Parliamentary Privilege

Rights of the House

The right to institute inquiries, to require the attendance of witnesses and to order the production of documents: access to unredacted documents; *prima facie*; alleged intimidation of committee witnesses

April 27, 2010 *Debates*, pp. 2039-45

Context: On November 27, 2009, the Special Committee on the Canadian Mission in Afghanistan presented its Third Report to the House. The Report addressed what the Committee considered to be a breach of its privileges in relation to its inquiries and requests for documents relating to the detention of combatants by Canadian Forces in Afghanistan.[1] On December 10, 2009, the House adopted an opposition motion to order the production of the documents that the Committee had been trying to obtain from the Government.[2] Prior to the debate commencing on the opposition motion, Rob Nicholson (Minister of Justice and Attorney General of Canada), argued that the motion was not in order because the Government, in refusing to produce the documents in question, was shielding confidential information related to Canada's national security, pursuant to the *Canada Evidence Act*. The Speaker ruled immediately, allowing the motion to be considered.[3] On December 30, 2009, the Second Session of the Fortieth Parliament was prorogued. The House Order of December 10, 2009, remained in effect when the new session began on March 3, 2010 and the Special Committee was re-constituted on the first sitting day of the session by unanimous consent.[4] On March 5, 2010, Mr. Nicholson, on a point of order, announced that the Government had appointed a former Supreme Court Justice, Frank Iacobucci, to undertake a review of the documents related to Afghan detainees, and stated that Justice Iacobucci would prepare a report that the Minister would table in the House.[5] On March 16, 2010, the specific terms of reference for Mr. Justice Iacobucci were tabled in the House.[6]

On March 18, 2010, three questions of privilege were raised in the House in relation to the Order for the production of documents related to Afghan detainees. Derek Lee (Scarborough–Rouge River), Jack Harris (St. John's East) and Claude Bachand (Saint-Jean) all argued that the absolute right of the House and its committees to send for documents obliged the Government to comply with the Order to produce the documents in question. Mr. Harris also argued that the Government's refusal to

provide unredacted documents undermined Parliament and its committees, and added that the Order of December 10, 2009, provided for enough flexibility in the way in which the documents were made available. In his submission, Mr. Lee also alleged that comments made by Peter MacKay (Minister of National Defence) during Oral Questions on December 1, 2009,[7] as well as those made by an official from the Department of Justice in a letter to the Law Clerk of the House of Commons, had intimidated officials appearing before the Special Committee, essentially implying that they ought not to answer questions. Therefore, he argued that this constituted a contempt of the House. Tom Lukiwski (Parliamentary Secretary to the Leader of the Government in the House of Commons) raised the procedural issue of the timeliness of the questions of privilege, noting that the matter dated from December. He also raised a more substantive point, arguing that the House Order of December 10, 2009, did not include any provisions to safeguard the sensitive nature of the documents. After hearing from other Members, the Speaker stated that he would wait to hear from the Ministers mentioned in the questions of privilege before returning to the House with a ruling. He did, however, address the question of timeliness, stating that although Mr. Lee had filed his request before the Third Session had begun,—the Speaker himself had asked him to defer raising the matter to see how events would unfold. Timeliness was not, he concluded, an issue in this case.[8]

On March 25, 2010, the Government tabled a large number of documents relating to the Order of December 10, 2009.[9] Jack Layton (Toronto–Danforth) rose on a point of order, objecting to the tabling of heavily censored documents and the lack of additional copies. He argued that it contravened the Order of the House, which required the documents to be produced in their original and uncensored form. After hearing from other Members, the Acting Speaker (Barry Devolin) stated that the issues raised would be addressed by the Speaker in a comprehensive ruling.[10]

On March 31, 2010, Mr. Lukiwski rose to speak to the matter and questioned the legitimacy of the Order adopted by the House on December 10, 2009, arguing that many of the documents listed in the Order could be requested only by means of an Address to the Crown. The Minister of Justice then argued that the comments of the Minister of National Defence and the Justice Department official were matters of debate, that parliamentary privilege was neither indefinite nor unlimited, and that the House had no authority to demand unfettered access to documents. He rejected the contention that the Government had breached parliamentary privileges by failing to comply with the Order of December 10, 2009,

and argued, citing Crown privilege, that the Government had the duty to protect information that could jeopardize national security. This, he claimed, empowered the Government to withhold confidential information requested by the House. In insisting on the production of the requested documents, the House was attempting to unlawfully extend the scope of its own privileges, which the Minister argued are not indefinite. The Minister added that it was the duty of Government to balance competing obligations, in providing information to the House when requested and also respecting its obligation to protect the public interest. After hearing from other Members on that day,[11] on April 1 and on April 12, 2010, the Speaker again took the matter under advisement.[12]

