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Chair

Mr. John Williams

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• (1550)

[English]

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

The orders of the day are pursuant to Standing Order 108(3)(g), chapter 3, “The Sponsorship Program”; chapter 4, “Advertising Activities”; and chapter 5, “Management of Public Opinion Research”, of the November 2003 Report of the Auditor General of Canada, referred to the committee on February 10, 2004, privilege, powers and immunities of the House of Commons.

We have no witnesses today because we are continuing the meeting we had last Tuesday, November 2. At that point in time we had a presentation by our counsel at the Gomery inquiry, Madam Beagan Flood. We also had a representation from Mr. Pratte, who is one of the lawyers at the commission, representing Mr. Chrétien, Mr. Pelletier, and Mr. Gagliano. He was speaking on behalf of the other two lawyers, so we had one position presented to us. In addition to that, we had Mr. Newman, from the Department of Justice, presenting his position of enlightenment. That was followed up by our law clerk and legal counsel of the committee, Mr. Rob Walsh, who presented his advice to the committee. That pretty well took up the entire meeting, and we never did get into a round table discussion.

What we want to do is discuss this issue amongst ourselves. Mr. Walsh, the clerk, is here. He would prefer that we discuss it amongst ourselves rather than having a dialogue with him, but he is here if we need points of legal clarification. The idea of this is to see if we can come to some consensus amongst ourselves as a committee of parliamentarians. We're not here to do the legal work. We'll leave that to lawyers. We're here to see if there is some kind of consensus, some ideas, or whatever we come to as a conclusion by the committee.

Before I adjourned the meeting on Tuesday I had three speakers recognized on the list to speak, and they will therefore be first: Mr. Holland, Mr. Murphy, and Mr. Lastewka. For anyone else who wishes to speak, just catch the clerk's attention and your name will be added to the list.

I'm now told Mr. Murphy will not be speaking this afternoon.

Mr. Holland.

Mr. Mark Holland (Ajax—Pickering, Lib.): Thank you.

Mr. Chair, I had a draft motion with various “whereas” clauses and some operative clauses. I'm not sure exactly where this is coming

from, but I believe it was prepared by counsel. I'm wondering, Mr. Chair, if you had an opportunity to review it. As a new member, I would be interested in your comments on that particular draft if you have seen it.

The Chair: This is a document that has been totally circulated, Mr. Holland. I have it in front of me too.

Are there any general questions before we start moving down? Let's see if we can find a road that we can follow together. Does anybody have any questions to clarify?

Mr. Mark Holland: I had a number of questions or comments. I was just interested in that first.

The Chair: This will be coming forward. I'll bring this in later, if you don't mind.

Mr. Mark Holland: You're going to bring it forward later. I'm just trying to understand this. Is this something that is coming from somewhere, or is it coming from you as a potential suggestion?

The Chair: This has been prepared by the law clerk and his staff, in conjunction with the researchers and the clerks, as a proposal that will come from the chair if we want to go in that direction.

Mr. Mark Holland: So it's your proposal then. I'm fine with that. I'm just trying to understand it.

The Chair: To find some direction that the committee may wish to follow, I have caused this document to be prepared.

What I wanted to begin with was based on the discussion of last Tuesday. Does anybody have any questions that require clarity? Are there any points that you are not clear on, or questions, or do you want a discussion amongst yourselves? Once we have that out of the way, then I'll make this proposal and ask if this is a proposal you are prepared to accept.

Mr. Mark Holland: I guess my comment, Mr. Chair, would be to keep me on the speakers' list when we move out of the questions phase and into the discussion phase.

The Chair: We'll put you right back on.

Mr. Wrzesnewskyj.

Mr. Borys Wrzesnewskyj (Etobicoke Centre, Lib.): I appear to have been overlooked in the distribution of this particular document.

The Chair: As I said, some copies did get out and I hadn't made a complete circulation, but we'll make sure everybody gets a copy of it now since it is now in the public domain.

Mr. Lastewka.

Hon. Walt Lastewka (St. Catharines, Lib.): One of the questions I wanted to have answered was this. Mr. Walsh had a discussion with or letters between himself and the various witnesses. What I'm looking for is what direction on privilege Mr. Walsh gave to whoever the witnesses were. Did he have a set letter that went to them when asked? Were there letters between Mr. Guité or Mr. Guité's lawyers and Mr. Walsh on privilege?

The Chair: There was a letter given to Mr. Guité.

Do you have copies there for circulation, Mr. Walsh?

Mr. Rob Walsh (Law Clerk and Parliamentary Counsel, House of Commons): The clerk has copies, Mr. Chairman.

The Chair: Okay, we're having them circulated right now.

Hon. Walt Lastewka: The reason I'm asking this question, Mr. Chairman, is that in all previous meetings you've spelled out the rules of the meeting and the rules of what is going to happen that day. Sometimes we challenge you because we disagree with you, and many times we agree with you.

Going back a number of months, I remember that Mr. Walsh had given advice to witnesses on behalf of the committee. That's the way I see it. I want to understand clearly, as we move forward on this, what advice that was. I take it that's the piece of paper you've just passed out.

• (1555)

The Chair: Let me just read this into the record—and the French copies are being circulated as well, I presume.

The English copy is addressed to Mr. Michael Edelson, of Edelson & Associates. He was the lawyer for Mr. Guité at the time, but I'm not sure if he still is. It's dated March 29, 2004, and it says:

Dear Mr. Edelson:

RE: Charles Joseph Guité

In recent telephone discussions relating to the testimony before parliamentary committees, you raised the possible application of section 5 of the *Canada Evidence Act*.

Section 5 excuses testimony that could incriminate a witness and applies in criminal proceedings conducted in court. This *Act* does not apply to parliamentary proceedings. However, witnesses appearing before Committees of the House of Commons, are afforded protection by *parliamentary privilege*.

Witnesses before parliamentary committees are obliged to appear and must reply fully and truthfully to all questions. These duties are balanced by the protection of the privilege in that the evidence given may not be used in any proceeding, criminal or civil. The basis of this privilege is the *Bill of Rights*, adopted in the United Kingdom in 1689 and incorporated into Canadian constitutional law by the *Constitution Act, 1867*.

