Videoconferencing in the Parliamentary Setting

by Charles Robert and Deborah Palumbo

Videoconference technology allows parties located at the opposite ends of the globe to experience simultaneous two-way video and audio communication. In addition to its tremendous implications for the business world, the technology is gradually having a similar impact in the parliamentary context. This raises three broad issues in the area of parliamentary law and privilege. The first is whether parliamentary privilege applies to members of committees who participate in videoconferences. The second is whether videoconferencing creates a sufficient "physical presence" to entitle members to be counted as part of quorum and to enable them to move motions and vote. The third is whether parliamentary privilege attaches to witnesses who testify before committees by videoconference.

The concept of privilege arises from the notion that parliamentarians and legislators require certain exemptions or immunities from the general law in order to allow them to carry out their duties.[1]

Immunity from arrest in civil matters and freedom from molestation are examples of some of the privileges that have been traditionally recognized. Perhaps the most important privilege is that of freedom of speech. The ultimate source of this privilege is Article 9 of the English *Bill of Rights, 1689*[2], which 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.

Thus a member of either House of Parliament is immune from civil or criminal prosecution for any speech or comment made in carrying out parliamentary functions.[3] The Ontario Court of Appeal explained the importance of this privilege when it stated that freedom of speech serves to protect a member from "harassment in and out of the House in his legitimate activities in carrying on the business of the House."[4]

The *Bill of Rights, 1689* is not restricted to members of Parliament. The protection provided by it is extended to include witnesses, petitioners, legal counsel and any others who participate in a parliamentary proceeding. Bourinot explains that with respect to any witnesses: "no evidence given in either House can be used against the witness in any other place without the permission of the House".[5]

Even the courts have acknowledged that witnesses are included within the protection provided by Article 9 of the *Bill of Rights, 1689.*[6]

Joseph Maingot, Q.C., author of *Parliamentary Privilege in Canada*, explains what this protection means — witnesses called before parliamentary committees are protected against civil and criminal action, except prosecutions for perjury where the evidence was given under oath.[7]

The protection provided to witnesses is only an extension of the protection provided to members of both Houses. It is not a right or guarantee belonging to a wit-

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Charles Robert is a Deputy Principal Clerk and Deborah Palumbo is Senate Legal Counsel with the Senate Law Clerk and Parliamentary Counsel Office. *This is a revised version of an article presented to the 1998 Professional Development Seminar of the Association of Clerks-at-the-Table in Canada, and to the 1998 annual meeting of the Association of Parliamentary Counsel and the Association of Legislative Counsel.*

ness, and consequently, the immunity can be withdrawn by the respective House.[8]

This immunity is important, nonetheless, because of the informal nature of parliamentary committee proceedings. Committees are not required to follow the strict rules of evidence that must be followed in the courts. As such, many of the protections provided to witnesses in court are not provided to committee witnesses – one such example is solicitor-client privilege. The fact that quorum is not even required for a committee meeting where the sole purpose of the meeting is to hear evidence from witnesses illustrates the informal atmosphere in which committees operate. Also, unlike a court room, in which all witnesses must be sworn in, committee witnesses do not usually take an oath prior to giving evidence.

Given that witnesses before parliamentary committees are usually granted the same protection as that provided to members of Parliament, the conclusions with respect to witnesses should mirror those with respect to members. If the protection applies to a member, the same protection will normally also apply to a witness.

With respect to videoconferencing, the main issue is whether a member or a witness who participates in a committee hearing by way of this technology is participating in a "proceeding in Parliament". If so, parliamentary privilege would attach. This question raises three sub-issues.

- Is a member or witness participating in a "proceeding in Parliament" when the committee and the member or witness are located in Canada but the member or witness is participating by way of a videoconference from another location in Canada?
- Is a member or witness participating in a "proceeding in Parliament" when the committee is authorized to travel outside Canada and the member or witness is also participating outside Canada by videoconference?
- Is a member or witness participating in a "proceeding in Parliament" when the committee is sitting in Canada and the member or witness is participating by videoconference outside Canada?

