Privilege and protection of committee witnesses

Mr Gary Levy, *in Ottawa.*

Parliamentary and public inquiries into a controversial federal programme in Canada throw up a constitutional dilemma regarding the extent of privilege.

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In February 2004 the Auditor General of Canada released a much anticipated audit of certain advertising and sponsorship programmes run by the federal government during the administration of former Prime Minister Rt Hon. Jean Chrétien. She found that C$100 million was paid to a variety of communications agencies and the programme was basically designed to generate revenue for these companies rather than to produce any benefit for Canadians.

Upon taking office in January 2004 the new Liberal Prime Minister, Rt Hon. Paul Martin, immediately cancelled the programme. From February to April 2004 the Public Accounts Committee (PAC), chaired by Mr John William, MP, examined the Auditor General's report but an election was called before it submitted its final report. The Martin government was returned, albeit in a minority situation, and in September 2004 a public inquiry appointed by Mr Martin and chaired by Justice John Gomery began hearings on the sponsorship programme.

The inquiry called many of the same witnesses who had appeared before the PAC and the question arose as to whether lawyers at the inquiry could use information in the PAC transcripts to demonstrate contradictions in testimony of witnesses or whether the committee transcripts were protected by parliamentary privilege. This article looks at the debate about this issue culminating in a ruling by Justice Gomery on 22 November 2004.

The debate

The debate over privilege began on 14 October 2004 when Mr Guy Pratte, Counsel for Mr Jean Pelletier, former Chief of Staff to Prime Minister Chrétien, raised a number of concerns about the way the inquiry was proceeding, all of which amounted, in his opinion, to an absence of due process protection for his client. He said he needed to use transcripts from the PAC hearings but that Counsel for the Commission had indicated he would object to this on the grounds that they were protected by parliamentary privilege. Justice Gomery agreed to hear arguments on this point and the House of Commons retained counsel to defend its position.

On 18 October, Ms Catherine Beagan Flood, made oral arguments and a written submission on behalf of the House. She pointed out that the privileges, powers and immunities of the House, as provided by section 18 of the Constitution Act 1867 and section 4 of the Parliament of Canada Act, include freedom of speech and debate as set out, among other places, in article 9 of the United Kingdom Bill of Rights 1689. This document specifically provides "that the freedom of speech and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

She said this privilege prohibits a court of law or other proceeding from considering submissions or comments made by anyone who participates in parliamentary committee hearings. She argued that by virtue of section 5 of the Parliament of Canada Act, these privileges are part of the general and public law of Canada and need not be pleaded and they are to be taken notice of judicially. The privilege of freedom of speech and debate precludes use of such transcripts by any other proceeding, including a commission of inquiry.

A week later Justice Gomery gave all counsel who wished to use the PAC testimony an opportunity to present their case. Mr Pratte and some other counsel took the position that it would not be a breach of parliamentary privilege for them to challenge the truthfulness of a witness by pointing out inconsistencies between the PAC and statements made before the Commission of Inquiry. He also argued that if parliamentary privilege did apply in these circumstances or if the Commissioner thought that the legal conclusion was somewhat unclear, then the Commissioner should ask the House to waive that privilege.

Justice Gomery declined to make a ruling immediately but asked the House to consider waiving privilege so he would not have to rule on the issue. He said:

> I would think, with due respect for the House of Commons, that the House would want to encourage the inquiry that is taking place before this commission. That the House of Commons through its PAC, was making the same kind of inquiry that we are making here, and I would think

that they would want to facilitate and even encourage this inquiry. If you read statements made by prominent politicians, at least some of them think that what is occurring here is a healthy thing; that it is desirable that witnesses should be heard and that the truth should be uncovered.

So why would they want to inhibit the normal process of cross-examination that would take place, including questioning about prior inconsistent statements by invoking their privilege? I am puzzled by that...

If I am forced to make a decision, I may make it one way or I may make it another way. But if the House of Commons is trying to preserve the integrity of its immunity, it might be better served by waiving its privilege in this particular instance and avoiding an unfavourable decision....

If I make a decision which is unfavourable (to the House of Commons) we may be involved in a long and tedious and costly litigation until the higher courts have decided who is right. But in the meantime, I wonder if the objectives of this inquiry are not impeded and I wonder if the House of Commons really wants those objectives to be impeded.

