

February 25, 2010

DRAFT SPEECH-PRIVILEGE/PPR – (HM)

1. Minister of National Defense on December 1<sup>st</sup>, 2009 during Question Period.<sup>1</sup>
2. Letter from Carolyn Kobernick December 9<sup>th</sup>, 2009 to Robert Walsh
3. Order of the House December 10<sup>th</sup>, 2009.<sup>2</sup>

Do the matters involve privilege and is there a breach?

In all three instances, the actions taken or not taken here impugn, obstruct or derogate from the Inquiry Powers of this House as integral and core functions, as a part of its constitutional legislative function as Grand Inquest of the Nation. No citation should be needed here but for the record, I cite the words of Sir Edward Coke in 1671, *Institutes of the Laws of England*, Volume 4; Bourinot's *Parliamentary Procedure and Practice in the Dominion of Canada* 1916, p. 70; and the Supreme Court of Canada (not that Court validation is necessary) in *Canada v. Vaid* 2005, p. 20. These benchmarks reflect 340 years of bedrock Parliamentary Function and Law.

One of the powers/privileges necessary to this inquiry function is the Power to Send for Persons, Papers and Records. The power is among those described in the Erskine May classic definition of privilege (21<sup>st</sup> Edition, p. 69) and the power is also codified in our House Standing Orders in SO 108(1)(a). The key words are 1) “empowered to examine and enquire” and 2) “empowered to send for persons, papers and records”. These are also bedrock and elementary House of Commons “101” constitutional law principles.

Delegation to Committees

Need to make two quick clarifications on Parliamentary terminology here:

a) The Power to Send for Persons, Papers and Records exercised by the House and its Committees is whole and complete and unabridged. The delegation of this complete power from the House to its Committees in SO 108 is full and unconditional. There are no words, phrases, precedents, events or

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<sup>1</sup> Canadian House of Commons *Debates*, (December 1, 2009), p. 7449.

<sup>2</sup> Canadian House of Commons *Debates*, (December 10, 2009), p. 7877.

statutes that distinguish this power in the hands of Committee from that of the House itself. I cite the words of the Speaker Fraser here in on March 17<sup>th</sup> 1987 when he says,

“I think it is important to emphasize, in case there should be any misconception in any quarter concerning the powers and functions of parliamentary committees, that committees appointed by this House are entitled to exercise all or any of the powers that this House delegates to them. These powers include the right not only to invite witnesses to appear but to summon them to appear, if necessary...”<sup>3</sup>

If there is non-compliance, a separate enforcement procedure and/or punishment procedure (usually a contempt matter) can be initiated in the House sometimes relying on the Sergeant-at-Arms. Our committees would not usually have this enforcement power, unless the House passed a statute for that purpose. This separation of the subpoena power from the enforcement, coercion and punishment and procedure has confused some, even in this House.

By analogy, the House of Commons and Parliament pass and adopt criminal laws, but we do not enforce them. The police and courts do. But this does not mean that Parliament does not have the power to pass the criminal laws in the first place. An Order issued pursuant to the Power to Send for Persons, Papers and Records is full and complete and binding and failing compliance, enforcement and punishment can be pursued. I note that many of our administrative tribunals and our cousins in American Congressional Houses and Committees also have a similar separation of the enforcement procedure which they assign to the civil or the federal courts. This assignment in no way derogates from the fullness of their subpoena powers.

Secondly, b) Many Canadian statutes refer to existing bodies or agencies which have a power to compel attendance or production of documents. This House of Parliament under our Constitution is not included among those. As far as I can determine, this House and its powers are distinct from every other organ of government and no statute is needed to provide for these powers and no statute or Constitutional provision abridges those powers and associated privileges other than as has been done explicitly in the Parliament of Canada Act. Such statutory references as “compelling production of documents or attendance” do not describe Parliament and are unhelpful in analysis or comparison.

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<sup>3</sup> Canadian House of Commons Debates, (March 17, 1987), p. 4265

### The Breaches

In reply to Question Period question asking why the Government had not provided documents ordered by the Special Committee on Afghanistan.

