal and has since been decided by the Ontario Court of Appeal, but before we got there along came Ainsworth. That is a case where Mr. Martin is in fact a party to the action. He's a defendant in the action. The fact that he's a party and Mr. Manley wasn't a party doesn't change matters. Here too they wanted Mr. Martin to be available to testify. He was not available and parliamentary privilege was relied upon. We didn't hear about this case until after a decision was taken by the B.C. Court of Appeal. The B.C. Court of Appeal decided that while there is a privilege that members don't have to testify during a session, the traditional shoulder period of 40 days before the session starts and 40 days after the session starts, the court didn't recognize.

Around that time we had another decision come along, which was not the subject of this point of privilege, out of the Federal Court in Calgary saying that, yes, the privilege existed, but no, there weren't 40 days at the beginning and 40 days at the end, there were 14 days at the beginning and 14 days at the end. The court thought that was more reasonable.

Subsequently, the first case, the Telezone case, came to the Ontario Court of Appeal. We were represented by counsel. I should point out that this was the first time in this series of cases that the House had its own lawyer involved. It brought the result that I had been praying for and for which I had been lighting votive candles for some time. It very much supported the position that, in my view, was the proper one. It supported the existence of privilege and the 40 days before and after. What is particularly important about that decision was it said, who are we to say otherwise? It said, it's not for us, the court, to tell the House of Commons what its privileges are. If we recognize the privileges they're claiming are within the category that has standing in parliamentary law as a privilege, if the House of Commons says it involves 40 days before and 40 days after, who are we to say it should be something else?

More than that, like the double cherry on top of a cake, they quoted Speaker Fraser and then Speaker Milliken in his ruling, and, while acknowledging that they were not bound by these rulings, which is correct as a point of law, they nonetheless cited them with the greatest respect and said they were prepared to defer to the rulings of the speakers because they are the ones who know best what the privileges of the House are.

● (1110)

That came in early January of this year, so I think we're off to a different role in 2004, hopefully, although we have another case in the Supreme Court of Canada that may touch on privilege or will touch on privilege in a different domain. We'll see what comes of that. But those cases right now have come to the point where there's a very good conclusion in Telezone—there are no further proceedings arising from that—and in Ainsworth, it is my understanding, and I have no official word from Mr. Martin himself or his counsel, but I have heard that he is prepared to go and testify, notwithstanding the fact that there is in that court a privilege acknowledged of while the House is sitting.

One's in Ontario court, now it's a B.C. court, and then there's Federal Court. You might say what it needs is a Supreme Court of Canada ruling. Well, there is no case that's going to be going to the Supreme Court of Canada. There was an application made for leave to appeal to the Supreme Court of Canada in the Ainsworth case, and it was turned down. That was worrisome at the time, because we hadn't yet heard from the Ontario Court of Appeal. When the Ontario Court of Appeal came in with its decision as it was, I felt much better, personally. The Ontario Court of Appeal is obviously a court that warrants serious consideration in any of the other provincial courts. I would hope that if the matter came to a superior court in any of the provinces—and again, it may, as we have a case in Alberta that may come before the court—the Ontario Court of Appeal would rule the day. However, there's a certain degree of uncertainty with that.

Mr. Martin and his involvement in that action is his business. It's not something I'm concerned in, in terms of lawyers. He's apparently prepared to cooperate, and I'm not concerned about that.

So my view of the two legal actions that are referred to you now is that they are arguably moot. The issues that they were all about have been resolved, for the most part favourably, and they're moot. That doesn't necessarily mean, as the clerk will comment, that your subject matter is moot, but I think the issue as a legal issue in those cases has become moot.

● (1115)

Mr. William Corbett: Thank you, Mr. Chairman.

The Chair: Mr. Corbett.

The Chair: Does that complete...?

Mr. William Corbett: No, I have a short presentation as well, supplementary to—

The Chair: Okay. I'm concerned, by the way.... As long as it's very, very pointed, I think you could ask Rob now, but to be honest, I would much sooner finish the other presentations. I have a number of people on the list, but I had assumed that I was going to start the list when the presentations were finished.

Mr. Corbett, if you would, please.

[*Translation*]

Mr. William Corbett: *Merci encore une fois, monsieur le président.*

First off, I would like to review briefly the issue of parliamentary privilege which exempts members from having to appear as witnesses in court proceedings, as well as touch on several precedents and how they apply in the Canadian context.