Committee Located in Canada and Member or Witness Appearing by Videoconference in Canada

Article 9 of the *Bill of Rights, 1689* does not specifically describe what the phrase "proceedings in Parliament" includes. Although the phrase has been judicially considered, it has never been defined in Canadian statute law.[9]

In Australia, however, subsection 16(2) of the *Parliamentary Privileges Act, 1987* does define it. This subsection states:

> 16. (2) ..."proceedings in Parliament" means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee, and, without limiting the generality of the foregoing, includes:
>
> (a) the giving of evidence before a House or a committee, and evidence so given;
>
> (b) the presentation or submission of a document to a House or a committee;
>
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
>
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

This provision, drafted before videoconferencing was a practical option, makes no specific reference to the location in which the evidence might be given or where the documentation might be prepared. Therefore, on the face of the law, there is certainly no restriction in this regard.

Generally, the phrase "proceeding in Parliament" has been considered a somewhat flexible concept, not strictly limited to proceedings that take place within the precincts of Parliament or to debates on the floor of the Chamber. In some jurisdictions even correspondence of parliamentarians that relates to their parliamentary duties and functions can also be protected by privilege.[10]

Since parliamentary committees are considered an arm of the Chamber and their proceedings are valid "proceedings in Parliament", parliamentarians and witnesses are protected when they participate in such hearings.[11] This protection exists for members whether they are part of quorum or not.[12]

The use of videoconferencing should not alter this situation when the committee is sitting in Canada. The committee's proceedings would be "proceedings in Parliament" and members or witnesses who participate in them, whether they do so in person or by videoconference within Canada, would be protected by privilege. This is because it is their participation in the "proceeding in Parliament" that provides them with this protection, not their location. According to Maingot, the location of the "proceeding", as in the case of a court, is irrelevant for the purposes of it being a "proceeding in Parliament" if the committee is located somewhere in Canada.[13]

With respect to committees of provincial legislatures, the rationale for protecting the member or witness is virtually identical. If a committee meeting is held anywhere within the province, privilege would attach to the state-

ments of a member or witness participating by videoconference if the member or witness is within the province. The meeting is a "proceeding in Parliament" and the location of the member or witness is irrelevant. The necessity for the protection is not diminished in any way by the fact that the participation by videoconference is occurring from another location in the province.

Committee Located Outside Canada and Member or Witness Appearing by Videoconference Outside Canada

If both the committee and the member or witness were located outside Canada and the member or witness participated by videoconference, the answer to the question of whether privilege attaches is obvious. Privilege would not protect the member or witness from prosecution or civil suits in Canada or in the foreign country because the jurisdiction of Parliament is not extra-territorial and, generally, Canadian law does not apply outside its borders.[14] Any activity conducted outside the boundaries of Canada could not be regarded as a "proceeding in Parliament". Maingot confirms that a committee cannot be constituted outside Canada.[15]

As to committees of legislatures, if the committee meetings are held outside the province and the member or witness is also participating outside the province but by videoconference, privilege would not protect the statements. The reason for this is that the committee is not functioning as a committee because it is outside the jurisdiction of the province.

Committee Located in Canada and Member or Witness Appearing by Videoconference Outside Canada

The remaining question is whether a member or witness who participates from outside Canada, by videoconference in a committee proceeding taking place somewhere in Canada, is protected by privilege. This is a somewhat more complex issue because the committee is within the jurisdiction of Parliament but the member or witness is not.

A purposive approach would require an examination of the rationale for the privilege and a determination of whether the justification for the privilege exists in the particular circumstances.

At least one author has argued for a purposive approach. Maingot takes the position that the phrase "proceeding in Parliament" should be given a broad and liberal interpretation; its meaning should not be restricted to its intended application in 1689. He writes that, in interpreting this phrase today, it is important to be mindful of the primary reason for the protection. The purpose was to allow members to carry out their duties and functions unfettered by concerns of any hostile reaction by the Crown, or of any possible liability for things said and done in relation to parliamentary matters.[16] He argues that privilege is founded on necessity. As such, necessity should be a basis for any claim that an event was part of a "proceeding in Parliament". In other words, any event that is necessarily incidental to a "proceeding in Parliament" should be protected.

Following this approach, it would seem that the manner in which the member participates should be irrelevant for the purposes of privilege. The justification for allowing a member freedom of speech in parliamentary proceedings exists regardless of any new technological developments that may alter the manner in which the member participates in the proceeding.