Parliamentary privilege is of a constitutional nature and supercedes both the terms and the impact of ordinary legislation such as the *Canada Evidence Act*. The protection of *parliamentary privilege* applies to witnesses, even if they feel that the confidentiality of *in camera* testimony has been breached.

If you wish, we may discuss this topic further, either by phone or in person.

Yours truly,

R.R. Walsh

And Mr. Walsh is, of course, our law clerk.

So that letter was given to Mr. Edelson, the lawyer for Mr. Guité, back on March 29, 2004.

Mr. Walsh, do you have something to say?

Mr. Rob Walsh: To answer Mr. Lastewka's question regarding the various witnesses who came forward, as you may recall, Mr. Lastewka, it happened many times that the chair made representations to the witnesses about the protections of parliamentary privilege. Privately, I had occasion to give that same assurance to some witnesses—not all, but some—and it generally followed along the lines of what you've just read in that letter.

Hon. Walt Lastewka: So, basically, when witnesses or the lawyers of the witnesses ask questions, we would use the same explanation from start to finish, and basically what's written in this letter.

Mr. Rob Walsh: Essentially the same explanation or assurance was given in each case.

Hon. Walt Lastewka: Thank you.

Thank you, Mr. Chair.

The Chair: Also, Mr. Lastewka, as I'm sure you'll recall, when every witness came forward I read them the following:...the refusal to answer questions or the failure to reply truthfully may give rise to a charge of contempt of the House, whether the witness has been sworn in or not. In addition, witnesses who lie under oath may be charged with perjury.

That is from page 862 of *House of Commons Procedure and Practice* by Marleau and Montpetit. As you'll recall, I read that every time into the record.

Mr. Rob Walsh: If I may, Mr. Chairman, perhaps I can add this, in case I wasn't quite accurate in what I just said.

It wasn't the case, Mr. Lastewka, that every witness who came before the committee received that assurance from me. Perhaps there were some, if the record was examined, who didn't hear it from the chair, either. In my view, it's not necessary that assurance be given for the witness to have the benefit of the protection of parliamentary privilege.

Hon. Walt Lastewka: The main reason I'm asking the question is that for those witnesses who requested an interpretation, this was the interpretation that was given to them.

Mr. Rob Walsh: That's correct, Mr. Chairman.

The Chair: Mr. Christopherson, please, followed by Mr. Guimond.

Mr. David Christopherson (Hamilton Centre, NDP): Thank you, Chair.

This is tied to the letter but also to part of what Mr. Walsh said at the last briefing. If I remember correctly, and I would ask Mr. Walsh to correct me if I'm wrong, Mr. Justice Gomery in his comments—I can't remember all the words, so this is a paraphrase—said he was, I believe, either puzzled or disappointed with regard to the fact that we had invoked, had chosen to invoke, our parliamentary privilege.

It seems to me, Mr. Walsh, through the chair, that the briefing you gave us indicated that, technically, there is no real invoking of these privileges; they exist. They exist for us, I would assume, from the moment we're sworn in and speak here or in the House, and they are deemed to be constantly invoked for any witnesses who come before us. This letter and any other explanation or assurances that you or anyone else gave at any point was merely a matter of explaining and confirming and affirming what is for us a constant, what is always there.

Could you just comment on that for me? I found it a little bit troubling, because it did leave the public with the impression—and I've no doubt that Mr. Justice Gomery didn't do anything on purpose—that we had taken an action that had caused him to be stymied in his abilities. My understanding of your briefing was, no, that's not the case, there's no trigger to invoke that, it's always there. Whether you explain it or not, it's there.

Could you help me be clear on that, please? Thank you.

•(1600)

The Chair: Mr. Walsh.

Mr. Rob Walsh: Mr. Chairman, as Mr. Christopherson might recall from my remarks yesterday, I made reference to section 5 of the Parliament of Canada Act, which makes it quite clear that the privileges, immunities, and powers of the House of Commons are there as a matter of law. The courts, including commissions of inquiry, are expected to be aware of this. All judges are to take notice of this.

When we went to the commission we went there not because we had to, in law, go there in order to make the privileges apply; we went there because we were concerned that they may be overlooked. It's not a widely understood or comprehended field of law. It doesn't arise every day in the lives of lawyers or judges. It's been my experience that the better practice is to get there and remind them of this law and of course hope that in fact it would be respected.

The Chair: I think Mr. Christopherson's question really was that when anybody speaks in this House, be it a member of Parliament or a witness at a committee, privilege is invoked. It's there. It doesn't have to be asked for.

Mr. Rob Walsh: That's correct, Mr. Chairman.

Once you are talking about a parliamentary proceeding, the privilege is there. I caution you, sometimes members will go and sit somewhere and call themselves a committee. They're not an official proceeding, and they have to be told, you don't have the protection of a parliamentary proceeding, because you're not an official proceeding of a committee. But once the parliamentary proceeding, whether of the House or a committee of the House, is underway, with the banging of a gavel, that privilege applies.

Mr. David Christopherson: That helps considerably. Thanks very much.

Thank you, Chair.

The Chair: Thank you.

Monsieur Guimond, s'il vous plaît.

[Translation]

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

I would like Mr. Walsh to clarify something. I read his interpretation and the proceedings of the committee and I wish to say that I agree with Mr. Walsh's approach. However, I have a question that is bothering me, perhaps because, like Mr. Walsh, I am a lawyer. I want to be sure I understand.

Who is it that parliamentary privilege is meant to protect?

Mr. Rob Walsh: That is a good question, Mr. Guimond. I imagine that one could say that the purpose is to protect debate, to protect the freedom of all those taking part in debate, be they members of the House, members of committees or even witnesses appearing before committees. The key thing here is to be free to speak without limits. That is the purpose of parliamentary privilege: no constraints, no limits, no rules to impede anyone's right to speak with complete freedom.