[*English*]

Erskine May defines parliamentary privilege as

> ...the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals...

[*Translation*]

These privileges include, among others: freedom of speech, immunity from arrest in civil matters; exemption from jury duty; and exemption from attending as a witness in court proceedings.

[*English*]

These privileges extend to members of Parliament and to the House of Commons.

As I've already mentioned before this committee at other times, any disregard or attack on the rights and powers and immunities of the House and its members, either by an outside person or body or by a member of the House, is referred to as a breach of privilege and is punishable by the House.

The privileges conferred on Canadian members of Parliament and senators were transferred from the British Parliament to the Canadian Parliament at the time of Confederation, through the Constitution Act of 1867. These privileges were also enacted by what is now the Parliament of Canada Act, and I refer you to sections 4 and 5 of the act.

As the Speaker stated in his ruling of May 26, 2003,

> The parliamentary privilege challenged by the two recent court decisions, that is, the immunity from testifying in court during a parliamentary session, is a personal privilege enjoyed by individual members of Parliament,

In this regard, the Erskine May text says the following:

> The privilege of exemption of a Member from attending as a witness has been asserted by the House upon the same principle as other personal privileges, viz, the paramount right of Parliament to the attendance and service of its Members.

May also states that

> It has been the general and very longstanding opinion, allowed by the courts and clearly stated by institutional authorities, that the privilege of freedom from arrest attaches to a Member of the House of Commons for 40 days after every prorogation or dissolution and 40 days before the next appointed meeting.

● (1120)

[*Translation*]

In a 1989 ruling, Speaker Fraser stated the following:

> [...] that the right of a Member of Parliament to refuse to attend court as a witness during a parliamentary session and during the 40 days preceding and following a parliamentary session is an undoubted and inalienable right supported by a host of precedents.

In a ruling handed down on January 6, 2004, the Court of Appeal of Ontario held that privilege existed and that any changes to the conditions or to the definition of parliamentary privilege should be left to the House. The Court held, and I quote:

[*English*]

> in 1867 the parliamentary privilege relating to testimonial immunity continued for 40 days after a parliamentary session and recommenced 40 days before a new session. Moreover, I do not see any development in constitutional or statute law since 1867 that would displace this conclusion.... Any change to the privilege must come through Parliament enacting a law pursuant to its power under s. 18 of the *Constitution Act, 1867,* and s. 4 of the *Parliament of Canada Act.*

As Mr. Walsh just mentioned, the issue before you in terms of the actual two court cases and the two court judgments may be considered moot at this time, but I do note that on May 12, when the Speaker heard members on the original question of privilege, two main points were raised by members. They asked whether or not the exemption should continue, and if so, is the protected timeframe—that is, the 40 days before and 40 days after the session—still appropriate? Should the committee decide to review this issue more thoroughly, experience from other jurisdictions may provide some guidance to the committee in this regard.

In 1967, in the United Kingdom, the House of Commons Select Committee on Parliamentary Privilege reviewed the privileges afforded to members. While confirming the application of the 40-day rule exempting members from attendance in court, the committee seemed inclined to re-examine its scope, indicating that "only pressing parliamentary needs should be allowed to prevent" a member from attending as a witness.

[*Translation*]

In 1999, the British Joint Committee on Parliamentary Privilege went one step further by recommending that this exemption be abolished. No follow up was ever given to this recommendation.

[*English*]

Australia and New Zealand have opted to legislate on parliamentary privilege. New Zealand, in the Legislature Act, 1908, chose to limit the application of the exemption to the duration of a parliamentary session, as well as 10 days before the commencement of such a session. As for Australia, the Parliamentary Privileges Act 1987 grants immunity to members on days when the House is sitting and within five days before or after sitting, and the same rule to apply to members of committees whenever committees meet if the House is not sitting.

I think that terminates my remarks, Mr. Chairman.

[*Translation*]

I'll be happy to answer your questions.

[*English*]

The Chair: I thank you both very much.

Colleagues, given the significance to what we're doing, I would suggest that translated versions of both of the decisions be placed in the electronic record of this meeting so that we'll have the thing fairly complete for future reference.

I'm going to proceed.

Yes, Rob.

Mr. Rob Walsh: Excuse me just a moment. Do you mean the court decisions?

The Chair: Yes.