Moreover, when the committee is sitting in Canada, it is clearly a "proceeding in Parliament" and the member is in fact participating in this proceeding through videoconference. The member's location would seem to be irrelevant once these facts have been established.

Whether something falls within the meaning of the phrase, therefore, should depend on whether the privilege is necessary in the particular circumstances. Clearly, the need for protection is in no way diminished by virtue of the fact that the member participates by videoconference.

The theory that parliamentary privilege should be applied to statements based on their purpose and context has indirect support in Canadian case law. On one occasion,[17] a member's statement to a journalist within the confines of Parliament was not afforded the protection of parliamentary privilege because the statement was not made for law-making purposes.[18] The court held that the location of the statement is irrelevant for the purposes of parliamentary privilege. The purpose of the statement, the context in which it is made and whether it was made for private or parliamentary purposes are the relevant issues. Therefore, it seems that statements made abroad by way of videoconference for the purpose of participating in a parliamentary committee sitting in Canada should be protected.

Taking this approach, a member or a witness who appears by videoconference from outside Canada before a committee located in Canada should be protected from actions initiated in Canada, although privilege would not protect the member or witness from prosecution outside the country.

The situation is little different for committees of provincial legislatures. Privilege should apply to protect members and witnesses in the province for statements they make in a proceeding by videoconference from out-

side the province if the committee is located somewhere within the province. However, the member or witness would probably not be protected from legal actions pursued outside the province.

Furthermore, the trend is to strengthen their protection before committees, not to weaken it. Also, the privilege accorded to documents and the protection provided to witnesses through the *Charter* reinforce a tendency to protect the rights of witnesses. In 1981, the Ontario Law Reform Commission recommended passage of legislation both at the federal and provincial levels to clarify and, possibly, expand the protection of witnesses before legislative committees.[19]

> The Commission recommends the enactment by the Province of Ontario of broad statutory provisions protecting witnesses in respect of the use of their evidence at subsequent proceedings. More specifically, we recommend that a witness who gives evidence at any legislative committee proceedings – whether such evidence is given orally, by way of affidavit, by the provision of documents, or otherwise – should have the right not to have any evidence so given used against the witness in any subsequent proceeding, except in prosecution for perjury or for the giving of contradictory evidence.

The reference by the Commission to the right of witnesses not to have incriminating evidence used against them in subsequent proceedings is a codification of the existing law; however, as noted above, the Commission also went further and recommended additional protections for witnesses.

As to videoconferencing, the broad language used in the Commission's recommendation seems wide enough to cover evidence given by way of this technique.

Furthermore, the Commission recommended that the protection of witnesses should be absolute and automatic and the committee should not have the power to withdraw it. The overriding concern of the Commission in making these recommendations seems to have been the risk of bad faith and the perceived vulnerability of a witness if committees retained the power to withdraw immunity.[20]

One could take the Commission's reasoning even further and focus on fairness; witnesses should be protected in all cases as a matter of fairness and due process. In other words, if witnesses before committees are not entitled to the protections provided by evidentiary rules of law, they should at the very least be entitled to immunity from civil actions and most criminal prosecutions, except for perjury.

When the Law Reform Commission published its Report, a task force of lawyers from the National Assembly and the Ministry of Justice in Quebec was also being given a mandate to recommend ways to ensure better protection of witnesses appearing before legislative committees. This Task Force was formed in the 1980s as a result of a committee investigation of Premier Lévesque's alleged involvement in an out-of-court settlement of the damage suit arising from riots at the James Bay worksites.[21] The Task Force's Report of August 1984 recommended that any person giving evidence before a committee of the Assembly should be considered a witness whose rights are deserving of protection, regardless of the circumstances that brought the witness before the committee. The Report made a number of recommendations for protecting witnesses, including the right to receive notice of the hearing several days in advance and the right to counsel.[22]

These reports illustrate the trend in Canadian jurisdictions towards broadening the protections provided to witnesses who appear before legislative committees, regardless of the manner in which they testify. This, in turn, supports the notion that witnesses who testify by way of videoconference should be entitled to the same privileges and protections as those who appear in person before committees within Canada.