Mr. Michel Guimond: I will give you two examples. The analogy that follows worries me. Let us suppose that I am your client and you are my lawyer. I told you certain things when you were preparing the case and you are bound by lawyer-client privilege. Do you agree that if I, as a client, leave this chamber and call a press conference, you are relieved of lawyer-client privilege because I, the client, spoke publicly about my case? Taking this line of thinking, are there certain analogies between lawyer-client privilege and the case before us. That is my first example.

I have another. This involves a situation that arose in Quebec about a month ago. Boxer Dave Hilton abused his two daughters—we now know this—when they were minors. It was never revealed that it was his own daughters who were involved. All that was known was that he had been sentenced for inappropriate conduct with two female minors. Last month, his daughters published a book, thus making their story public. Dave Hilton's lawyer then argued before the court that they could not publish their book and make their story public because they were bound by the court order, which prevented them from revealing their identity. But they themselves revealed their identity.

I would like some reassurance. Having said that, I do not want there to be any doubt here and I repeat that I support the decision we are preparing to take. I just want some clarification, so that this little concern I have is put to rest.

•(1605)

Mr. Rob Walsh: Mr. Chair, the two examples Mr. Guimond has given explain his earlier question about whom the rule is intended to protect.

In the first example, Mr. Guimond, where you are the client and I am the lawyer, I am bound by lawyer-client privilege to say nothing. You as the client, however, have the right to speak to whomever you wish about the matter. The obligation to remain silent and to respect confidentiality is binding on me alone, not on you as my client. Even if you speak at a press conference, I am still so bound. I must still maintain confidentiality.

I am not very familiar with the second case, but I have read about it in the newspaper. It involved two daughters who were the subject of a court-ordered publication ban. The purpose was not to protect the father, but the two daughters, because they were minors. If the daughters decided to talk about all these confidential matters I imagine, without knowing the details of the case, that the court would see this as voiding the rule of confidentiality because it was meant to protect not the father, but the daughters alone, I believe. But I am not sure that this is the case here.

Mr. Michel Guimond: The purpose of the protection conferred by parliamentary privilege on those who testify before us in committee is to ensure that the committee doesn't start sending out press releases about things said confidentially here. But what would happen if witnesses themselves were to say that it didn't bother them and that they wanted the information made public?

Mr. Rob Walsh: I thought of that, Mr. Guimond. The committee or the House of Commons could authorize witnesses to release their testimony, but there is a problem. So doing would impose a burden on the witnesses, who would have to ask the following question: are you going to allow us to speak about your testimony, or not? Should a witness say no, this might raise questions as to why. This would place a witness who wished to retain this privilege in a difficult position. Do you follow me?

• (1610)

Mr. Michel Guimond: Yes.

Mr. Rob Walsh: That is the only reason why it is not a good idea just to let the witness decide. Those who decide to say no would have to explain why.

The Chair: Alright, Mr. Guimond?

[English]

Mr. Fitzpatrick, please.

Mr. Brian Fitzpatrick (Prince Albert, CPC): You didn't have time the other day, Mr. Walsh, but I'm curious about this point about the history of our parliamentary system and so on, and there being some sort of precedent here. If Parliament says that something is a privilege, and then a judge or a court outside the system says it isn't a privilege and makes a ruling on that, you obviously have a collision course between the judiciary and Parliament. There has to be some sort of mechanism in our system to resolve that. Would that be through the court system? Or what would be the process to resolve that kind of an impasse?

Mr. Rob Walsh: Mr. Chairman, if I gave the impression in my submission that the courts had no role to play here, I was not speaking as clearly as I should have done.

The question of parliamentary privilege—that is to say, whether the privilege claimed exists, as a matter of law—is a legal question. It is within the jurisdiction of the courts to consider. There is law in that. There's legal history. The courts can make the determination whether the privilege that the House is claiming is, in the case of Canada, a privilege enjoyed by the British House...and which came to the Canadian houses of Parliament in 1867, by section 18 and section 4 of the Parliament of Canada Act.

However, having decided, as a court might in a given case, that a certain privilege exists, the Supreme Court of Canada decided in the 1993 New Brunswick Broadcasting case that it is not consistent with privilege for the courts then to enter into the question of whether the privilege was properly exercised. The courts would say, no, it's not for us to supervise or oversee, as it were, how the House chooses to exercise its privileges, because that—and this is my language—would be an intrusion by the courts into the privileges of the House.

The court does address the first question: does the privilege that you're claiming exist as a matter of law? If it does, that's the end of

the question, and the House is free to exercise its privileges as it sees fit.

In each situation, Mr. Fitzpatrick, the question obviously arises, does the privilege claimed exist in law? In this case here, I would argue it's abundantly clear—it's not so clear in other cases, perhaps, but in this case it's abundantly clear—that privilege exists. And if the privilege exists, then there's no legal question as to how it's exercised; it's for the House to decide how and when and where this privilege is insisted upon, or not insisted upon, by the House.

Mr. Brian Fitzpatrick: Okay.

The Chair: Just to recap in my own words, Mr. Walsh, the courts have recognized that there is such a thing as parliamentary privilege. The courts have said that they have the right to determine whether or not what Parliament claims is a privilege is indeed a privilege. If the courts agree that it is a privilege, then they have nothing else to say in the matter.

Mr. Rob Walsh: That's correct, Mr. Chairman.

The Chair: I have Mr. Christopherson, Mr. Lee, and Mr. Lastewka. Shortly after that, I want to turn our minds from going backward to moving forward.

Mr. Christopherson.

Mr. David Christopherson: Thank you, Chair.

Now I'm a little confused on this issue. I was doing fine until we had the last piece. I have to say that my working understanding of this—or my thoughts on it, and those of a good number of my colleagues—was that if an individual wanted to opt out of the privilege and waive it, they could. This is the first time I've heard that we may have a problem with that if someone chose to. Most of us, certainly in any kind of talking we've done, were under that impression. It must come as news to other colleagues too.

How firm is that? It's the first I've heard of this. And it has come up before; if somebody wanted to waive it, do we supercede that? Is our position that we trump that and say, no, even if you want to, you can't release your own testimony?

Through you, Chair.