A waiver as requested by Justice Gomery would require a resolution of the House of Commons and the Commissioner asked that the issue be considered immediately by the House. As this was uncharted water it was unclear how to proceed, however, on 2 November, the PAC invited lawyers from the House of Commons, the Department of Justice and several individuals appearing before the Commission to discuss the matter. Before hearing from Counsel the statement by Justice Gomery was read into the record by the Mr Williams, the PAC Chairman.

The Committee then heard from Mr Pratte who argued there was no prohibition in Canadian law on referring to any transcript of a witness before a committee for the purposes of assisting a public commission of inquiry in ascertaining the truth.

He acknowledged that matters of parliamentary privilege, while arcane to some, are vitally important to the health of democracy and the parliamentary form of government. But he argued that equally important are Royal Commissions of Inquiry, now known as public inquiries, which go back in British law to the Middle Ages and in Canada to the Inquiries Act 1867.

He disagreed with the position taken by the House of Commons for several reasons. First of all, the intention of the Bill of Rights 1689, if read in its historical context, cannot have been intended to prohibit any reference to comments made by a witness so as to impede the work of a public inquiry.

His second point was that in 1867 Canada incorporated the British law as it was in respect of parliamentary privilege at that time, and at that time, although privilege had expanded to protect Members from libel suits or from decisions or operations of the House being reviewed by the courts, there was not a single case or decision at the time saying that you cannot make reference to a statement of a witness in the context of a public inquiry.

His third point was that since 1867 there has not been a single case binding on any court in Canada that says you cannot not make a reference to a statement by a witness before a parliamentary committee in any court in the land or any public inquiry. There is some law in other parts of the Commonwealth, but it is conflicting. The tendency in Canada has been, over the last 25 years in fact to refer to statements made in the House to ascertain in a courtroom the purpose of legislation. That has not been deemed to be an infringement of privilege. As a matter of law, he suggested there is absolutely no prohibition or violation of privilege in referring to committee transcripts.

Fourth, the primary purpose of referring to prior statements and allegedly prior inconsistent statements, he argued, is always the same in any court. It is to help of the judge to assess the credibility of the witness. A secondary purpose is to be fair to the witness. If there is an apparent inconsistency one ought to be able to explain it, and 95 per cent of the time, those inconsistencies are more apparent than real, and the witness can explain what he or she meant to say.

Finally he argued that without access to the transcripts Justice Gomery would be in a vacuum. "He is the only person who cannot make some judgment by comparing what was seen on television in the spring and what he hears every day this fall. He is the only person who cannot officially put two and two together. Yet, he is the only person who is formally tasked with finding the facts in the context of a public inquiry."

Written assurances

Following Mr Pratte's testimony Mr Richard Auger, counsel to Mr Chuck Guité, the central government bureaucrat in the sponsorship programme, made a submission that supported the House of Commons position. He pointed out that aside from legal arguments about privilege, Mr Guité had been given specific written assurances from the House of Commons Law Clerk that his testimony could not be used at a later date. The PAC also heard from other witnesses including the Law Clerk, Mr Rob Walsh, and then it adopted a report that was presented to the House of Commons on 5 November.

The Committee reviewed the background to the issue and concluded as follows:

The House of Commons reaffirms all of the privileges and immunities enumerated herein and that the proceedings and all evidence, submissions and testimony by all persons participating in the proceedings of the PAC continue to be protected by all the privileges and immunities of this House. 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; and
e) such other considerations as it deems appropriate.

The House did not sit the week of 8 November but on 15 November it concurred in the report of the PAC. Appreciating the urgency and importance of this matter, the Standing Committee on Procedure and House Affairs met immediately and established a subcommittee to consider this order of reference. The Members of the subcommittee were: Ms Françoise Boivin (Liberal), Mr John Reynolds (Conservative), Mr Michel Guimond (Bloc Québécois), Mr Yvon Godin (New Democratic Party) with Ms Judi Longfield (Liberal) as Chair.

The subcommittee heard from several expert witnesses including Mr Walsh, Mr Joseph Maingot, former Law Clerk and Parliamentary Counsel and author of Parliamentary Privilege in Canada, and Mr Robert Marleau, former Clerk of the House of Commons and co-author of House of Commons Procedure and Practice.