Mr. Rob Walsh: In the Ontario Court of Appeal, we managed to make a special request for a second-language version, and they provided it to us.

The Chair: Rob, we are translating the Telezone one ourselves.

Mr. Rob Walsh: No, I have a French version of the Telezone Court of Appeal. The Court of Appeal agreed. I explained the nature of the client and they acceded.

I don't have the B.C. Court of Appeal. I didn't ask for a French version of their decision.

With all due respect, Mr. Chairman, I think it would be wiser to ask the court first to provide a French version of their decision.

● (1125)

The Chair: Okay, your point is that it should be the court, not us.

Thomas advises me that we have a French version of it.

Mr. Rob Walsh: In courtesy to the court, if they want to undertake to provide a translation, I think we should let them. If they don't, then we do it.

The Chair: Subject to all of that, a translated version of these two decisions would be put in the electronic record, if that's okay with you.

I'm going to proceed in our usual way, five- or six-minute exchanges. The list I have so far: Dale Johnston, Elinor Caplan, Michel Guimond, Roger Gallaway, Yvon Godin.

Dale.

Mr. Dale Johnston (Wetaskiwin, CPC): Thank you, gentlemen, for your presentation. I feel maybe just a little bit beyond my depth, because I'm not schooled in law.

When we're talking about 40 days after a sitting and 40 days prior to a sitting, are we talking about 40 calendar days or 40 working days? That's my first question.

Mr. William Corbett: It's my understanding, Mr. Johnston, it would be 40 calendar days.

Mr. Dale Johnston: I was going to ask how this would affect jury duty, because I know members of Parliament are exempt from that, but I think maybe Rob partially answered that. However, it does raise another question. When you receive a jury summons, it states on there that some of the people who are exempt from that are members of Parliament, members of the legislature. So if we were to decide to change privilege, would that necessarily mean that our exemption from jury duty would be changed?

Mr. Rob Walsh: Mr. Chairman, there are two sides to this coin, like most coins. The law relating to jury duty and who is or is not exempt is out there. If they want to exempt members of Parliament as a category of individuals, that is the law's privilege to do that.

The other side of the coin is that any proceeding, whatever it is, that by force of law is requiring the attendance of a member of Parliament is subject to the priority of the House's right to have the member in attendance at the House for the duration of a session and 40 days before and after. So if they want to exempt members of Parliament all year round, that's fine, that's their business. But all the House would insist on, if it were to do so—and this can all of course be waived—would be to say “If you're expecting this member to go to that jury selection process on this day when the House is sitting, or within 40 days, he ain't going”, and they can't do anything about that. That's the point.

Mr. Dale Johnston: Well, then, this raises the question in my mind as to whether there is a time when you can be called as a witness as a member of Parliament. Is there actually a time? With 40 days prior to and 40 days after, it doesn't look to me like.... I mean, the law might just as well say you're exempt as long as you're an elected member. If there is a time when you can be called as a witness.... And I understand that there's a difference between being a witness and being a principal, being named in the suit. Is that correct? There's no difference? So is there ever a time? That's my question. Is there ever a time when a member of Parliament can be called?

Mr. William Corbett: The essence of the dilemma here, Mr. Johnston, is, I think, the changed nature of the parliamentary calendar, the nature of our sessions.

The 40 days before and after is something that we inherited at the time of Confederation, 1867. It probably, in the horse-and-buggy era, might have been a valid principle. Parliament met in annual sessions that were seldom longer than two or three months. The intersession was considerably longer.

But you could make the argument that with sessions that go on now for up to two and three years, and intersessions that seldom if ever reach 80 days, that indeed the 40 days before and 40 days after is in need of modernization for the year 2004. I haven't looked back historically for the last 10 years, but I have an intuitive sense that the windows for anyone to be compelled to attend would be few, far between, and very short.

● (1130)

Mr. Dale Johnston: So if the windows aren't closed, they're very nearly closed.

In the professional opinion of either of you gentlemen, do you think there should be a time when members of Parliament can be called as witnesses or principals while they're sitting?

Mr. Rob Walsh: At the risk of being legalistic and defining things in a Jesuitical way, we have to distinguish between a member testifying in court and a member being compelled by order of the court to appear. It's the latter we're concerned about here. There's no constraint against a member of Parliament testifying in court if he or she wishes to do so voluntarily. I think the better practice is for members to cooperate with judicial proceedings and make themselves available whenever they can. Any privilege is at risk of being stomped on if it's abused, perhaps even by the House itself at some point.