On April 1 and 26, 2010, the Government tabled additional documents. The documents were redacted and, by unanimous consent, were tabled either in English or in French only.[13]

Resolution: On April 27, 2010, the Speaker ruled on these questions of privilege. Given the complexity of the issues, he grouped them thematically for the purposes of the ruling. First, he declared that it was procedurally acceptable for the House to use an Order rather than an Address to require the production of the documents in question. Second, with regard to the allegations made by Mr. Lee about the intimidation of witnesses, he ruled that neither the Minister's words nor the letter from the Department of Justice official constituted witness intimidation, though he conceded that the letter could have had a chilling effect. The Speaker could not find that there had been a direct attempt to prevent or to influence the testimony of any witness and that there was therefore no *prima facie* case of contempt on this point. Third, the Speaker stated that it was within the powers of the House of Commons to ask for the documents specified in the Order, that its power to do so was absolute, and that it did not transgress the separation of powers between the executive and legislative branches of Government. The Speaker declared that it was the Government's responsibility to provide cogent reasons for not producing documents ordered by the House. He also reminded the House that all sides agreed that the protection of confidential information needed to be taken seriously. The challenge for the House was to put into place a mechanism whereby the documents could be made available to the House, without compromising the security and confidentiality of the information they contained. The Speaker also addressed the issue of trust among Members and the Government, noting that the Government should be more trusting of the House with confidential Government information,

and conversely, Members should be more willing to accept the Government's assertions.

The Speaker concluded by stating that, having analyzed the evidence and the precedents, the Government's failure to comply with the Order of December 10, 2009, constituted a *prima facie* breach of privilege. He added that he would allow the House Leaders, Ministers and party critics two weeks to negotiate some way of resolving the impasse, but, if the matter could not be resolved in that time, he would return to make a statement on the motion that would be allowed to be proposed to the House.

Decision of the Chair

The Speaker: I am now prepared to rule on the question of privilege raised on March 18, 2010, by the hon. Member for Scarborough–Rouge River, the hon. Member for St. John's East and the hon. Member for Saint-Jean concerning the Order of the House of December 10, 2009, respecting the production of documents regarding Afghan detainees.

I would like to thank those three Members raising these issues. I would also like to thank the hon. Minister of Justice and Attorney General of Canada, the hon. Parliamentary Secretary to the Leader of the Government in the House of Commons, the hon. House Leader of the Official Opposition, and the hon. Members for Toronto Centre, Joliette, Windsor–Tecumseh, Yukon, Toronto–Danforth, Outremont and Kootenay–Columbia for their interventions on this important matter on March 18, 25 and 31, and on April 1 and 12, 2010.

The facts that have led the House, and the Chair, to be seized of this case are the following:

On February 10, 2009, the House recreated the Special Committee on the Canadian Mission in Afghanistan. This Committee conducted its business in the usual way and began, in the fall of that year, to seek information from the Government on the treatment of Afghan detainees.

On November 27, 2009, the Committee reported to the House what it considered to be a breach of its privileges in relation to its inquiries and requests for documents.

On December 10, 2009, the House adopted an Order for the production of documents regarding Afghan detainees.

On December 30, 2009, the session in which this Order was adopted was prorogued.

On March 3, 2010, when the present session began, the Special Committee was re-constituted and resumed its work. Since Orders of the House for the production of documents survive prorogation, the House Order of December 10, 2009, remained in effect.

On March 5, 2010, the Minister of Justice rose in the House to announce that the Government had appointed former Supreme Court Justice Frank Iacobucci to undertake "an independent, comprehensive and proper review of the documents at issue".

The Minister described Mr. Iacobucci's mandate in relation to the Order of December 10, 2009, specifying that the former Justice would report to him.

On March 16, 2010, the Leader of the Government in the House of Commons tabled the specific terms of reference for Mr. Iacobucci.

On March 18, 2010, three Members raised questions of privilege related to the Order of December 10, 2009. A number of other Members also contributed to the discussion.

On March 25, 2010 and again on April 1 and 26, 2010 the Government tabled a large volume of documents regarding Afghan detainees "without prejudice" to the procedural arguments relating to the Order of December 10, 2009.

On March 25 and April 1 the Chair also heard interventions from Members.

On March 31, 2010 the Government responded to the arguments made in relation to the questions of privilege raised on March 18, 2010.

Last, on April 1, and again on April 12, 2010, the Chair heard arguments on the questions of privilege from several Members, took the matter under advisement and undertook to return to the House with a ruling.