Mr. Rob Walsh: Mr. Chairman, I would express the view that, yes, the privilege belongs to the House. If the House wants to affirm that privilege and intervene in such a manner as to prevent an individual from waiving the privilege, it could do so. This is not to say that it would do so, or in any particular instance that it would want to do so. What we're talking about in this case is not an individual choosing to set aside the protection afforded to him or her by the privilege, but rather a legal proceeding taking on the practice of allowing counsel to use testimony for purposes of cross-examination in that proceeding. That is the broader privilege; it is of a broader nature. You might be a better judge of this than I would be, but I don't know if the House would ever get particularly exercised about a particular individual choosing to waive whatever protections he or she had by virtue of parliamentary privilege, if it is limited to that individual and otherwise does not present a problem to the House.

•(1615)

Mr. David Christopherson: Is that to say then, Mr. Walsh, through you, Chair, that any counsel we have there, whether Ms. Beagan Flood or someone else, is not about to leap to their feet to try to stop the proceedings if one of the lawyers or one of the witnesses says they are going to waive it and allow it to be introduced by whatever process? I'm not a lawyer, and I don't know. If it were suggested to the commissioner, Mr. Justice Gomery, that's what they would like to do, before we even have a chance to deal with this, what would be the reaction of legal counsel at the hearings representing the House?

Mr. Rob Walsh: Counsel would rise and ask Mr. Justice Gomery for an opportunity to seek instructions from her client as to the position the House would take in that eventuality, but I would not expect that we would necessarily object just because, in our own minds, we see it as a contravention of privilege. We would seek instructions from our client, and I hope we would be afforded an opportunity to get those instructions.

Mr. David Christopherson: Thank you. That's clearer, anyway.

The Chair: Mr. Lee, and then Mr. Lastewka.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Mr. Chairman, isn't it our objective here to try to respond to the questions raised by Mr. Justice Gomery and try to communicate to him that—

The Chair: We started off the meeting by just making sure that everybody was clear on where we're at, and then I'm going to propose some—

Mr. Derek Lee: Okay, it's clear.

The Chair: Mr. Lastewka.

Hon. Walt Lastewka: I want to speak on going forward.

The Chair: Okay, if we're all ready to move forward—

Hon. Walt Lastewka: Leave my name on the list.

The Chair: Okay. We are all ready to move forward in conjunction with the law clerk, the researchers from the Library of Parliament, and the clerks to provide some direction to the committee. I believe you all have a copy of this. I am going to make a proposal that has some alternatives we may wish to discuss. We are now moving forward to looking at potential avenues we may go down.

It reads as follows:

WHEREAS the privileges, powers and immunities of the House of Commons—

•(1620)

Mr. Derek Lee: Mr. Chair, you're not going to read the whole thing, are you?

The Chair: Do you all have copies? Okay, let me then summarize it in my own words. These are my words.

There are four options. The first one is that we reaffirm our privileges—and that's it.

The second one is that we reaffirm our privileges and allow the transcripts to be used.

The third one is that we reaffirm our privileges and we ask the House to refer it back to us for further inquiry.

The fourth one is that we reaffirm our privileges. This one's a bit more complex so I'm going to read it just for the record:

And that the question of any further or other consideration of these privileges as they apply to the Commission of Inquiry, or generally, be referred to the Standing Committee on Procedure and House Affairs, with the following order of reference:

The Standing Committee on Procedure and House Affairs consider the question of whether or not and in what circumstances it may be possible for the House of Commons to waive its privileges under Article 9 of the Bill of Rights 1689, including review of:

- a) the circumstances which led to this reference;
- b) the views of the Standing committee on Public Accounts;
- c) The position in Canada;
- d) The position in the Commonwealth;
- e) Such other considerations as it deems appropriate.

We have an option of standing pat and giving them what they want. The public accounts committee could ask the House to have us have clear deliberations, or refer it to the Standing Committee on Procedure and House Affairs with specific terms of reference.

Those are the four options. In conjunction with the assistance I have at this end of the table, the options are laid before you as directions that we may want to proceed in.

Now we'll have debate. Mr. Lastewka wanted to stay on, so—

Mr. Derek Lee: Mr. Chairman, I wanted to stay on too.

The Chair: Okay, Mr. Lee, Mr. Lastewka, Mr. Allison, and we'll continue on with debate.

Mr. Lee.

A point of order.

Mr. Mark Holland: I have only one question, that I be put on the list.

The Chair: You're on the list. Mr. Holland, we'll get you on after Mr. Allison.

Mr. Lee.

Mr. Derek Lee: I've conceived of our objective here as somehow replying to the Gomery inquiry—which has evidenced some frustration at the existence of this Constitution-based set of laws. Isn't it our objective then to get back to him in some fashion to inform him and to make the public and the commission counsel better aware that these Constitution-based laws are not simply some pop-up set of procedural rules that have conspired to interfere with what counsel want to do there? They're actually pre-existing, permanent parts of our Constitution. We want to make sure he and the commission counsel and witnesses at the inquiry and the public know that members of Parliament and witnesses before Parliament are permanently protected from being impeached in relation to their free speech and testimony here in our House of Commons. It applies to the Senate too.

This draft motion, I think, tries to do that. I wish there were some way we could hold out more finality for the public inquiry, but I guess there isn't. The motion essentially sends the matter to the House for its consideration in the event it might wish to comment further.

The Chair: From discussions with the experts who support all of our committees, and especially the people who support our committee, I think there may be a way to address what you're trying to say, Mr. Lee. It is that we try to get some notice on an order paper of the House of Commons so that when we're gone next week, if it comes up next week....

Is this the type of direction you're looking for?

Mr. Derek Lee: I think that's a good suggestion, Mr. Chairman, if you, on behalf of the committee, could place the issue directly before the House—where it should be, in my view—in a manner that would allow the House to at least treat the issue formally in response to Mr. Justice Gomery's request. It wouldn't necessarily provide immediate finality, but it would at least engage the House on the issue.

The Chair: Let me make this point. We have four options that have been circulated. Mr. Lee is saying that if we decide on one of these four options, it may be advisable to take it down to the House and have it tabled there, so it becomes a formal notice on the notice paper and so on.