There is a problem with this 40 days, but frankly you've got the same problem with 14 days, which is what the Federal Court in Calgary suggested. The House may adjourn in June for the summer, with everybody anticipating there's going to be a prorogation with a new session in the fall. The session is scheduled to resume by September 16, let's say, with prorogation on the 15th or the 14th because this is done by the Governor General as a royal prerogative, and then the new session starts.

It's not hard to collapse the process so the 14 days won't be seen until you get to an election. Then, of course, there has to be a certain period left for elections. Then you run into the problem that if that is the window for testifying in court, members of Parliament may be otherwise preoccupied, and legitimately so, but they have a subpoena to appear in court. The person pushing that subpoena is losing patience because they've been waiting a long time. So it's something to think about, whether you collapse that 40 days.

The Chair: Okay.

Yvon Godin.

[*Translation*]

Mr. Yvon Godin (Acadie—Bathurst, NDP): I wasn't here for the start of the presentation, and I apologize for my absence. It's somewhat like the story of the horse and buggy, wouldn't you agree? People didn't travel by Boeing 747 in 1867. Hence the recommendation that perhaps it's time to modernize the system. We need to go back in time and look at the reasons why this practice was adopted, rather than hide behind the rule today. There's no denying it any longer: the era of the horse and buggy is over.

I'd appreciate hearing your views on the subject and learning if any research has been done to ascertain if the rule was brought in 1867 simply because travelling across the country took a long time and it was impossible for members to attend court, or if the real reason was to protect Parliament. However, distance cannot be discounted. I cannot get to British Columbia in six hours.

Mr. William Corbett: In our British parliamentary system, the practice of parliamentary privilege has inherited everything that was in place in the British Parliament at the time of Confederation. However, in everything I've read on the subject of parliamentary privilege, I've yet to see a definitive reason for this 40-day before and after timeframe. I can speculate as to the reason, but it would be just that, speculation. We merely inherited the existing rule.

[*English*]

But, Mr. Chairman, I have not seen anywhere anyone speculating or drawing a definitive reasoning for the existence of the 40 days.

[*Translation*]

Mr. Yvon Godin: That's how the British Parliament functioned in 1867, and the practice is merely a holdover from that era. Have any changes been introduced in the ensuing years, or have any other countries with similar rules changed or modernized their practices?

● (1135)

Mr. William Corbett: Mr. Godin, the British Parliament, through its speaker, has referred the matter twice for review to a joint committee of the two Houses of Parliament. Recommendations were made, but no follow up was ever given. In the United Kingdom, the 40-day timeframe remains in effect.

Mr. Yvon Godin: Could we possibly see these recommendations?

Mr. William Corbett: I believe that's possible. I don't know whether your clerk has already included them in the briefing books that are circulating. I'm certain that the reports of the two British committees are included. If not, we can always get that information to you.

[*English*]

The Chair: Merci, Yvon.

Because of events in the room, the order has changed a little bit. I have to go to Elinor Caplan now, then to Michel Guimond and then to Roger Gallaway, if that's okay. And then we'll go back to the Conservatives.

Elinor Caplan.

Hon. Elinor Caplan (Thornhill, Lib.): Yes, thank you very much.

I find this discussion an interesting and important one, and I was aware of the court rulings. I wasn't aware of the ruling from January, but I wondered if you've looked at any precedents that have been established over the years around what members have done or not done, and whether or not they have had any impact on the privileges discussion. That's question number one.

Second, if we're going to have a discussion of privileges, Mr. Chair—and we haven't had a look at this since the 1800s, when they didn't have TV—it also seems to me that we should be looking at the question of privilege in the House to say libellous and defamatory-type things, or things that would be considered libellous and defamatory, with the advent of television.

It's my understanding that initially, when the privilege of the safeguards of the House were brought in, yes, everything went into Hansard, but you didn't have the kind of distribution of what, if clearly said outside the House by an individual, would be subject to the protections of libellous and defamatory responses and activity. I think that is something that should be looked at as well.

The fact that people see it on TV or they read in the newspaper that it was said.... If we are concerned about not only privileges of the member, but also about how we are all, on both sides of the House.... I'm talking about everybody, because I was in opposition for seven years at Queen's Park, and I engaged in similar kinds of rhetoric, knowing you had that protection. So I'm not speaking in a partisan sense at all. It's really about how do we want people to see all of us and the work we do, and should we review the rules around privilege in the House for being able to say things that clearly, outside the House, would have ramifications and implications that privilege guards against.