Before addressing the arguments brought forward, I want to take this opportunity to remind Members of the role of the Chair when questions of privilege are raised.

House of Commons Procedure and Practice, Second Edition, O'Brien and Bosc, at page 141 states:

> Great importance is attached to matters involving privilege. A Member wishing to raise a question of privilege in the House must first convince the Speaker that his or her concern is *prima facie* (on the first impression or at first glance) a question of privilege. The function of the Speaker is limited to deciding whether the matter is of such a character as to entitle the Member who has raised the question to move a motion which will have priority over Orders of the Day; that is, in the Speaker's opinion, there is a *prima facie* question of privilege. If there is, the House must take the matter into immediate consideration. Ultimately, it is the House which decides whether a breach of privilege or a contempt has been committed.

As Speaker, one of my principal duties is to safeguard the rights and privileges of Members and of the House. In doing so, the Chair is always mindful of the established precedents, usages, traditions and practices of the House and of the role of the Chair in their ongoing evolution. It is no exaggeration to say that it is a rare event for the Speaker to be seized of a matter as complex and as heavy with consequence as the matter before us now.

Because of the complexity of the issues that have been raised, and the large number of lengthy interventions made by hon. Members, I have taken the liberty of regrouping the issues thematically in order to address the arguments presented more effectively.

The main and most important issue that the Chair must address today concerns the right of the House to order [the][14] production of documents, including the nature of the right, questions related to the extent of the right and the manner in which the right can or ought to be exercised. All Members who have intervened on these matters of privilege have touched on these fundamental questions in one way or another. In addition, the Chair has been asked to determine whether or not the Order has been complied with, and if not, whether this constitutes, *prima facie*, a contempt of the House.

A second matter before the Chair is the contention—made primarily by the Member for Scarborough–Rouge River—that witnesses were intimidated by answers given in Question Period by the Minister of National Defence and that a letter written by an official from the Department of Justice was contemptuous of the House in setting out for potential witnesses a false basis for refusing to answer questions in a committee of this House.

Arguments were also made in relation to a third theme, namely the form, clarity and procedural validity of the December 10 Order of the House. These issues arose when the Parliamentary Secretary to the Leader of the Government in the House of Commons contended on March 31, 2010, that the Order of December 10 was fatally flawed in that it seeks documents that he claims can only be obtained by way of an Address to the Governor General. Related issues were brought to the Chair's attention on the same day by the Minister of Justice, who stated, at page 1225 of the *Debates*:

> Mr. Speaker, as you will recall, the December Order called for uncensored documents. It listed eight different categories of documents to be produced. The Order did not specify exactly when such documents should be produced, who should produce them or to whom they should be produced. The Order made no reference to the confidential information being protected…

The fourth theme that the Chair wishes to address concerns the issue of accommodation and trust which a number of Members on both sides of the House have raised. Several Members have made reference to the need to safeguard confidential information that, in the words of the Minister of Justice, as found at page 7881 of the *Debates* of December 10, 2009, "if disclosed, could compromise Canada's security, national defence and international relations".

More significantly, a number of Members have indicated that they wish to find a way to accommodate the desire of the House for information while also accommodating the desire of the Government to protect sensitive information.

The first arguments the Chair wishes to address are those related to the form, clarity and procedural validity of the December 10 Order.

The Minister of Justice has called into question the clarity of the Order. On reading the Order, it is abundantly clear to the Chair that it is the Government that is expected to produce the documents demanded, and that in the absence of instructions to the contrary, the documents are to be tabled in the House in the usual manner. In this sense the Minister and the Parliamentary Secretary are correct in asserting that no provision is made in the Order for confidential treatment of the material demanded. The Chair will return to this aspect of the question later in this ruling.

As to when the material is to be tabled, the Order says very clearly "forthwith". *House of Commons Procedure and Practice*, Second Edition, at page 475 states:

> … if the House has adopted an Order for the production of a document, the Order should be complied with within a reasonable time. However, the Speaker has no power to determine when documents should be tabled.

As to the procedural validity of the Order, as well as its form, the Chair wishes to draw the attention of the House to Bourinot's *Parliamentary Procedure and Practice in the Dominion of Canada*, 4th edition, which states at pages 245 and 246:

> Previous to the session of 1876, it was customary to move for all papers by address to the Governor General, but since that time the regular practice of the English Houses has been followed. It is now the usage to move for addresses only with respect to matters affecting imperial interests, the royal prerogative or the Governor in Council. On the other hand, it is the constitutional right of either House to ask for such information as it can directly obtain by its own order from any department or officer of the government… papers may be directly

> ordered when they relate to canals and railways, post office, customs, militia, fisheries, dismissal of public officers, harbours and public works and other matters under the immediate control and direction of the different departments of the government.