#### 1) First Breach of Privilege:

The Minister of National Defence has declared in his answer during Question Period on December 1, 2009 in the House that

“There is a mandatory obligation on public officials to ensure that when information is released, it is in compliance with the Canada Evidence Act... With respect to information, I think most people, even the hon. member, can understand that we want to protect operational matters, information received from other countries, other sources, confidential sources, national security. Those are the reasons these documents are being examined by the Department of Justice.”<sup>4</sup>

These words attempt to mislead and/or actually do mislead the House and the public on the obligations of government witnesses and all persons to respond to orders to appear, answer questions and provide documents to our House committees. The Minister says those documents can only be released to the Special Committee under the provisions of the Canada Evidence Act. More importantly, the words are not just simply wrong and misleading but, coming from a Government Minister and Minister of National Defence, they have the direct effect of obstructing the House and Committees of the House by intimidating all witnesses, especially Armed Forces personnel and public servants, from complying with House and Committee requests and orders. He says statutes of general application prevent persons from complying with orders of this House for documents. Under our law and Constitution, subjects under a House of Commons order are not prevented by statutory provisions from complying, and all our witnesses have the full protection of our Houses and Constitution-based privileges, and no such procedure may be taken up or questioned in Canada's courts.

I submit that those words constitute a slander of parliamentary powers, core powers, and if allowed to stand, could or will stand there forever and serve directly and intentionally to undermine our country's

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<sup>4</sup> Canadian House of Commons *Debates*, (December 1, 2009), p. 7449.

constitutional order, and the standing and the capacity of this House and Committees to carry out our inquiry functions, an inherent power.

Whether the Minister spoke out of ignorance, or with malice, to this House, the result is the same. The Minister's words and position on this matter must be found in contempt of this House and 350 years of parliamentary accountability, and he must be asked to clarify and withdraw, and if necessary be admonished. As useful precedent, I refer you to certain proceedings in Jamaica in the year 1808-09 where after refusing to provide evidence to the Legislative Council and ordering all his men not to testify, a Major General Carmichael was ordered arrested, was taken into custody by the Sergeant-at-Arms, was brought to the bar, allowed to make a statement on his breaches of privilege, be provided the evidence and was then discharged by the Speaker<sup>5</sup>.

Mr. Speaker, under all these circumstances, the words, the actions and non-actions of the Minister of National Defence described here, constitute a breach of the privileges of this House and in the absence of clarification or apology, a contempt.

2) In a letter dated December 9, 2009, the Assistant Deputy Minister, Public Law Sector, Department of Justice wrote to our Law Clerk and Parliamentary Counsel. That letter and the reply from Mr. Walsh were made available to me at my request following their circulation to a Member or Members of the Special Committee on Afghanistan. The letter outlines the position of the Department of Justice on the "Application of Acts of Parliament to Officials of the Government of Canada". I would table both these letters (with consent) or simply make copies available to the Chair.

Now I choose my words carefully here. This letter from the Assistant Deputy Minister, Department of Justice breaches the privileges of this House by in effect laying for witnesses a false basis for refusing to provide disclosure to the House or its committees after being ordered to do so. You will find these contemptuous suggestions in paragraph 4 on page 2 of the letter. They read: "Of course, there may instances where an Act of Parliament will not be interpreted to apply to the Houses of Parliament (or their committees). However, that does not mean automatically that government officials-who are

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<sup>5</sup> Derek Lee, *The Power of Parliamentary Houses to Send for Persons, Papers & Records*, (University of Toronto Press Inc: Toronto, Ontario, 1999), pp. 108-113.

agents of the executive, not the legislative branch—are absolved from respecting duties imposed by a statute enacted by Parliament, or by requirements of the common law, such as solicitor-client privilege or Crown privilege. This is so even if a parliamentary committee, through the exercise of parliamentary privilege, may extend immunity to witnesses appearing before it. A parliamentary committee cannot waive a legal duty imposed on government officials.”

Mr. Speaker, to me these words are sad and shocking.