In his appearance, Mr Walsh reviewed the evidence and advice that he had given to the PAC and outlined the basis for parliamentary privilege and the issues involved. He noted that if the House affirmed privilege it must be prepared to defend these privileges in the courts if necessary.

Mr Maingot traced the history of parliamentary privilege, and of article 9 of the Bill of Rights 1689. In his opinion, privilege can only be waived by means of the enactment of a statute, not by means of a resolution of the House of Commons. Mr Marleau, in his testimony, discussed the 1999 report of the United Kingdom Joint Committee on Parliamentary Privilege, which maintained that any suggestion that there was an improper motive or that something was untrue or misleading with respect to a parliamentary proceeding should be handled by the House itself as part of its right to regulate its internal affairs. He reviewed some of the considerations and implications involved in this case. He noted that privilege belongs to the House, not to individual Members.

Privilege and the esssence of parliamentary government

The Procedure Committee began its report by noting that the request to waive privilege may appear to be one that the House of Commons should accede to. Members of the House are anxious to facilitate the work of the Commission, and to assist it in determining the facts with regard to the sponsorship programme and advertising activities of the government of Canada. The cross-examination of witnesses on the basis of prior inconsistent statements is a relevant and important means of eliciting evidence and establishing credibility.

However, the Members were mindful of the fact that parliamentary privilege is part of the constitution of Canada, and goes to the very essence of parliamentary government. Current Members of the House of Commons are custodians of privilege. Assuming that a waiver of privilege is permissible, it should not be given lightly, or without due consideration of all the circumstances and interests.

The report reiterated the importance of article 9 of the Bill of Rights 1689 adding that Blackstone, in his *Commentaries on the Laws of England* wrote: "The whole of the law and custom of Parliament has its origin from this one maxim, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere."

Freedom of speech allows Members of Parliament to speak without fear. It is essential for the effective working of the House. Witnesses who appear before parliamentary committees are entitled to the same protections as are Members of the House of Commons. The report also made reference to a unanimous resolution of the U.K. House of Commons in 1818 that stated: "That all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House in respect of anything that may be said by them in their evidence." It argued that this principle is part of Canadian law and has been re-asserted time and again in countries with a parliamentary system based on the Westminster model. For example a 1994 New Zealand case that went to the Judicial Committee of the Privy Council referred to:

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

The Procedure Committee noted there were two examples in the Canadian Parliament where the House of Commons purported to waive privilege with respect to proceedings in Parliament. The first, in 1892, concerned criminal chargers involving a former Member of the House of Commons who had been expelled for bribery and influence-peddling. In the second, in 1978, the House unanimously allowed in camera transcripts of committee evidence to be provided to a Royal Commission. Permission was sought from each witness, and the transcripts were to be reviewed in camera by the Commission.

It further noted that some witnesses who appeared before the PAC were given written or oral assurances and others could assume that their testimony would be protected by parliamentary privilege. To withdraw such protection after the fact would be unfair to them as individuals. Members of Parliament and other persons participating in parliamentary proceedings must be assured that there is complete freedom of speech, so that they are able to be as open and forthright as possible.

This is not to say that Members of Parliament were prepared to treat with impunity allegations that witnesses misled or lied to parliamentary committees. Such allegations are taken extremely seriously, and, if proven, will be punished to the fullest extent possible. Pursuant to section 12 of the Parliament of Canada Act and sections 132 and 136 of the Criminal Code, if a witness testifies under oath, he or she can

be charged with perjury for deliberately lying to a parliamentary committee.

In addition, untruthful answers or testimony before a Chamber of Parliament or a parliamentary committee constitute a contempt of the House, and can be punished as such, with the various penalties at the disposal of the House, from a reprimand to imprisonment. A Member can raise a question of privilege in the House of Commons, and, if the Speaker were to find a *prima facie* case, the matter could be referred to a committee for examination. Standing committees also have the right to recall witnesses to seek explanations for apparent inconsistencies.

According to the report, misleading or lying to the House and its committees undermines the integrity of parliamentary proceedings, but it is primarily the responsibility of the House to pursue and to punish. To permit the use of testimony from a parliamentary proceeding to cross-examine a witness before a commission of inquiry would be a violation of article 9 of the Bill of Rights 1689, and would undermine and challenge the long-established principle of the autonomy and independence of the legislative and judicial branches. It would undercut the confidence that Members and witnesses must have in their right to freedom of speech in Parliament.