As this passage makes clear, an order is issued when seeking papers that fall under the "immediate control and direction of the different departments of the Government". As an example, in the case of the documents related to the Chief of the Defence Staff referred to by the Parliamentary Secretary, it is simply not credible to claim that these documents are not under the control of the Government.

The Parliamentary Secretary has referred to certain rulings of my predecessors in making his arguments and has also provided additional material in support of his contention. The Chair has examined these precedents—a ruling from 1959 by Mr. Speaker Michener and a ruling from 1982 by Madam Speaker Sauvé—but is not convinced that they directly support the particular circumstances faced by the House in this case.

A further point to be made on this issue has to do with the documents tabled "without prejudice" so far by the Government in response to the Order of December 10. The Chair wishes to point out that of the documents tabled, several appear to fall into the categories which the Parliamentary Secretary claims require an address before they can be produced. In addition, the fact that these documents have been tabled has been cited by the Government as a gesture of good faith on its part and an indication that it is complying, to the extent that it feels it can, with the Order of December 10.

Finally, as the Member for St. John's East noted, in response to objections raised at the time debate was commencing on the original motion, a decision was rendered that the motion was in order. Consequently, the House went on to debate and decide the matter: the House has expressed its will, and that is where the matter now stands.

I have considered the arguments put forward, and for the reasons stated above, the Chair concludes that it was procedurally acceptable for the House to use an Order and not an Address to require the production of these documents.

The Chair will now turn to the allegations related to witness intimidation. The Member for Scarborough–Rouge River has contended that the comments made by the Minister of National Defence in reply to a question during Oral Questions on December 1, 2009, amounted to intimidation. He argued that the Minister's contention that the documents in question could be released to the Special Committee on the Canadian Mission in Afghanistan only under the provisions of the *Canada Evidence Act* was wrong and misleading, obstructed the House and intimidated witnesses, especially armed forces personnel and public servants, thereby lessening the likelihood of their compliance with House requests and orders.

The hon. Member for Scarborough–Rouge River also took exception to a December 9, 2009, letter to the Law Clerk and Parliamentary Counsel of the House from an Assistant Deputy Minister from the Department of Justice on the obligations of witnesses before committees, and on the obligation to provide documents ordered by committees. He argued that the letter constituted a contempt of the House by setting out for witnesses a false basis for refusing to provide disclosure to the House or its committees after being ordered to do so. In particular, the Member for Scarborough–Rouge River stressed that if the contents of the letter were crafted with ministerial approval, it could constitute a conspiracy to undermine Parliament and the ability of the House to carry on its constitutional functions.

The Government responded that the remarks made by the Minister of National Defence were simply matters of debate and differences of opinion between Members. Of the second complaint, the Government took the view that the letter from the justice official constituted nothing more than an exchange of views between legal professionals and it could not be construed as "an attempt to intimidate the Government witnesses".

The hon. Member for Scarborough–Rouge River had argued that the Minister's reply constituted a slander of Parliament's core powers to hold the Government to account and thus was a contempt. However, particularly since this exchange between the Minister and the Member for Vancouver South occurred during Question Period, I find that I must agree with the Parliamentary Secretary's characterization of this exchange as a matter of debate.

I have no need to remind the House that freedom of speech is one of our most cherished rights. Although Members may disagree with the comments made by the Minister, I cannot find that the Minister's words in and of themselves constitute witness intimidation, hence nor do they constitute a *prima facie* contempt of the House.

As for the Member for Scarborough–Rouge River's other concern regarding the letter from the Assistant Deputy Minister, the procedural authorities are clear that interference with witnesses may constitute a contempt. *House of Commons Procedure and Practice*, Second Edition, at page 1070, states: "Tampering with a witness or in any way attempting to deter a witness from giving evidence may constitute a breach of parliamentary privilege."

It is reasonable to assume that a letter signed by an Assistant Deputy Minister, acting under the authority of the Minister of Justice, is an expression of the Government's view on an issue, and given that its contents have been widely reported and circulated, the letter could leave the impression that public servants and Government officials cannot be protected by Parliament for their responses to questions at a parliamentary committee, when this is not the case.

Specifically, I would like to draw to the attention of hon. Members the section of the letter in question, which the Member for Scarborough–Rouge River tabled in the House on March 18, 2010, where the Assistant Deputy Minister lays out a view of the duties of public servants in relation to committees of the House. The letter states:

> Of course, there may be 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 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. To argue to the contrary would be inimical

> to the principles of the rule of law and parliamentary sovereignty. A parliamentary committee is subordinate, not superior, to the legislative will of Parliament as expressed in its enactments.