Let's see if we can come to a conclusion on one of the four options, or if somebody has some other ideas...and then we'll come back to Mr. Lee's point there.

So I have Mr. Lastewka, Mr. Allison, Mr. Holland, Mr. Christopherson, Mr. Guimond, and Mr. Fitzpatrick.

Mr. Lastewka.

Hon. Walt Lastewka: Thank you, Mr. Chair.

I want to thank you and the law clerk for distributing the article by the Chief Justice, Right Honourable Beverley McLachlin. I've read that paper now about five times. I'm really struck with her final statement, which, if I may, I'd like to read:

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

I think that paragraph in summation of her report plays a key role for us in this House and in the judicial system. By having this referred to the public accounts committee, I am afraid it could become political rather than take the interests of the House, its procedures, and the various committees. I know it was referred to the public accounts committee because the public accounts committee did the work in the springtime.

I would support that it not be this committee that decides yes or no, because it could become very political—one of us is going to get blamed for it—and that we should seek the attention of the House as a whole, because this will affect not only this committee. From now on in it would affect each and every standing committee of the House. I think it's very important that the members of all those committees also have a say. I would ask you, as the chair, who has ruled on these procedures in the past, that we do something along the line that allows the 308 members their position, their discussion, and their decision-making. I would support going to the greater good.

• (1625)

The Chair: Thank you, Mr. Lastewka.

You're absolutely right. As we all know, the public accounts committee deals with the Auditor General. We deal with retrospective examination of problems that are brought to our attention. But we don't normally deal with issues of privilege and we don't normally deal with issues that have real impact, not only on all other committees but on all other committees from here on in and the House itself too.

Therefore, this is why one of the options is...and I think Mr. Lastewka is suggesting that we look at option 4. It would suggest that we report to the House or advise the House that perhaps this would be better dealt with by the procedure and House affairs committee, which is the committee that deals with all issues of privilege and these kinds of matters.

I have Mr. Allison, Mr. Holland, Mr. Christopherson, Monsieur Guimond, Mr. Fitzpatrick and, Mr. Carr.

Mr. Dean Allison (Niagara West—Glanbrook, CPC): Thank you, Mr. Chair.

I'd also like to thank Mr. Walsh for the great explanation of parliamentary privilege, because I think as a new member I now have a pretty good understanding. I could probably explain to just about anyone what parliamentary privilege is, what it entails, and the history of all that stuff, so I appreciate that.

I also understand that it doesn't just involve this committee, but it does, as Mr. Lastewka indicated, involve all of the committees in this House as well as all the members. I do get the fact that it doesn't really apply to people who aren't going to tell the truth, which is something we had talked about before.

I concur with Mr. Lee and Mr. Lastewka that it seems as if it would make sense to have this looked at by more than just us. This is not our place in terms of procedures. I realize this is where the question has been directed.

So I would agree with Mr. Lee and Mr. Lastewka that that would make sense. Option four would look like a good option at this time.

The Chair: Mr. Walsh has just reminded me—as I say, this is why we have these wonderful experts sitting up here. It's not the chair who comes up with all these points, but back to Mr. Lastewka. We refer it to the procedure and House affairs committee, but it's still a decision of the House. If they make a decision and recommendation to the House, each and every one of us at that time has an opportunity to pass comment on their recommendation.

Thank you, Mr. Allison.

Mr. Holland, Mr. Christopher, Monsieur Guimond, Mr. Fitzpatrick, and Mr. Carr.

Mr. Mark Holland: I agree with the appropriateness of option four. I would perhaps like to make a statement, and I'm not sure that this does it, with respect to our position on the use of testimony that came before this committee.

I think it's important, in light of some of the interventions made by witnesses yesterday, to talk about three points, and certainly my impression of them. I want to say the presentation Mr. Walsh gave was extremely helpful. I'll agree with Mr. Allison in this regard that as a new member it was very, very helpful. I was aware of the concept of parliamentary privilege. I can't say I ever had occasion to study it in this much detail. Now I'll have a very clear understanding of its roots and its importance and the need to defend it.

One of the things I took exception to yesterday was the suggestion by one of the witnesses that one of the reasons we had to do this is that there were only two options—basically you either waived privilege or you tried somebody for perjury. The reality is this committee still has, within the construct of parliamentary privilege, the ability to call somebody back and have them account to this committee, and question them on any discrepancies that might have arisen and get an answer to our satisfaction. We can do that within our own process.

Second was the notion of truth, that somehow the truth can only be arrived at if we abandon our sense of parliamentary privilege. I take exception to that. I think the truth is very easily arrived at through their calling the same witnesses and undertaking their process without having to jeopardize our process.

The one I took particular exception to, and I think it is actually a dangerous concept, is the concept that there's essentially no difference between testifying in front of a judicial inquiry or in a court of law, as the example was given, and our process. Basically, it was said to us that they're one and the same; there's no difference. I think that's not respecting the division between our process and the judiciary, the different values those are based on, and the different objectives they're trying to achieve.

The question was asked by Mr. Guimond, what is the ultimate purpose of this process of parliamentary privilege? Who is it meant to protect? I very much see parliamentary privilege as protecting free speech, as protecting our ability and witnesses' ability to engage in discussions and democratic dialogue without fear of reprisal. I think the whole point around ensuring that we don't start populating our committees with scores of lawyers, all watching out and carefully wording their words in thought of future processes, is a salient point and something we very much have to be cognizant of.

Mr. Lastewka and Mr. Allison have talked about the consequence of this beyond this process. I think that's one of the things we really have to be mindful of and speak to. This really isn't about this one, isolated incident. It's about a much broader, much more important issue, and therefore it must be deliberated very carefully upon. We must make our decisions very carefully, because it's ultimately going to have large ramifications for future processes.

In that regard, I am pleased to refer the matter to the House. I think I've made my position pre-eminently clear as to how I'll vote at some eventual point. My only addition is I would prefer to make some direct comment on our feelings on testimony as it directly related to us. Ultimately, we may be asked that, and it may be said that we never made any comment at all, other than to say good luck to somebody else in dealing with it. I think there is some consensus in this room for that.