The conclusion that witnesses appearing by videoconference from outside Canada to give evidence to a committee sitting in Canada should also be protected is supported by the fact that documents prepared for Parliament have been protected. This is important because a parliamentary committee sitting in Canada may receive documentation from abroad and this is similar in many ways to a parliamentary committee sitting in Canada that receives oral testimony from a witness who is physically abroad.[23]

The *Canadian Charter of Rights and Freedoms* also illustrates the trend towards strengthening the protection of witnesses generally. Section 13 reads:

> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

This section has provided protection to witnesses against the use of evidence given in court in subsequent criminal proceedings. And although it is unclear on the face of the section whether the expression "any proceedings" includes parliamentary committee hearings for the purposes of the *Charter*,[24] section 118 of the *Criminal Code*[25] defines the phrase "judicial proceeding" as including a "proceeding...before the Senate or the House of Commons or a committee of the Senate or the House of Commons, or before a legislative council, legislative assembly or house of assembly or a committee thereof that is authorized by law to administer an oath...".

It should be noted, however, that no protection is offered in relation to civil proceedings.[26] Moreover, all *Charter* rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (section 1 of the *Charter*).

Quorum and Voting of Members: The Senate Perspective

Participation in committee hearings by members through videoconferencing raises a number of other issues. First, does attendance by the member through videoconference constitute attendance for the purposes of quorum? Can that member be considered present for the purpose of moving motions and voting?

As a matter of practice, physical presence has always been an absolute requirement in order to constitute a sitting of the Senate. Section 35 of the *Constitution Act, 1867* requires the presence of at least 15 Senators, including the Speaker, for the Senate to be able to conduct any business. The word "presence" is not defined in the section. Nor is it defined in rule 9(1) of the *Rules of the Senate*, which reiterates the requirement of 15 Senators to constitute quorum.

If quorum is not present at the opening of a Senate sitting, the Speaker will usually wait for a short period until 15 members are present before proceeding to "Senators' Statements". If, at any subsequent point in the sitting, a formal count of the House is taken and there is no quorum, the Senate will adjourn to the next sitting.

Similarly, when Senators are expected to vote on any question, either by voice or recorded division, they must be present in the Chamber in order to participate in the process. In the case of a voice vote, the Speaker asks for the "yeas" and "nays"; for a recorded division, Senators must rise in their places to be counted. Rule 66(4) of the *Rules of the Senate* states that "no Senator shall vote who was not within the Bar of the Senate when the Speaker put the question". It also states that "Senators shall vote only from their place in the Senate".

Committees, as subordinate entities of the Senate, cannot exercise any powers beyond what the Senate itself possesses. Accordingly, practice has required that Senators be physically present where the committee is meeting in order to be counted for quorum and to exercise the right to move motions and to vote. Under current rules, at least four Senators must be present for most committees to be able to conduct formal business and make decisions. Therefore, unless the Senate changes its quorum and voting practices, Senators who participate by videoconference cannot be counted as present for quorum purposes nor can they move motions or vote.

In the Senate, there has only been one committee meeting, thus far, where a Senator participated by videoconference. Senator Perrault was involved in a proceeding of the Standing Senate Committee on Fisheries by videoconference from Vancouver on May 27th, 1998. The minutes of the proceeding noted that the Senator was in attendance by videoconference. There was no question about quorum as the number of members located in the committee room exceeded the minimum four and, since the purpose of the meeting was to hear witnesses, the committee did not deal with any substantive motions or hold any votes at that meeting. Senator Perrault was allowed to participate by asking questions and making comments. However, it is doubtful that he would have been able to participate by voting or moving motions because the *Rules of the Senate* require physical presence for Senate sittings.

Other jurisdictions have examined the question of how videoconferencing would affect quorum. For example, the New York State Legislature has looked at the issue and resolved it by requiring physical presence. The State legislated that quorum for a committee meeting exists through members who are physically present at a central location. However, other videoconference attendees will be counted as present as long as there is a quorum. In fact, the state legislature has declared a meeting to be any gathering of people, whether in person or by videoconference. Thus, if Canada were to follow the New York example, a quorum would continue to require physical presence but other members appearing by way of videoconference would be considered present for attendance purposes.