It does concern me that the letter of the Assistant Deputy Minister could be interpreted as having a "chilling effect" on public servants who are called to appear before parliamentary committees, as contended the Members for Scarborough–Rouge River and Toronto Centre. This could be especially so if the view put forth in the letter formed the basis of a direction given by department heads to their employees who have been called to testify before parliamentary committees.

At the same time, it is critically important to remember in this regard that our practice already recognizes that public servants appearing as witnesses are placed in the peculiar position of having two duties. As *House of Commons Procedure and Practice*, Second Edition, states at pages 1068 and 1069:

> Particular attention is paid to the questioning of public servants. The obligation of a witness to answer all questions put by the committee must be balanced against the role that public servants play in providing confidential advice to their Ministers.… In addition, committees ordinarily accept the reasons that a public servant gives for declining to answer a specific question or series of questions which… may be perceived as a conflict with the witness' responsibility to the Minister.…

The solution for committees facing such situations is to seek answers from those who are ultimately accountable, namely, the Ministers themselves.

It has been argued that there may be a chilling effect, which could come dangerously close to impeding members of committees in carrying out their duties; however, I remind the House that this letter was sent to our Law Clerk, so on balance, I would need to see the use made of this letter, in particular whether it was ever presented to a person who was scheduled to testify before the Special Committee with the intent of limiting the person's testimony.

As things stand, there does not appear to the Chair to be sufficient evidence for me to conclude that this letter constitutes a direct attempt to

prevent or influence the testimony of any witness before a committee, and for these reasons, I cannot find that there is a *prima facie* question of contempt on this point.

I now turn to the questions of the House's right to order the production of documents and the claim that the Government has failed to comply with the Order of the House.

The hon. Member for Kootenay–Columbia argued that even if the documents were provided to the Committee, the Committee could not, given their sensitive nature, make use of them publicly. However, I cannot agree with his conclusion that this obviates the Government's requirement to provide the documents ordered by the House. To accept such a notion would completely undermine the importance of the role of parliamentarians in holding the Government to account.

Before us are issues that question the very foundations upon which our parliamentary system is built. In a system of responsible Government, the fundamental right of the House of Commons to hold the Government to account for its actions is an indisputable privilege and in fact an obligation.

Embedded in our Constitution, parliamentary law and even in our Standing Orders, it is the source of our parliamentary system [from][15] which other processes and principles necessarily flow, and it is why that right is manifested in numerous procedures of the House, from the daily Question Period to the detailed examination by committees of estimates, to reviews of the *Accounts of Canada*, to debate, amendments, and votes on legislation.

As I noted on December 10, 2009, *House of Commons Procedure and Practice*, Second Edition, states at page 136:

> By virtue of the Preamble and section 18 of the *Constitution Act, 1867*, Parliament has the ability to institute its own inquiries, to require the attendance of witnesses and to order the production of documents, rights which are fundamental to its proper functioning. These rights are as old as Parliament itself.

And on pages 978 to 979:

> The Standing Orders do not delimit the power to order the production of papers and records. The result is a broad, absolute power that on the surface appears to be without restriction. There is no limit on the type of papers likely to be requested, the only prerequisite is that the papers exist—in hard copy or electronic format—and that they are located in Canada….
>
> No statute or practice diminishes the fullness of the power rooted in the House privileges unless there is an explicit legal provision to that effect, or unless the House adopts a specific resolution limiting the power. The House has never set a limit on its power to order the production of papers and records.

Further, at page 70, Bourinot's 4th edition states:

> The Senate and House of Commons have the right, inherent in them as legislative bodies, to summon and compel the attendance of all persons, within the limits of their jurisdiction, as witnesses, and to order them to bring with them such papers and records as may be required for the purpose of an inquiry.

In the arguments presented, the Chair has heard this power described as unabridged, unconditional, unqualified, absolute and, furthermore, one which is limited only by the discretion of the House itself. However, this view is not shared by all and so it is a privilege whose limits have now been called into question.

The Government's view is that such an unqualified right does not exist for either House of Parliament or their committees. The executive, the holder of the sensitive information sought by the House, has competing obligations. On the one hand, it recognizes that there is an expectation of transparency so that Government actions can be properly monitored to ensure that they respect the law and international agreements. On the other hand, the Government contends that the protection of national security, national defence and

international relations demand that some information remain secret and confidential, out of the reach of those obliged to scrutinize its actions and hold it to account.

In his March 31 intervention, the Minister of Justice quoted from the 1887 parliamentary treatise of Alpheus Todd to support the view that "a due regard to the interests of the State, occasionally demand… that information sought for by members of the legislature should be withheld, at the discretion and upon the general responsibility of ministers".