That having been said, if there isn't consensus in this room, we could then enter into a very protracted debate on that particular topic. It could go on for many days without value. I would throw out the caveat that if there is unanimous consent on that item, it would be of value to add it. If there is not, I don't think there's value in us thrashing it around for days on end.

● (1630)

The Chair: We will see that it does.

In a reference to the Standing Committee on Procedure and House Affairs, it does include that they take into consideration the views of the Standing Committee on Public Accounts.

Mr. Mark Holland: Right. I guess it wouldn't be a bad thing for us today if there was consensus and agreement—

The Chair: Let's do one thing at a time. Let's find out where we're going. Once we get that done, we may want to offer a view as well. But first things first.

Mr. Christopherson, Monsieur Guimond, Mr. Fitzpatrick, Mr. Carr.

Mr. David Christopherson: Thank you, Chair.

Let me just say, on behalf of the NDP caucus in the House, that our views are similar to those expressed so far. We have just not been able to get over the fact that Parliament would extend privileges, yank them back after the fact, and say, sorry, we've changed our mind. We cannot get past that point. I'll be very shocked if at the end of the day our view is different from that.

The fact that it looks like we're evolving to a consensus is a positive message for us to send to the House, to this committee...but also to Mr. Justice Gomery that we do have this in hand, we do take his request seriously, and we are moving as expeditiously as the House can. We recognize the importance of this and the fact that we have to get expert advice. This is a democratic place. Views have to be expressed. Votes have to be taken.

I'm also in favour of the notion contained in recommendation four for a couple of reasons. Sending it to Procedure and House Affairs...I understand it's the committee that contains all the House leaders, and anything that affects all of the House goes there. This is an issue that's much bigger than just our consideration of it.

Not only that, on a practical level I don't imagine there's any point person from any of the caucuses sitting around the table here who isn't touching base with their House leader to make sure that positions being put forward at the committee level are consistent with the caucus positions House leaders are putting forward in other places. If for no other reason than efficiency and ability to get back to Mr. Justice Gomery as quickly and as timely as possible, this is a good move.

I do note, though, that Mr. Holland has mentioned that in the (b) part of four it says they take the views of the standing committee into account. Of course, we'd have to deal with that if we passed this motion, because we haven't yet said what our views are.

Whether that would unravel things or not, I don't know. I hope not. We have one more caucus to hear from. If we can do this in a nice tidy way that doesn't create a whole other political problem for us and everyone else, I think we'll be helping the process and moving it along.

• (1635)

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

On the views of the standing committee, the order of reference to the procedure and House affairs committee includes them seeking from us our considered unanimous or otherwise point of view. That will be offered at a later date. They will have to then come back to us and seek that, or we may make that determination at another meeting. But I don't think we want to get into a debate on item number two until we resolve this issue.

Mr. David Christopherson: I didn't realize it was going to work quite that way. So the issue was sent to us by the commissioner. We're going to send it to another committee. Then, knowing ahead of time that that committee will then ask us our opinion at a later date, we'll deliberate, give them—

The Chair: Let me explain again.

Mr. David Christopherson: I'm a little unclear about how that's efficient.

The Chair: If we agree on this process that we adopt item four, and I'm instructed by this committee to report this to the House or put a notice of motion on the order paper, then that would include seeking the views. Then we can quite easily—immediately if we so desire—move to determine what our view is. I don't want to clutter up items one, two, three, or four with, at the same time, trying to determine what our views are. We're trying to determine a process by which we resolve and address the issue raised by Mr. Justice Gomery.

The proposal is that we send it to the procedure and House affairs committee with specific terms of reference. That seems to be the consensus we're moving toward as a direction. If we agree on that direction, then we will determine what our views are. To do two things simultaneously... It just makes it very difficult, with 12 people around the table, to address their minds to one issue, make a resolution, address item two, fix item two, and deal with item three. To try to keep in mind two or three things at the same time and bring them all to a resolution is virtually impossible.

Mr. David Christopherson: With respect—and I'll wrap up here—I'm not going to create a big enough stink to block what I think is a good motion. But that seems a little bit protracted to me. We could do it a little more efficiently.

It's pretty clear what the views are going to be now. If it's not unanimous, then we'll have a recorded vote. We'll know where the majority is, and we'll pass it on to the committee. Then the ball will be in their park and we'll have done our bit with it. I'll go along with it, if that's what the majority wants to do to get this going.

The Chair: Mr. Walsh.

Mr. Rob Walsh: I just want to clarify a point Mr. Christopherson raised, on which he may not have the full picture.

Mr. Justice Gomery's request is not to this committee; his request is to the House. It came to this committee because the House leaders

were interested, obviously, in knowing what this committee felt about the question, insofar as it was this committee's witnesses who were involved. For that reason it's at this committee.

Mr. Justice Gomery is looking for a response from the House of Commons.

• (1640)

The Chair: Monsieur Guimond, Mr. Fitzpatrick, Mr. Carr.

[*Translation*]

Mr. Michel Guimond: Thank you, Mr. Chair. I would not wish to prolong debate, particularly since I agree with the most of the comments made by my colleagues.

I would favour a notice of motion in the order paper. As for the wording of the motion, I too favour the fourth option, which refers the whole matter back to the Standing Committee on Procedure and House Affairs. This is not just because I sit on this committee, but because I believe that that is the appropriate forum for considering this matter. In your spare time, during the break week, reread the passages in the Standing Orders concerning the various powers given to the Standing Committee on Procedure and House Affairs. You will see that these are responsibilities that do indeed fall within its mandate.

I will conclude by saying that, as far as this matter is concerned, and without prejudice to the position I will take at the Standing Committee on Procedure and House Affairs, we should always bear in mind... When we began examining chapters 3, 4 and 5 of the Auditor General's report, I recall clearly sitting on the committee on several occasions with my colleague Odina Desrochers. Mr. Lastewka was present as well, it will be recalled, as were you, Mr. Chair. The others were not there. This was a very special procedure whereby the clerk systematically swore in witnesses, which is not done for all testimony.