Potential Limitations on Parliamentary Privilege

The use of videoconferencing in order to receive testimony from outside Canada also raises a problem that stems from the very nature of the testimony. In courts of law, rules of evidence permit witnesses to refuse to answer certain questions if they can establish sufficient grounds to do so. For example, witnesses may refuse to answer on the basis that they risk incriminating themselves. Other privileges that may be claimed in court include solicitor-client privilege and doctor-patient privilege. The rules of evidence vary from country to country.

In Canada, since the rules of evidence do not formally apply to committee proceedings, witnesses can be obliged to answer all questions put to them.[27] The impact of this general requirement is, however, mitigated by the fact that the privilege of freedom of speech and immunity from prosecution usually extends to all witnesses appearing before committees.

In cases where a witness testifies from abroad by way of videoconference, even if it may be concluded that parliamentary privilege attaches to such a witness to protect the person from criminal prosecutions and civil suits within Canada, Parliament may be limited in its own powers over the witness. Witnesses testifying from abroad are not protected from criminal prosecutions or civil suits carried out in the foreign country, although they should be entitled to the privileges that country offers for the purposes of evidence law.

Rules of comity[28] and sovereignty require that a citizen of another country be given that country's protections on that country's soil. Witnesses who are testifying from abroad cannot be forced by the Canadian Parliament to answer questions over their objections. As stated earlier, Parliament's jurisdiction does not extend beyond the borders of Canada.

This fact seems to support the notion that, when videoconferencing involves witnesses giving testimony in a foreign country, that country's laws, and not those in Canada, should apply. In other words, when a committee is sitting in Canada and the witnesses are testifying by videoconference from abroad, they should receive only the protection of the jurisdiction in which they are physically present. Statements made by committee members and those made by witnesses who are all physically located in Canada would be privileged, but any statements made by members or witnesses from abroad would not.

However, it is also arguable that, in these circumstances, the proceeding is clearly a "proceeding in Parliament" because the committee is sitting in Canada, even though the witness is abroad. Therefore, Canadian parliamentary privilege should apply.

There are three international conventions covering the taking of evidence abroad:

- the Hague Convention on the Taking of Evidence Abroad in Civil and Criminal Matters (1970),
- the Inter-American Convention on the Taking of Evidence Abroad (Panama, 1975), and
- the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (Strasbourg, 1978).

Canada, however, is not a party or a signatory to any of those treaties. Therefore, Canada must look to international common law in order to determine the extent of recognition required in Canada respecting the privileges provided to witnesses testifying in other countries.

Videoconferencing in Canadian Courts

Videoconferencing in the court system provides an interesting parallel to videoconferencing in the parliamentary system. Videoconferencing is not a new phenomenon in the Canadian legal system. At the trial level, civil courts have made sparing use of the medium for live expert witness testimony.[29] The technique has also been used in sexual assault cases involving witnesses who are minors and who may be subject to trauma or intimidation.[30] At the appellate level, videoconferencing has been used for motions and applications seeking leave to appeal where an oral hearing has been scheduled for some time but has not yet taken place.

In October 1991, the Supreme Court of Canada's videoconferencing service was expanded to include oral submissions on appeals.[31] The Ontario Court of Appeal issued a similar Practice Direction in December of 1995.[32] The Federal Court of Canada has also made use of the technique. In fact, it recently cut its travel budget by 10 % through the use of videoconferencing.[33]

Another example of the use of videoconferencing in court proceedings is the Nova Scotia Court of Appeal which used the technology in a sentencing hearing.[34]

To date, the courts have used videoconferencing to receive lawyers' submissions but have been reluctant to use it for the purpose of hearing testimony from witnesses.

An interesting case involving videoconferencing of testimony from an accused occurred in the Vancouver Provincial Courthouse in February 1997. On this occasion, Judge Kitchen conducted a deposition hearing by way of videoconferencing. One of the accused appeared by video from Hong Kong and the other appeared by video from Taipei, Taiwan. Judge Kitchen adopted the written submissions of Crown Counsel from the pre-trial conference as the basis for the jurisdiction to utilize the procedure. The Crown's submission contained two alternative arguments in favour of the use of the technique.

The first argument made reference to paragraph 537(1)(*j*) of the *Criminal Code*, permitting an accused to appear "...by closed circuit television or other means that allow the Court and the accused to engage in simultaneous visual and oral communication for any part of the inquiry other than the part in which the evidence of a witness is taken."