The Minister also cited *Bourinot* in 1884, observing that the Government may "feel constrained to refuse certain papers on the ground that their production would be… injurious to the public interest". Had he read a little further, he might have found the following statement by Bourinot at page 281:

> But it must be remembered that under all circumstances it is for the House to consider whether the reasons given for refusing the information are sufficient. The right of Parliament to obtain every possible information on public questions is undoubted, and the circumstances must be exceptional, and the reasons very cogent, when it cannot be at once laid before the Houses.

As the Members for Saint-Jean and Joliette commented on March 25, 2010, Bourinot's 2nd edition notes that even in instances where a Minister refuses to provide documents that are requested, it is clear that it is still ultimately up to the House to determine whether grounds exist to withhold documents.

Bourinot, in referring to procedures for notices of motions for production of papers, wrote at pages 337 and 338:

> Consequently, there are frequent cases in which the Ministers refuse information, especially at some delicate stage of an investigation or negotiation; and in such instances the House will always acquiesce when sufficient reasons are given for the refusal… But it must be remembered that under all circumstances it is for the House to consider whether the reasons given for refusing the information are sufficient.

Joseph Maingot's *Parliamentary Privilege in Canada*, 2nd edition, also supports the need for Parliament to have a voice in these very matters when it states at page 190:

> The only limitations, which could only be self-imposed, would be that any inquiry should relate to a subject within the legislative competence of Parliament, particularly where witnesses and documents are required and the penal jurisdiction of Parliament is contemplated. This dovetails with the right of each House of Parliament to summon and compel the attendance of all persons within the limits of their jurisdictions.

Similarly, in *Erskine May*, 23rd edition, in a discussion of the exclusive cognizance of proceedings at page 102, we find the following:

> … underlying the Bill of Rights [1689] is the privilege of both Houses to the exclusive cognizance of their own proceedings. Both Houses retain the right to be sole judge of the lawfulness of their own proceedings, and to settle—or depart from—their own codes of procedure. This is equally the case where the House in question is dealing with a matter which is finally decided by its sole authority, such as an order or resolution, or whether (like a bill) it is the joint concern of both Houses.

In David McGee's *Parliamentary Practice in New Zealand*, [3rd][16] edition, at page 621 he asserts, "The Australian legislation", referring to the *Parliamentary Privileges Act, 1987*, "in respect of article 9 of the Bill of Rights… may be taken to indicate the types of transactions falling within the term 'proceedings of Parliament'".

He then goes on to state that such proceedings to which privilege attaches include "… the presentation of a document to a House or a committee… ".

Odgers' Australian Senate Practice, 12th edition, at page 51 states clearly:

> Parliamentary privilege is not affected by provisions in statutes which prohibit in general terms the disclosure of categories of information….
>
> Statutory provisions of this type do not prevent the disclosure of information covered by the provisions to a House of the Parliament or to

> a parliamentary committee in the course of a parliamentary inquiry.... They... do not prevent committees seeking the information covered by such provisions or persons who have that information providing it to committees.

In light of these various authorities, the Chair must conclude that the House does indeed have the right to ask for the documents listed in the Order of December 10, 2009.

With regard to the extent of the right, the Chair would like to address the contention of the Minister of Justice, made on March 31, that the Order of the House of December 10 is a breach of the constitutional separation of powers between the executive and the legislature.

Having noted that the three branches of Government must respect the legitimate sphere of activity of the others, the Minister argued that the Order of the House was tantamount to an unlawful extension of the House's privileges. This can only be true if one agrees with the notion that the House's power to order the production of documents is not absolute. The question would then be whether this interpretation subjugates the legislature to the executive.

It is the view of the Chair that accepting an unconditional authority of the executive to censor the information provided to Parliament would in fact jeopardize the very separation of powers that is purported to lie at the heart of our parliamentary system and the independence of its constituent parts. Furthermore, it risks diminishing the inherent privileges of the House and its Members, which have been earned and must be safeguarded.

As has been noted earlier, procedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of Government documents, even those related to national security.

Therefore, the Chair must conclude that it is perfectly within the existing privileges of the House to order production of the documents in question. Bearing in mind that the fundamental role of Parliament is to hold the Government to account, as the servant of the House and the protector of its privileges, I cannot agree with the Government's interpretation that ordering

these documents transgresses the separation of powers and interferes with the spheres of activity of the executive branch.

But what of the House's responsibility regarding the manner in which this right can or ought to be exercised? The authorities cited earlier all make reference to the long-standing practice whereby the House has accepted that not all documents demanded ought to be made available in cases where the Government asserts that this is impossible or inappropriate for reasons of national security, national defence or international relations.