The case at hand is, to a certain extent, about keeping one's word. Some witnesses consented in good faith. We did not have to subpoena them. They testified in good faith. But they asked the committee for the protection of parliamentary privilege. I feel that if we take another direction we will, to a certain degree, be going back on our word.

I worked in labour relations for 16 years, always on the management side. When I shook the hand of the union president or negotiator, and it was a firm and hearty handshake, keeping one's word counted more than any number of documents.

Whether word has been given verbally or otherwise, anyone reading the proceedings of the public accounts committee of the day will see that this word was in writing and repeated.

For all these reasons, I agree with the notice of motion approach. I would also favour the fourth option. In our notice of motion, instead of presenting the four options, I think we are able to reach a sufficiently broad consensus here to limit it just to the wording of the fourth option.

Le président: Thank you very much, Mr. Guimond.

[English]

Mr. Fitzpatrick and Mr. Carr.

Mr. Brian Fitzpatrick: I'm favouring number four, although I do have a bit of hesitancy. I think the wording is sufficient to cover my concern.

With all due respect to Mr. Walsh, and I appreciate his comments on privilege, if we're talking about the general principle, the heart and soul of the bill of rights, and so on, what's really behind that sort of thing is that when you take the oath before this committee, you tell the truth. You tell the truth, and that evidence cannot be used as a confession against you at some subsequent proceedings, in a court of law, to find criminal or civil liability on it. But if you come here and somebody says, "Keep your word", that's premised on you telling the truth. I believe in keeping your word, too, but if somebody's not telling the truth, I think a lot of things are off the deck.

Certainly, in my own view, if somebody says something totally contradictory here, and Justice Gomery is sitting there with a different story, and nobody can test the person's credibility on those issues, there are some real problems developing on that front. And that doesn't go into creating any civil or criminal liability, but it does get to the heart of impairing a judge from trying to find the real facts and the truth, and making a proper decision.

I'm thinking that number four gives members of Parliament enough scope to decide whether or not that one narrow little area is privilege. I think it's a moot point. I don't think it's a black and white issue. We as parliamentarians have that option open to us, to ask, if somebody totally changes his story, can he not be tested in some other proceedings with that testimony? I think if a person is changing his story, he's broken his word to us as parliamentarians, too.

That's a point I want to get on the record. It's a legitimate point, and I think every member of Parliament should consider it, because then we're being duped; our privilege of free speech and the understandings we have as parliamentarians are being seriously undermined as well by witnesses.

● (1645)

The Chair: Thank you very much.

Mr. Carr.

Mr. Gary Carr (Halton, Lib.): Two real quick points.

There seems to be a consensus on number four. I will support it, but only on the condition that it is unanimous. I do not want to play politics with this. I think we need to come out united on it. If everybody is going to support it, I will go with the wishes. If it is not unanimous, then I will reconsider my position.

So I would like to be very clear, and hopefully hear from the two other members.... I think the NDP has been clear. The Bloc has been clear. One Conservative has been, and hopefully we'll hear from the other members and we'll be unanimous. That's my first point.

Second, to Mr. Walsh, this is the same question I had asked you privately. Hopefully you can deal with it. In number four, I'm just wondering if the first paragraph, being as strong as it is, when Mr. Justice Gomery reads it, will unduly challenge Mr. Gomery. I'd like you to comment on that first paragraph, on the reason or rationale for

us to take that very strong position. Perhaps you can comment on why we're putting that first paragraph in there.

Of course, as you know, I'm not a lawyer. I'm just wondering what Mr. Justice Gomery will see in that first paragraph, which is very, very strong. Perhaps Mr. Walsh could comment on the rationale behind the first paragraph.

The Chair: And you're saying that first paragraph, Mr. Carr, is "The House of Commons reaffirms all of the privileges and immunities enumerated...?"

Mr. Gary Carr: Yes.

The Chair: Mr. Walsh.

Mr. Rob Walsh: That paragraph is meant to offer to Mr. Justice Gomery, and to anyone else who is following this issue, that the privileges of the House, as you said earlier, are always there, and they always apply. It's stated here to remind all, including Mr. Justice Gomery, that the privileges we're talking about were there on October 25 and they're there now—so that's just reiterating this—but that the House is undertaking this process by which one of its committees is being asked to consider whether there should or should not be a qualification, or a lifting, or a waiver, whatever word you want to use, of the application of that privilege to the particular case that's being considered, the facts and issues that are being considered, by Mr. Justice Gomery.

So the first paragraph is meant to act as a reminder that the privilege always was there, and, until the House decides it's not there, it remains there.

Mr. Gary Carr: Very quickly, I'm just wondering if Mr. Justice Gomery will see it that way. Obviously, my fear is he will maybe see that first paragraph as a bit of a challenge. Unfortunately, Mr. Walsh didn't really answer that question.

Is that going to be seen as confrontational from the standpoint of the legal people at the Gomery?

● (1650)

Mr. Rob Walsh: Well, I can't speak for Mr. Justice Gomery. I would hope that Mr. Justice Gomery would not see it the way you're suggesting.

It's really meant to offer clarity so that there can be no ambiguity in the situation we're in right now. We wouldn't want Mr. Justice Gomery to see the motion proposed here in option four without the first paragraph; then he would be indeed asking himself, is the privilege there or is it not? Then he'd perhaps be in a greater quandary as to what position the House is leaving him.

This is meant to offer clarity to Mr. Justice Gomery, consistent with the representations made to him on October 25 that there is this privilege and the House is, by this motion, reaffirming that. But it's looking at whether on this occasion there might be justification for not applying it or insisting upon it in its usual and complete terms.

Mr. Gary Carr: I will bow to your judgment, Mr. Walsh.

The Chair: Thank you very much.

Before we go to Mr. Kramp, on Mr. Carr's point, is there anybody here who's going to speak on the negative, against going toward option four?

Mr. Kramp, please.

Mr. Daryl Kramp (Prince Edward—Hastings, CPC): I obviously don't have to ask for total concurrence. We already have that.

My concern, Mr. Chair, is the scope of this issue and the capacity of this committee to be able to pass quick, immediate judgment on something that obviously is beyond the normal dealings of this committee.