So I wanted to raise that as well, because I think we should look at all of the privilege. If we're going to update...we should be looking at all of those things that are considered privilege.

The Chair: Would you care to comment, gentlemen?

Mr. William Corbett: Thank you, Mr. Chairman.

I have to say to Ms. Caplan that other jurisdictions using the Westminster model have indeed been much more rigorous in conducting fairly regular reviews of the privilege regime in existence. I know that at least two committees in the United Kingdom have conducted fairly rigorous exercises in looking across the broad range of all the privileges available to members, and have made recommendations. I know that the Australians as well, and the New Zealanders, have done such.

There has not been a special committee of both houses in the Canadian context to review privilege questions since about 1976. The last one that occurred was a special committee on the rights and immunities of members, and it wasn't as comprehensive an exercise as one might have hoped for at the time.

So it's certainly something lurking out there that probably calls for attention but hasn't got that kind of attention.

● (1140)

The Chair: We appreciate the suggestion and the comments.

Roger Gallaway.

Hon. Roger Gallaway (Sarnia—Lambton, Lib.): Privileges, as you pointed out, were received in section 18 of the British North America Act. You made an interesting point around one of these court decisions where the court acknowledged that on July 1, 1867, these were the privileges as received, the 40-day rule, and therefore it was not up to them, in that particular case, at least—I think it was the Ontario Court of Appeal—to tinker with it.

I want to point out to you another statute, and that's the Supreme Court Act. The Supreme Court Act says that a court will take notice of the Constitution. As we know, the Constitution is many documents. It may be all of those documents that are set out in section 52 of the 1982 act, the Canada Act.

I would ask you, and this is probably a patently unfair question, but I'm going to ask it anyway: How is it that a judge would not pay attention to section 18 of the British North America Act, knowing that they are charged with looking at the Constitution in making a decision? In fact, we know now of two cases where they just wantonly disregarded the Constitution. In your view, how could this have happened?

Mr. Rob Walsh: Mr. Chairman, in a word, because I don't want to be disrespectful or contemptuous of the courts—and I'm being facetious, in part—it's ignorance. We don't have a copy of the Parliament of Canada Act here, but it says in section 5 that the parliamentary powers, immunities, and privileges of the House are to be respected by the courts and don't have to be pled in court—the court shall take notice. Do you think I'm going to sit back and not send counsel to Telezone or whatever because, oh, I don't have to worry, they know what privilege is? That would be a very ill-advised assumption.

I've come to the House here, and as a lawyer, after a lot of years of practising as a lawyer, and it's "parliamentary what?" When I phone lawyers who have a lot of years of experience and I say it's the issue of parliamentary privilege, they say "what?"

So there's a huge learning curve out there for a lot of people in the legal community about what this means.

If the courts are supposed to take judicial notice of what parliamentary privilege is, it's risky business if you assume they're going to. Once it's drawn to their attention, as we now can say with regard to the Ontario Court of Appeal, they seem to be ready to take it into account.

Section 5 says the privileges, immunities, and powers held, enjoyed, and exercised—

Hon. Roger Gallaway: Yes, that's what I was referring to.

● (1145)

Mr. Rob Walsh: You know the one.

Hon. Roger Gallaway: Secondly, we have seen a number of decisions where the courts—and it's not limited to the Supreme Court—make claims about their powers that, I would say to you, are rather extravagant. In that sense, there's this new doctrine that was created in the Supreme Court of Canada called the contextual approach to interpretation of certain constitutional documents.

Let me give you an example. Section 91.26 of the British North America Act, which, the last time I checked, was part of the Constitution, is one of the headings of power. It says that Parliament will make rules with respect to divorce and marriage. The meaning of "marriage" on July 1, 1867 was defined. It was already defined. Yet through this magic of the contextual approach, the court has found that it can redefine it.

I ask you, what then would preclude a court—the most obvious suspect would be the Supreme Court of Canada—to redefine the privileges of this place, themselves having been born in the Constitution, using the contextual approach, whatever that means?

Mr. Rob Walsh: Mr. Chairman, the reference to the contextual approach is akin to what in another context is called situation ethics. You take a look at the situation you're in and you find a way out.