O'Brien and Bosc, at page 979, states: "—it may not be appropriate to insist on the production of papers and records in all cases."

The basis for this statement is a 1991 report by the Standing Committee on Privileges and Elections, which, as recorded on page 95 of the *Journals* of May 29, 1991, pointed out:

> The House of Commons recognizes that it should not require the production of documents in all cases; considerations of public policy, including national security, foreign relations, and so forth, enter into the decision as to when it is appropriate to order the production of such documents.

In his comments on this aspect of the matter before us, the Parliamentary Secretary to the Leader of the Government in the House of Commons referred to my ruling of June 8, 2006, where I stated that national security, when asserted by a Minister, was sufficient to set aside a requirement to table documents cited in debate. The examples cited by the Parliamentary Secretary related strictly to documents that have been cited by a Minister in the absence of any other explicit expression of interest by the House in the said documents.

Having reviewed the June 8 ruling, it is clear to the Chair that there is a difference between the practice of the House which allows a Minister, on the sole basis of his or her judgment, to refrain from tabling a cited document for reasons of confidentiality and national security, and an Order, duly adopted by the House following notice and debate, requiring the tabling of documents.

Another important distinction between the Order adopted by the House on December 10, 2009, and the practice respecting notices of motions for the production of papers, referred to by the Member for St. John's East on April 12 is that, with respect to such notices, there is an opportunity for a Minister or Parliamentary Secretary to indicate to the House that the notice is acceptable to the Government subject to certain reservations, such as confidentiality, or national security.

Thus the House, prior to the adoption of the motion, is fully aware that some documents will not be produced if the motion is adopted. If the House does not agree, the motion must either be transferred for debate or be put immediately to the House without debate or amendment.

Something similar happened on December 10, 2009. Before the House voted on the motion that became an Order to produce documents, the Ministers of Justice, National Defence and Foreign Affairs all rose in the House to explain the reasons why the documents in question should not be made available. This is in keeping with what Bourinot refers to as the Government's responsibility to provide "reasons very cogent" for not producing documents.

Under normal circumstances, reflecting on past history in the House, these assertions by the Government might well have been found to be acceptable by the House. In the current circumstances, however, the reasons given by the Government were not found to be sufficient. The House debated the matter and voted to adopt an Order for the production of documents despite the request of the Government.

The reason for this, it seems, has to do with the issue of accommodation and trust. On December 10, 2009, as found on page 7877 of the *Debates*, I stated:

> It is unfortunate, if I may make this comment, that arrangements were not made in committee to settle this matter there, where these requests were made and where there might have been some agreement on which documents and which format would be tabled or made available to Members. How they were to be produced or however it was to be done, I do not know, but obviously that has not happened.

Several Members have made the point that there are numerous ways that the documents in question could have been made available without divulging state secrets and acknowledged that all sides in the House needed to find a way to respect the privileges and rights of Members of Parliament to hold the Government to account, while at the same time protecting national security.

The Government, for its part, has sought to find a solution to the impasse. It has appointed former Supreme Court Justice Frank Iacobucci and given him a mandate to examine the documents and to recommend to the Minister of Justice and Attorney General what could be safely disclosed to the House.

The Government has argued that in mandating this review by Mr. Iacobucci, it was taking steps to comply with the Order consistent with its requirements to protect the security of Canada's armed forces and Canada's international obligations.

However, several Members have pointed out that Mr. Iacobucci's appointment establishes a separate, parallel process outside of parliamentary oversight, and without parliamentary involvement. Furthermore, and in my view perhaps most significantly, Mr. Iacobucci reports to the Minister of Justice; his client is the Government.

The authorities I have cited are unanimous in the view of the House's privilege to ask for the production of papers and many go on to explain that accommodations are made between those seeking information and those in possession of it to ensure that arrangements are made in the best interests of the public they both serve.

Certainly from the submissions I have heard, it is evident to the Chair that all Members take seriously the sensitive nature of these documents and the need to protect the confidential information they contain.

The Chair must conclude that it is within the powers of the House of Commons to ask for the documents sought in the December 10 Order it adopted. Now it seems to me that the issue before us is this: Is it possible to put in place a mechanism by which these documents could be made available to the House without compromising the security and confidentiality of the information they contain? In other words, is it possible for the two sides,

working together in the best interests of the Canadians they serve, to devise a means where both their concerns are met? Surely that is not too much to hope for.