Ordinarily, we are dealing with departmental expenses and items of that sort. This appears to be almost like a major constitutional argument, which I don't think has come before Parliament ever before.

Has it, Mr. Walsh, on many occasions?

Mr. Rob Walsh: We know of at least two occasions, in 1892 and 1978.

Mr. Daryl Kramp: You know, I really don't recall too much of either one of those.

Needless to say, just to bring this into perspective, this is not an everyday occurrence. With the history and the normal dealings of this committee, I think to ask us to pass quick judgment on an item like this would really be stretching our capacity, particularly as newly elected members.

According to Mr. Lastewka's earlier comments, too, this reaches into all the committees and potentially all of the workings of Parliament. So without a doubt, I think we need all the resources of Parliament to deal with an issue like this and bring it to the House in its proper form, armed with all of the due diligence and course of study that it would need.

I don't think, on the other hand, that abrogates our responsibility as a committee to have an opinion. I do think we should refer this, and I concur that the fourth option here is a good, sound decision in the short term. I would certainly hope that at some particular point I could learn from the sage experience of a number of people who have been around this committee for a number of years. I would really welcome their opinion on this.

As well, I think there are a number of us here who might look at this matter of privilege, maybe in a couple of different perspectives, without, I suppose, having been exposed to the direct happenings that just took place with some of the politics of the last session, regarding the timing prior to an election, etc.

So I would hope we could deal with this matter in the manner that's before us now, in a manner that might be consistent with some of our values that we can hopefully establish as a committee here, particularly in the line of the truth being the truth.

I am a bit concerned that a precedent of law might even stop the truth from coming out in the long term. Does the primacy of the privilege protect the truth eventually from coming out? I think there are arguments for that. Of course, the truth of your word, giving your word in protection, is also....

So do we have the primacy of a conflict over which truth is more important? I think we could have some really serious discussion on this as a local committee.

Once again, I don't want to belabour the point. This issue should go before the entire House and the other committees. It's just too significant, and the repercussions are too large for us to deal with at this particular level at this time, other than simply having an opinion.

• (1655)

The Chair: Thank you, Mr. Kramp.

We've had a fulsome discussion. We seem to be agreed on item four. I've asked if there's anybody with a dissenting opinion. Nobody has indicated. I'll ask again. Does anybody have a dissenting opinion?

Mr. Lastewka has asked...and I'll give him a very short intervention, because I'm not going to start a second round. In deference to our long friendship that goes back many years, I will give Mr. Lastewka the last word.

Hon. Walt Lastewka: And someone who has been very particular, dotting the i's and crossing the t's in constitutions since we first met, some 35 years ago, by the way....

As I mentioned earlier, I read Justice McLachlin's.... It behooves all of Parliament to get a copy of this. I hope, Mr. Chairman, that you're circulating it or putting it on the e-mail to all parliamentarians.

I'll read one sentence:

Courts can determine whether a claimed privilege is indeed necessary to the proper functioning of the House, but may not review the rightness or wrongness of any decision taken pursuant to a necessary privilege.

Those are very strong words.

Building on what Mr. Kramp said just a few minutes ago, I think it's important during a minority government, as we start in a minority government, for many new members—and as a refresher course for those who have been here a number of years and maybe haven't delved into something like this.... I think this would be a good debate even for Mr. Fitzpatrick, Mr. Williams, and myself to be conducting in the House.

I appreciate your comments, Mr. Kramp and Mr. Allison, as new members, and what you have brought to the committee.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Lastewka.

I'm going to bring this discussion to a close. There seems to be consensus around the room. I'm going to call it consensus.

Monsieur Guimond, s'il vous plaît.

[*Translation*]

Mr. Michel Guimond: Since there is consensus, I think there might be agreement for a recorded vote.

[*English*]

The Chair: I tend to prefer, when I've called for consensus and no one dissents, that it is deemed to be a consensus. I prefer that to a recorded vote. That's my preference.

I will again call. Does anybody want to speak in the negative?

Mr. David Christopherson: I would prefer a recorded vote.

The Chair: Okay, there are two calls for a recorded vote. Let us have a recorded vote.

Since there's a vote, I should actually give a motion. The motion is that the chair go to the House of Commons and rise on a question of privilege that the following motion has been put on the notice paper with the preamble—which I believe has been distributed to all—that the House of Commons reaffirms all of the privileges and immunities.

Do you want me to read it into the record? I'll read it into the record: that item number four be the recommendation of this committee.

I will take that down to the House and read it. I will rise on a question of privilege and read it into the record.

Mr. Gary Carr: This will be in the first person, so I don't get it wrong: I would be in support of that.

The Chair: You'd be in support.

Madam Clerk, call the roll.

(Motion agreed to: yeas 10; nays 0 [See *Minutes of Proceedings*])

The Chair: It is unanimous. Since the chair does not have a vote, let the chair say that he would compliment the committee on a job well done and he concurs with their decision.

[*Translation*]

Mr. Guimond, please.

Mr. Michel Guimond: I would like to explain what prompted me to ask for a recorded vote. It was because of Mr. Carr's comment. I have learned that Mr. Carr is a former speaker of the Legislative Assembly of Ontario. I therefore imagine he is very familiar with the parliamentary rules that govern us. I was concerned when he said that he would agree to vote in favour but that he might change his mind if someone voted against. It is the same principle as the one that a woman cannot be half pregnant. It is only after voting in favour that one sees whether someone has voted against.

I would not presume to teach you anything about parliamentary procedure, but your earlier comment was ambiguous. It raised a doubt in my mind and it was to dispel any doubt that I asked for a recorded vote. However, this should not be seen as a lack of trust on my part towards anyone here.

•(1700)

[*English*]

The Chair: Okay.

Ladies and gentlemen, I have some work to do. I have to go to the House, as I've just been ordered by you to do so. I think I will adjourn this meeting.

Next week is a break week. Next week is the day we remember our fallen dead and those who died to save us, to protect us during the wars. I'm not going to say have a happy week, but do take time to remember those who defended the freedom we have in this House.

The meeting is adjourned.

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