As to the second argument, the Crown also held that the remote physical appearance by the accused from Taipei constitutes physical appearance in the Vancouver courtroom, because the technology ensures simultaneous visual and oral communication between all participants in the proceeding taking place in British Columbia.

Consequently, all the essential hallmarks of the court experience existed.

Unfortunately, the judge did not indicate the basis on which he permitted the hearing by videoconference. If the judge based his decision on the argument that videoconferencing is akin to physical presence, then it can be argued that parliamentary privilege should also apply to protect testimony provided by videoconference. If, on the other hand, the judge based his conclusion on paragraph 537(1)(j) of the *Criminal Code*, then it is arguable that the use of videconferencing should be reserved for certain kinds of evidence only.

Several Canadian boards and administrative tribunals (quasi-judicial bodies) also routinely use various forms of communications technology for the gathering of sworn *viva voce* testimony.[35] For example, the Immigration and Refuge Appeal Board often uses a much less effective audio link for receiving evidence in other centres across the country.[36]

In *R. v. Nikolovski*,[37] the Supreme Court of Canada ruled that a video camera accurately recorded all it perceived and, therefore, its content could be regarded as clear and convincing evidence.[38] This recognition of the accuracy of video media ensures the future growth of the use of videoconferencing in the Canadian legal system.

Videoconferencing in court proceedings is also occurring more and more frequently in other jurisdictions. Several Australian states have recently legislated the use of the live video link for the transmission of *viva voce* evidence.[39] Australian courts desiring to increase participation from aboriginal people have found that videoconferencing is an alternative and increasingly available option for overcoming problems in relation to the giving of evidence where distance is a factor.[40]

In 1988, the United Kingdom legislated the use of videoconferencing in the courtroom when the testimony of witnesses outside the country is required.[41]

Finally, most United States jurisdictions have made some provision for the use of videconferencing in the legal system. California law provides that any individual who has the right to attend a court proceeding in person also has the right to attend that proceeding by videoconference. This includes prosecutors and victims. In Hawaii, the legislature has declared that videoconferenced testimony satisfies all requirements for giving evidence and that it must be treated in all respects as though the victim or witness were located in the State. In other words, a victim participating by videoconference would be entitled to all the rights and would be subject to all the duties of a victim testifying in the State of Hawaii.

Even federally, the rules of evidence specifically provide that depositions may be taken by electronic "and other" means. Currently 18 district courts use videoconferencing in prison-related proceedings, such as pretrial hearings, witness testimony and evidentiary hearings.

The main reservation with the use of videoconferencing in the United States has been the fear that physical presence in the courtroom reinforces the solemnity of the accusation and the trial and this, in turn, makes witnesses more likely to tell the truth. Because of this concern, the technique has been used most prevalently in non-trial procedures and for hearing motions by counsel. As well, experts are increasingly permitted to give their testimony by videoconference since it is viewed as independent and non-accusatory.

Conclusion

The use of videoconferencing as a means of conducting committee proceedings raises a number of challenging questions related to parliamentary privilege. This is not surprising given that the technology is relatively novel in Canada and has been used sparingly to date. In the parliamentary context, it is only now being considered a viable alternative to requiring members of a committee to be physically present or to having witnesses flown in from abroad or requiring a committee to travel outside Canada — all of which can be cumbersome and far more costly than videoconferencing.

Based on our analysis, members and witnesses who appear before a committee sitting in Canada by way of videoconference from another province are entitled to full protection. If the committee is sitting outside Canada and the member or witness appears by videoconference from outside Canada as well, they are not entitled to any protection in Canada or in the foreign country. Existing practices support these conclusions. If, on the other hand, the committee is sitting in Canada but the member or witness appears by videoconference from abroad, the answer is not as clear. There are arguments in favour of both sides. On the whole, however, the arguments in favour of providing full protection here in Canada far outweigh those against doing so.

With respect to quorum and voting, videoconferencing does not override the traditional requirement of physical presence. Members appearing by videoconference can be considered in attendance but they can not be counted for the purposes of quorum nor are they entitled to move motions or vote.