The Procedure Committee came to the conclusion that a waiver of privilege was not appropriate or in the public interest in this case. Accordingly, it recommended:

> That the House of Commons reaffirm the privileges and immunities enumerated in the resolution of the House of Commons on 15 November 2004, and that the proceedings, and all evidence, submissions and testimony by all persons participating in the proceedings of the Standing Committee on Public Accounts continue to be protected by all the privileges and immunities of this House; and
> That the Speaker of the House of Commons be authorized to take such steps as he deems appropriate to defend the privileges of the House of Commons as they may be at issue before the Commission of Inquiry, or in such court reviewing any decision or anticipating decision of the Commission of Inquiry relating to the privileges of the House of Commons, its Members.

The report, however, was not unanimous. In a dissenting opinion the Conservative Members of the Procedure Committee argued in favour of waiving parliamentary privilege "for the very limited purpose of the question before it and with the express proviso that under no circumstances would the particular waiver in this case be regarded as a precedent and would be limited to the unique facts and considerations in this case."

The dissenting report noted that the Commission was established as a result of findings by the Auditor General of Canada of possible corruption and criminal activity involving the awarding of contracts by the government, with such activities reaching the very highest levels of the government. If substantiated it was argued these activities would constitute a serious incident of corruption. The dissenting report argued:

> This committee and thus the House of Commons itself must not just consider what is in the best interests of Parliament, as was suggested by one of the expert witnesses that appeared before the sub-committee, but rather what is in the overall public interest of Canadians. Is it to at all costs protect and preserve parliamentary privilege or is it rather to best ensure that the Commission on behalf of all Canadians determines the truth in this matter? The Conservative Members of the committee come down clearly in this case in favour of the latter and thus the overall public interest. Therefore, the Conservative Members of this committee recommend to the House of Commons, that it waive its parliamentary privilege in this case but limited to the cross-examination of one or more of these witnesses before the Commission and for the sole purpose of determining if there is any inconsistency between any of the evidence they gave before PAC and any evidence they have given or may give before the Commission going to their credibility. In waiving its privileges in this case, the House should expressly indicate that such waiver is not to be considered by the House as any sort of precedent for the future but is limited to the very unique and pressing circumstances in this case.

The report of the Procedure Committee along with the dissenting opinion was adopted on division but without debate on 18 November.

The ruling

When the Gomery Commission resumed four days later its counsel said that in anticipation of a ruling he had taken the precaution of retaining counsel for the Commission in any federal court proceeding that might arise from a ruling by the Commissioner.

The formal resolution of the House was transmitted to the Commission by Ms Began Flood. The Commissioner asked Mr Pratte to commence cross examination of Mr Guité without referring to any PAC transcripts and that he would withhold any ruling unless and until Mr Pratte or some other counsel attempted to use the transcripts. Toward the end of his cross examination Mr Pratte said he had some questions about testimony before the PAC. The Commissioner then rendered his decision.

Justice Gomery said he was grateful to the House for the dispatch with which it considered and dealt with this issue. He began by considering the status of the Bill of Rights 1689 which was at the heart of the argument, saying:

> It is not suggested by any of the parties contesting the objection that article 9 does not apply to the proceedings of committees of the House of Commons but they argue that it applies only to what is said by Members of Parliament and does not extend to what is said by persons appearing as witnesses before parliament or its committees. Counsel for these parties argue that article 9 was not intended to apply to such witnesses but to the statements made in debate by Parliamentarians themselves and that the purpose of the enactment was to protect the latter from civil or criminal proceedings based upon such statements. Its objective was not, according to their submission, to protect from scrutiny in the courts the declarations made by witnesses before parliamentary committees which they later contradict [illegible]

court proceedings or which are inconsistent with their testimony.

He noted the historical context in which the Bill of Rights was enacted. In 1689 Parliamentarians clearly wished to ensure their immunity from prosecution for what was said in parliamentary debate but it may be doubted that they were thinking of the testimony of witnesses before parliamentary committees. It may even be doubted that parliamentary committees existed in 1689.