I think what you're referring to, Mr. Gallaway, is a debate in constitutional circles in the United States during the Reagan years, and still going on with the likes of Mr. Justice Scalia and the United States Supreme Court. That's the contest between does the Constitution mean what the fathers of the nation meant when they wrote it, or is it what in our jurisprudence has come to be a living tree? Is it an ongoing document that is reinterpreted as society and times change? So there's an underlying meaning to these words, which may take on a different form as you go through history. The latter is what is meant by this contextual interpretation.

To go more specifically to your question about privilege, I would venture to say that the Supreme Court of Canada for itself, and now the Ontario Court of Appeal, has quite judiciously recognized that it ought not to be messing around with the House of Commons privileges, unless it wants to see the House of Commons messing around with its privileges. It's the old game of what's good for the goose is good for the gander.

Marriage is just a concept, which, like the living tree analogy, could change its meaning over time. Other concepts in the Constitution could well see their meaning change over time. We're talking about parliamentary privilege as part of the Constitution of Canada, as you well know, but the unwritten portion, if you like. It would be quite a bold move, in my view, for the Supreme Court to say we're now going to redefine downward what this privilege is of the House of Commons. To do so would be to subject the House of Commons and Parliament to the views on matters of the court, which is unconstitutional in the sense that it causes inequality or an imbalance in the respective branches of government.

Hon. Roger Gallaway: I would point out to you that since the so-called living tree decision of perhaps more than 50 years ago—the tree is growing quickly—the contextual approach as enunciated by Justice Wilson, Mr. Justice Iacobucci, and the chief justice herself has escalated considerably. Do you think that the courts—and I'm talking courts in general—have received the message that this is indeed the Constitution they're playing with? I'm looking for an assurance that in terms of the courts' activism, this is the end of it.

The Chair: Please do this quite briefly. We can come back to Roger later on if we wish. It would be someone else's turn now.

Mr. Rob Walsh: There's never an end to what a lawyer could start up again. So in a sense there are always going to be more cases brought on that bring the same issue back to the courts.

I do believe that the courts in Canada in the last very short while have come to a recognition of what parliamentary privilege is and why it is important that it defer to the parliamentary institutions with regard to the meaning of that term.

The Chair: Roger, we can come back to you.

Next is Loyola Hearn and then the chair.

Mr. Loyola Hearn (St. John's West, CPC): Thank you very much, Mr. Chair.

If I remember correctly from my reading, back in the early 1600s they were talking about parliamentary privileges. Of course, the British North America Act brought the British parliamentary system here. I think of the number of very highly qualified people who probably took parliamentary business and reform more seriously than we do and who have gone through those halls and have not tampered with parliamentary privilege. I also think about today's sue mentality and what it would be like if we didn't have any privileges. We'd spend more time in courts than we would in the House.

So I certainly agree, and I think we issued those words when we spoke to the original point of privilege raised by the then government House leader, that if it's not broke, don't fix it. I believe we've been served well by what we have. Perhaps we should thank the courts for recognizing the fact that we're the masters of our own destiny there. If we are seen to be tampering, then it might open the door for the courts and others to tamper also. So, Mr. Chair, I think we are well served with the decision. We should leave well enough alone.

● (1150)

The Chair: Can I have an intervention, then, and Roger, can we finish with you? Would that be okay?

My view is it's hypothetical to us, but it's not actually hypothetical. This committee met with a delegation of parliamentarians from another country, and we met with them because we're the procedure and House affairs committee. They were interested in how we operate and they're interested in these matters. In this case the definition has to do with when Parliament is sitting—14 days before, 14 days after, 40, and so on.

In their jurisdiction their rule required the member to attend. They had a rule that if a member did not attend for six months, he or she lost parliamentary privileges. The case they described to me was the case of a member who in a distant riding had been called before the courts for burglary. He had hidden away and had been searched for by the police for five months and 29 days, I think it was, or something like this. Then on the penultimate day, he surrendered to the police. When this delegation got back, he was going to be brought to the door of Parliament in chains. The chains would be taken off so he could step into Parliament, and so he would be qualified for parliamentary privilege for another six months.

I just wondered on that.... I understand the point our colleagues here were making, that it appears we're covered for the whole year. Say hypothetically that for whatever reason—and not a case like perhaps illness—the member did not attend. Is there any obligation for us to attend, or does Parliament simply have to sit?