Ultimately, the issues videoconferencing raises will become increasingly important in the future as more demands are placed on legislatures to find ways to cut costs without sacrificing efficiency or effectiveness. Videoconferencing is certainly one way to do this – it will no doubt be a way of the future.

Notes

1. Joseph Maingot, Q.C., *Parliamentary Privilege in Canada*, 2 ed. (Montreal: McGill-Queen's University, 1997) at 306.
2. 1 Will. & Mar. (2nd Sess.), c. 2, s. 1 (U.K.) [1689 according to the present calendar]. It should be noted that the *Bill of Rights 1689* is also referred to as the *Bill of Rights 1688* in various publications.
3. See Maingot, *supra* at 77.
4. *Roman Corp. Ltd. v. Hudson's Bay Oil & Gas Co.* (1971), 23 D.L.R. (3d) 292 at 299.
5. Bourinot, *Parliamentary Procedure and Practice*, 4th ed. (Montreal: Dawson Brothers, 1916) at 74, referring to a resolution of the British House of Commons of May 26, 1818.
6. *R. v. Murphy* (1985), 64 A.L.R. 498.
7. Maingot, *supra*, note 1 at 100.
8. Katherine Dunkley and Bruce Carson, *Parliamentary Committees: The Protection of Witnesses, the Role of Counsel and the Rules of Evidence* (Ottawa: Library of Parliament, Research Branch, 1986) at 8.
9. Other jurisdictions may offer some guidance. For example, the United States statutory law granting immunity for certain testimony, 18 U.S.C. §§ 6002 and 6005, offers protection for testimony "before or ancillary to" either House or committee thereof. This express language seems to obviate the argument over whether videoconferenced testimony is "before" the body; "ancillary to" would seem to encompass the technology quite nicely, as it has been stretched to include depositions taken outside committee by government officials. In the United Kingdom, the phrase "proceeding in Parliament" has also been interpreted in its wider sense. The expression has been used to include matters connected with, or auxiliary to, the formal transaction of business. *Halsbury's Laws of England*, 4th ed., vol. 34 (London: United Kingdom Butterworths, 1997) provides at 598: "Freedom of speech and debates or proceedings in Parliament is of the highest constitutional importance and should not be narrowly construed." This is persuasive authority for allowing privilege for videoconferenced testimony.
10. See Maingot, *supra*, note 1 at 103-104.
11. See Maingot, *supra*, note 1 at 37-38.
12. Note, however, that when a committee is meeting for the sole purpose of hearing witnesses, the requirement for quorum is reduced or effectively waived but the protection of privilege still exists because the meeting remains a parliamentary proceeding.
13. Maingot, *supra*, note 1 at 38.
14. J.-G. Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworth Canada Ltd., 1997) at 4.
15. Maingot, *supra*, note 1 at 38; also see *Re Ouellet (No. 1)* (1976), 67 D.L.R. (3d) 73 at 74, in which Hugessen A.C.J. stated in *obiter* that "proceedings in Parliament" in Article 9 of the *Bill of Rights, 1689* clearly cover committee proceedings wherever they sit, provided the committee is sitting somewhere in Canada.
16. Maingot, *supra*, note 1 at 98.
17. *Re Ouellet (No. 1)* (1976), 67 D.L.R. (3d) 73, aff'd 72 D.L.R. (3d) 95 (Québec C.A.).
18. It is worth noting, however, that "law-making" is not the only purpose of a parliamentary assembly. Its functions also include investigating, deliberating and representing.
19. Ontario Law Reform Commission, *Report on Witnesses Before Legislative Committees* (Ministry of the Attorney General, 1981) at 112.
20. Dunkley and Carson, *supra*, note 8 at 25-26.
21. *Ibid.* at 28-29.
22. *Ibid.* at 29-30.
23. Documents presented to members of Parliament that are relevant to a committee proceeding are protected if they remain part of the internal proceedings. Maingot, *supra*, note 1, writes at page 104 that any printed matter connected to a "proceeding in Parliament" is protected when it is distributed by the House as part of its internal administration. If the documents are related to a proceeding in Parliament, they are privileged regardless of the location in which they were prepared. Whether the document is used as part of a "proceeding in Parliament" is the key element in determining whether the material is protected. Moreover, when either House orders the publication of any "report, paper, notes and proceedings", the publisher is absolutely privileged because of sections 7 to 9 of the *Parliament of Canada Act*, R.S.C. 1985, c. P.-1. These correspond with sections 1, 2 and 3 of the English *Parliamentary Papers Act, 1840*, 3 & 4 Victoria, c.9 (U.K.). In Canada, a court is required immediately to stay any civil or criminal proceedings related to the publication of the document and to deem the process finally determined, by virtue of these provisions. The documents, however, will only receive protection if they are published "by order or under the authority of the House of Commons or the Senate" (Maingot, *supra*, note 1 at 74). If they are published without an order or outside the authority of either House, they are not protected. What is important here is that there is, again, no qualification that published documents must be prepared in Canada in order for parliamentary privilege to attach within Canada. The treatment of documents prepared for parliamentary committees is similar to that given with respect to documents submitted to lawyers. Those prepared for the purpose of legal representation are privileged, regardless of the location in which they were prepared (See Anthony F. Sheppard, *Evidence*, Revised Edition, (British Columbia: Thomson Canada Limited, 1996) at 1026-39). In court proceedings, there is an emphasis on the purpose of the document rather than the circumstances of its creation. This supports the conclusion that oral testimony provided by videoconference from abroad should also be protected.
24. See Dunkley and Carson, *supra*, note 8 at 9.
25. R.S.C. (1985), c. C-46.

26. Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Thomson Canada Limited, 1992) at 51-4.

27. Dunkley and Carson, *supra*, note 8 at 6. It should be noted, however, that witnesses may appeal to the committee and provide reasons why they should be permitted to refrain from answering any specific question. It would, of course, be left to the committee to decide whether to grant the request.

28. One American court summed up the rule of comity as follows: "[T]he well-accepted rule [is] that while no law has of its own force any effect outside the territory of the state or nation from which its authority is derived, foreign laws may, within certain limits, be given effect. Comity, however, will not be extended to foreign law if it is contrary to the policy of the forum.": *In re Ampicillin Antitrust Litigation* (81 F.R.D. 377 (DDC 1978) at 391). For example, the United States has refused to recognize a foreign country's patent agent privilege, arguing that patent regulation is an essential policy of the U.S. forum. Under comity analysis, foreign countries *could* compel their citizens to answer a Canadian committee's questions over the witness' objections, but such coercion would be voluntary and unlikely.

29. See for example *Freeswick v. Forbes* [1996], O.J. No. 1466, Court File No. 4749/90; Gary Botting & Hugh Trenchard, "Witness Evidence via Live Video Link in the Canadian Criminal Courtroom", (July 1997) 55 *The Advocate* 523, 524.

30. See subsections 486(2.1), (2.11) and (2.2) of the *Criminal Code*

31. See Notice to the Profession, October 1991, Rules of the Supreme Court of Canada; Botting & Trenchard, *supra*, note 29 at 524.

32. O.C.A. Practice Direction, December 18, 1995.

33. Monique Conrod, "Lawyers Learn Advantages of Videoconferencing" *The Lawyers Weekly* (12 September 1997) at 2.

34. Justice Kenneth Matthews *et al.*", *The Expert: A Practitioner's Guide*, vol. 2 (Scarborough, Ont: Carswell, 1995) c. 17 at 28.

35. *Viva voce* testimony means "with the living voice, by word of mouth." With respect to the examination of witnesses, this phrase is equivalent to "orally". It is used in contradistinction to evidence by way of affidavit or deposition. As descriptive of a species of voting, it signifies by speech or by voice, as distinguished from voting by written or printed ballot.

36. Botting & Trenchard, *supra*, note 29 at 525.

37. December 12, 1996, (24360) S.C.C. [1996] S.C.J. No. 122.

38. Botting & Trenchard, *supra*, note 29 at 525.

39. *Evidence (Closed Circuit Television) Act*, 1992 (ACT); *Evidence (Closed Circuit Television) Amendment Act*, 1994 (ACT); *Evidence Act*, 1929 (S.A.) s. 13(2).

40. *Terry Marritjngu Munugurr v. R.*, No. CA18 of 1993, Ct. Crim. App., N. Terr. Aus. (1994).

41. *Criminal Justice Act*, 1988, c. 33, s. 32.