In the absence of Canadian cases directly on this point he said he would consider two conflicting Commonwealth judgments raised by counsel, the 1986 Australian case of *R. v. Murphy* and the Judicial Committee of the Privy Council decision in the appeal of the New Zealand case of *Prebble v. Television New Zealand Ltd.*

The parties who argued against parliamentary immunity for the transcripts had relied upon the reasons of Mr Justice Hunt who said:

> What is meant by the declaration that 'freedom of speech...in Parliament ought not to be impeached or questioned in any court or place out of Parliament' is, in my view, that no court proceedings (or proceedings of a similar nature) having legal consequences against a Member of Parliament (or a witness before a parliamentary committee) are permitted which by those legal consequences have the effect of preventing that Member (or committee witness) exercising his freedom of speech in Parliament (or before a committee) or of punishing him for having done so. In other words, the phrase 'impeached or questioned in any court or place out of Parliament' in Art. 9 should be interpreted in the sense that the exercise of the freedom of speech given to Members of Parliament (and committee witnesses) may not be challenged by way of court (or similar) process having legal consequences for such persons because they had exercised that freedom."
> Freedom of speech in Parliament is not now, nor was it in 1901 or even in 1688, so sensitive a flower that, although the accuracy and the honesty of what is said by Members of Parliament (or witnesses before parliamentary committees) can be severely challenged in the media or in public, it cannot be challenged in the same way in the courts of law. It is only where legal consequences are to be visited upon such Members or witnesses for what was said or done by them in Parliament that they can be prevented by challenges in the courts of law from exercising their freedom of speech in Parliament. It is only when that is the consequence of the challenge that freedom of speech in Parliament needs any greater protection from what is said or done in the courts of law than it does from what is said or done in the media or in public.

According to Justice Gomery this decision so alarmed the Parliament of Australia that in 1987 it enacted the Parliamentary Privileges Act to explicitly affirm the parliamentary privilege argument rejected by Mr Justice Hunt.

The parties who argue in favour of immunity for the transcripts rely on *Prebble v. Television New Zealand Ltd*, which takes a much broader view of the immunity created by article 9 of the Bill of Rights. Lord Browne-Wilkinson expressly disagrees with the conclusions reached by Justice Hunt and says in his opinion that:

> Article 9 of the Bill of Rights is a manifestation of the principle that the courts and Parliament should recognize their respective constitutional roles and that one should not be allowed to challenge in any way what is said or done in the other.

He continues:

> According to conventional wisdom, the combined operation of article 9 and that wider principle would undoubtedly prohibit any suggestion in the present action (whether by way of direct evidence, cross-examination or submission) that statements were made in the House which were lies or motivated by a desire to mislead."

After expressing his disagreement with the conclusions of Justice Hunt in *R. vs Murphy* he concludes:

> Moreover to allow it to be suggested in cross-examination or submission that a Member or witness was lying to the House could lead to exactly that conflict between the courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House: if a court were also to be permitted to decide whether or not a Member or witness had misled the House there would be a serious risk of conflicting decisions on the issue.

Neither of these cases are binding on Canadian courts and the circumstances were also distinguished by Justice Gomery:

> First of all, I am not here sitting as a court of law, but am presiding over a Commission of Inquiry, which has the mandate to make factual findings in order to make, subsequently, recommendations to prevent mismanagement of sponsorship programmes or advertising activities of the government of Canada in the future. The terms of reference by which the Commission was created require me to submit, on an urgent basis, reports to the Governor-in-Council and I interpret this requirement to mean that as Commissioner I should avoid, to the greatest degree possible, legal entanglements that would have the effect of delaying the Commission's hearings and the submission of its reports. Since the terms of reference forbid me to make findings of civil or criminal responsibility, the present Commission is not at all similar to a court, although some of its procedures are comparable to what occurs during a trial. I also note that the terms of reference authorize the Commissioner to adopt any procedures and methods that he may consider expedient for the proper conduct of the inquiry.
> Another distinguishing factor should be noted. This is a public inquiry into matters of great interest to the public, which relies upon the media for information concerning the evidence. The hearings are televised, as were the

hearings before the PAC. Should I decide to maintain the objection, I would be in the seemingly paradoxical situation of deciding to exclude from consideration by the Commission testimony which has been available to the population in general and which has been widely commented upon in the media.