Mr. Rob Walsh: There's no legal obligation.

Mr. William Corbett: No, there is no legal obligation, Mr. Chairman, that the member must attend. Members are considered to be doing the public business if they are in their constituencies. Certain of these protections apply only to proceedings in Parliament. Others apply during the larger period of time, which is when Parliament is in session, whether it be adjourned or not.

The case you were describing was of a member subject to criminal charges. There is nothing in any of our privilege regime that will protect a member under those circumstances.

The Chair: I told the story in part because our colleagues from this other country implied that there was corruption involved in getting him to the door of Parliament. In other words, he finally surrendered to the police, but there had in effect been a pay-off to get him there too.

Roger Gallaway, briefly.

Mr. Rob Walsh: Just to finish that question, Mr. Chairman, at least 20 members would have to show up once a year.

Mr. William Corbett: Yes, and at the same time; that's quorum. That's a constitutional requirement, Mr. Chairman.

The Chair: Roger, briefly; then my intention is to close this down. Colleagues, just so you know, I thought that following that we might have about 10 minutes in camera when we would decide what to do about this matter.

Roger.

Hon. Roger Gallaway: I wonder, just as a general question, if you could advise us in your opinion who in Canada or perhaps in a Westminster system is doing work on this topic. I'm talking about serious study on it. We've lost Mr. Forsey, and Mr. Eglinton, who was his researcher, is still alive but is not here; he's pursuing other interests. Is there anyone in Canada who's actively studying the whole question, the realm of the law of Parliament? We're in this strange dynamic now where the law of Parliament is potentially going to be co-opted by courts, and we're forgetting that this place also is a court. I'd like to hear whether you know of anyone who is doing active work on this.

● (1155)

Mr. William Corbett: Mr. Chairman, the former law clerk, Joseph Maingot, has written the definitive work on privilege in Canada. He produced a second edition thereof. I understand he's nosing around with a view to writing a comparative study of privilege in both the Canadian House and other Westminster parliaments, and perhaps even comparing it with the privilege regimes in some of the European countries.

The simple truth is that in the academic world in Canada, there is almost no attention at all paid to this subject. I couldn't find you a name of anyone in any university specializing in this domain at all.

The Chair: Thank you, Roger.

Colleagues, in a moment I'll thank our witnesses. Then we will have a short private discussion on what we're going to do next.

Before I do that, for the record, if it's possible we will have Jacques Saada here on Thursday, either on the action plan or, if it's appropriate, on Bill C-3. If that is not possible—because we are having some discussions with him—I propose we invite the Speaker to be here and have an in camera session on security on Parliament Hill.

Yvon Godin.

[*Translation*]

Mr. Yvon Godin: Before we wrap up, I'd like to ask one quick question. We've been presented with two cases relating to privilege. Are there many such cases? Is any data available on the subject? Are there two, ten or twenty such cases? Has it become a problem?

Mr. Rob Walsh: No, the nature of the privilege remains unchanged.

Mr. Yvon Godin: I'm talking about the persons who are invoking privilege. How many such cases have there been?

Mr. William Corbett: Four cases, I believe, including the two already mentioned.

Mr. Rob Walsh: There's a third case, that of Chief Victor Buffalo, and

[*English*]

Schwartz Hospitality Group versus HMTQ, which involves the former minister, Sheila Copps. We had a case involving Robert Gauthier, which is finished. We had a case involving Mr. Quigley out in your part of the country, and that's finished. We have a case involving an employee of the House of Commons, which is in the Supreme Court of Canada, on privilege.

[*Translation*]

Mr. Yvon Godin: I understand, but in the Quigley case, for example, it wasn't a matter of wanting to compel members to attend court or some such thing. It was merely a question of interpreting privilege in order to obtain CPAC in both languages. That has nothing to do with the matter at hand.

Mr. Rob Walsh: You're right. These cases are unrelated.

Mr. William Corbett: I'm talking about the overall number of cases involving privilege.

[*English*]

The Chair: Thanks, Yvon.

I would like to thank Bill Corbett, our clerk, and Rob Walsh, the law clerk and parliamentary counsel. Gentlemen, we appreciate it. Rob, I know that you've been appearing before committees all morning, and we particularly appreciate that.

We are now going to move in camera for a short session. I ask those who should not be here to leave, and we will proceed to consider what we will do on this matter.

[*Proceedings continue in camera*]

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