Why is this legal opinion wrong a breach of privilege and a contempt?

Mr. Speaker:

Three citations:

- Maingot 2<sup>nd</sup> Edition, p. 20: “A privilege may not be diminished, prejudicially affected or repealed save by express statutory enactment to that effect.”
- Beauchesne 4<sup>th</sup> Edition, p. 96  
Page 105. (1) “No general statute or order in council can override the privileges, immunities and powers of the Commons. As the prerogatives of the Crown can only be given away or delegated to others by the consent of the Crown stated in express terms, so the rights, privileges and immunities of the House of Commons cannot be taken away by implication or by the vague terms of any statute, but only by the express words of the law or by the express resolution of the House.”
- In *House of Commons v. Canada Labour Relations Board* in 1986 2 FC 376, the Federal Court of Appeal held: “It is a well established principle that an express provision of a statute is necessary to abrogate a privilege of Parliament or its members.”

The problem here is not just that the Assistant Deputy Minister of Justice is wrong and fully disregards any reference to Parliamentary Law and its constitutional purpose, but actually describes that government officials would not be absolved from respecting statutory duties if required to testify before a committee. These are not the words of an ordinary citizen over the counter at Tim Hortons; these are the words, the pronouncements, the position of the Department of Justice over the hand of the Assistant Deputy Minister of Justice for the Public Law Sector.

These and other words in this letter show no knowledge or regard for the law of this institution and betray a shocking and unprofessional ignorance of the Parliamentary law which binds our democracy together. If these words were crafted with others and with Ministerial approval, it would constitute in my view a conspiracy to undermine Parliament and the ability of this House to carry out its constitutional functions. Either way, in ignorance or with subversive intent, this document, over the hand of the Assistant Deputy Minister of Justice, constitutes a contempt of this House and cannot be allowed to stand under our Constitution. I gave written and polite notice of my concern over this opinion to both Ms. Kobernick and the Minister of Justice on January 27, 2010 and there has been no reply.

3) On December 10<sup>th</sup>, 2009, this House adopted an Order calling for the production forthwith of specified documents before the Special Committee on Afghanistan<sup>6</sup>. This order has received no response as far as I am aware as a member of this House. It has been over two months since the Order and the silence of the Government could not be more loud in its contempt. I refer as well to Standing Order 49 which provides for the continuing in force of House orders for papers through a prorogation. The failure to turn over those documents and the silence of Government Ministers says volumes about the matter of respect for this House and its decisions and stands in stark disrespect.

The proceedings in 1991 in the Justice Committee and the House (involving the persons Légère and Gingras) may for some have raised at that time arguably legitimate questions as to the extent of the power to send for persons, papers and records. Speaker Fraser seems to have allowed for that notwithstanding his clear 1987 words referred to earlier. But at this time, 18 years later, following the report of the Committee who reviewed that subpoena power and the unanimous House order to the Government to turn over the unexpurgated documents to the Justice Committee, and the 1999 publication of a book here on this very subject, and the publication of two editions of House of Commons Practice and Procedure, there are no uncertainties or questions unanswered, or unclear as to this law and the House and Committee powers. May I re-use with some license the dictum: “There are none so blind as those who will not see, or read, or learn”. Those who purport to govern and

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<sup>6</sup> Canadian House of Commons *Debates*, (December 10, 2009), p. 7877.

administer Canada must be taken to know the place of the Magna Carta, the events of 1648, 1689, 1867, and 1982 in our constitutional history and the constitutional accountability of a government to this elected House with all its inquiry functions. Canadians do not elect governments, they elect a House. The three breaches by these parties I raise here today are, in this light, cardinal insults to this House and all Canadians represented here, and, if these breaches were coordinated in conspiracy, then I say they are constitutionally seditious and immediately deserving of sanction.

I am prepared to move a motion Mr. Speaker, if you find a prima facie case. (optional) but I would ask you to consider allowing the matter to be stood down for up to 24 hours to allow negotiations with House Leaders on the content of that motion and I know Members would want to contribute their good faith efforts and reduced partisanship to this effort.