However, he went on to say this is not so paradoxical as it may at first appear. Facts having their source in privileged communications are often denied to judges and juries, as triers of questions of fact, yet no one contests the legal validity of their eventual findings and verdict:

> The final distinction is the explicit promise made to Mr Guité by the PAC that he would benefit from parliamentary immunity. From the case reports it does not appear that a similar promise was made to the witness concerned in the cases of *Murphy* and *Prebble*.
> Should I decide the objection by authorizing the use of the transcripts for the purposes of cross-examination, I would undoubtedly have the advantage of knowing to what extent Mr Guité may have made declarations to the PAC which may be inconsistent with his testimony before the Commission, but this would be at the cost of the risk of provoking an application for judicial review of my decision and the possibility of a stay of the proceedings of the Commission. This is, in my opinion, a much greater danger and disadvantage to the completion of my mandate than being deprived of the use of the transcripts.

He concluded that questions to a witness concerning prior inconsistent statements have for their sole objective the undermining of the witness' credibility. They do not serve to put into evidence the earlier testimony of the witness. Such questions are only one method of attacking a witness' credibility. All of the other means of assessing and testing credibility remain. Even without the use of prior testimony the Commissioner concluded he should be able to come to satisfactory conclusions concerning the credibility of Mr Guité, based upon his experience as a judge, the documentation in the record, prior inconsistent statements he may have made elsewhere and other factors such as the manner in which witnesses testify, contradictions, if any, in their testimony and the evidence of other witnesses.

The Commission should not be seen to encroach in any way upon the privileges and immunities of Parliament, and should respect the promises and undertakings it made to Mr Guité. For this reason, and for the practical reason that it is desirable and necessary to proceed with the work of the Commission of Inquiry without interruption, he ruled the transcripts could not be used:

> Should this ruling give rise to an application for judicial review by the parties contesting the objection or by one of them, in the event that my ruling on the objection is eventually overturned before the report of the Commission has been produced, Mr Guité could, if necessary, be recalled to be questioned concerning the allegedly contradictory statements made previously. In other words, nothing will have been done that cannot be subsequently corrected.

Thus counsel were prohibited from asking Mr Guité any question based upon an allegedly contradictory declaration made by him before the PAC.

The future of privilege

The decision of Justice Gomery seems, in the short term at least, a vindication for the traditional understanding of parliamentary privilege. However before the public inquiry ends it is quite possible the decision will be appealed to the federal court and then perhaps even to the Supreme Court. Even if not appealed the debate illustrates a number of questions about privilege that may ultimately have to be decided either in court or by Parliament.

In Canada the dilemma is whether it is possible to have both an entrenched Charter of Rights and Freedoms (adopted in 1982) and the traditional concept of parliamentary privilege (inherited from the U.K. in 1867). Lawyers and judges seem troubled by the exceptional nature of privilege although so far the Supreme Court has upheld aspects of privilege within well described boundaries relating to internal practices of the institution itself. But as more and more cases involving privilege are referred to the courts the boundary may become so narrow as to render the entire concept meaningless.

Some people think Canada should follow the Australian model and adopt a statute on privilege. Others think privilege should be codified in the standing orders but not legislated. The main objection to legislation is that the statute would be subject to interpretation by the courts and this would lead to more rather than less involvement by the judiciary.

There is a simple theoretical solution to be found in the 1982 constitution although practical considerations make it unlikely in the near future. The constitution allows Parliament to pass laws not subject to the Charter of Rights provided the statute contains a "notwithstanding clause." Laws adopted in this way automatically expire in five years unless re-enacted.

If a written statute on what constitutes privilege could be drafted why not adopt it with the notwithstanding clause so the courts would not be able to intervene? This would be in keeping with the original purpose of parliamentary privilege and the intent of the Bill of Rights. The legislation would have to be renewed every five years, but that is exactly the maximum length of a Parliament. So the ceremonial opening of a new Parliament could be updated to include re-adoption of the Parliamentary Privileges Act with the notwithstanding clause. This would provide both a symbolic and a legal statement of parliamentary supremacy as well as demonstrating how the ancient traditions of Parliament can be adapted to the modern era.

For a variety of reasons both ideological and historical Canadian legislators are loath to use the notwithstanding clause so we are unlikely to see such an approach in the near future. Politicians seem to believe that public opinion would never stand for the use of the notwithstanding clause in any circumstance. However this argument also implies that public opinion does not support the concept of parliamentary privilege. If that is the case and if we agree that in a democracy the legitimacy of both legislation and convention ultimately rests on public opinion then despite the Gomery decision parliamentary privilege in its present state is unlikely to survive many more years.