The Member for Toronto Centre has made a suggestion, as recorded on page 615 of the *Debates* of March 18, 2010:

> What we believe can be done is not beyond the ability of the House. It is done in many other parliaments. Indeed, there are circumstances under which it has even been done in this House. It is perfectly possible for unredacted documents to be seen by Members of Parliament who have been sworn in for the purpose of looking at these documents.

O'Brien and Bosc, at page 980, points to ways of seeking a compromise for Members to gain access to otherwise inaccessible material:

> Normally, this entails putting measures in place to ensure that the record is kept confidential while it is being consulted: *in camera* review, limited and numbered copies, arrangements for disposing of or destroying the copies after the committee meeting, *et cetera*.

In some jurisdictions, such as the Legislative Council in the Australian state of New South Wales, and I would refer Members to *New South Wales Legislative Council Practice* by Lovelock and Evans at page 481, mechanisms have been put in place, which satisfy the confidentiality concerns of the Government as well as those of the legislature. Procedures provide for independent arbiters, recognized by both the executive and the legislature, to make determinations on what can be disclosed when a dispute arises over an order for the production of documents.

Finding common ground will be difficult. There have been assertions that colleagues in the House are not sufficiently trustworthy to be given confidential information, even with appropriate security safeguards in place. I find such comments troubling. The insinuation that Members of Parliament cannot be trusted with the very information that they may well require to act on behalf of Canadians runs contrary to the inherent trust that Canadians have placed in their elected officials and which Members require to act in their various parliamentary capacities.

The issue of trust goes in the other direction as well. Some suggestions have been made that the Government has self-serving and ulterior motives for the redactions in the documents tabled. Here too, such remarks are singularly unhelpful to the aim of finding a workable accommodation and ultimately identifying mechanisms that will satisfy all actors in this matter.

But the fact remains that the House and the Government have, essentially, an unbroken record of some 140 years of collaboration and accommodation in cases of this kind. It seems to me that it would be a signal failure for us to see that record shattered in the Third Session of the Fortieth Parliament because we lacked the will or the wit to find a solution to this impasse.

The House has long understood the role of the Government as "defender of the realm" and its heavy responsibilities in matters of security, national defence and international relations. Similarly, the Government understands the House's undoubted role as the "grand inquest of the nation" and its need for complete and accurate information in order to fulfill its duty of holding the Government to account.

Examples have been cited of mechanisms that might satisfy the competing interests of both sides in this matter. In view of the grave circumstances of the current impasse, the Chair believes that the House ought to make one further effort to arrive at an interest-based solution to this thorny question.

Accordingly, on analyzing the evidence before it and the precedents, the Chair cannot but conclude that the Government's failure to comply with the Order of December 10, 2009, constitutes *prima facie* a question of privilege.

I will allow House Leaders, Ministers and party critics time to suggest some way of resolving the impasse, for it seems to me we would fail the institution if no resolution can be found. However, if in two weeks' time, the matter is still not resolved, the Chair will return to make a statement on the motion that will be allowed in the circumstances.

In the meantime, of course the Chair is disposed to assist the House in any way it can, and I am open to suggestions on any particular role that I as your Speaker can play.

I thank the House for its attention.

Postscript: On May 11, 2010, Jay Hill (Leader of the Government in the House of Commons) rose in the House and reported that the discussions among the parties were ongoing. He submitted to the Speaker a request from all of the parties to extend, to the end of the time provided for Government Orders on May 14, 2010, the time permitted for negotiations and a motion to that effect was agreed to.[17] At noon on May 14, 2010, Rob Nicholson (Minister of Justice and Attorney General of Canada) rose in the House to announce that the parties had reached an agreement in principle that would allow the documents to be released to Members for review and, at the same time, would protect the security and confidentiality of their contents. He subsequently tabled a document outlining the terms of the agreement.[18] He noted that the details of the proposal would be outlined further in a memorandum of understanding to be signed by all party leaders by May 31, 2010. The House Leaders of the three opposition parties, Ralph Goodale (Wascana), Pierre Paquette (Joliette) and Libby Davies (Vancouver East) signalled their support for the agreement.[19] On May 31, 2010, the Minister of Justice rose in the House and explained that progress was being made but more time was needed for the negotiations.[20]

On June 15, 2010, the Government House Leader announced, during "Statements by Ministers", that three of the four parties had come to an agreement with regard to the method of dealing with the documents. Mr. Goodale and Mr. Paquette spoke in support of the agreement. Ms. Davies responded that her party was not in agreement with the others and that Jack Harris (St. John's East) would be raising a question of privilege on the matter later that morning.[21] In his question of privilege, Mr. Harris stated that the agreement reached did not respect the Speaker's ruling of April 27, 2010, and that he would be prepared to move a motion that would be consistent with the Speaker's ruling. After hearing from other Members, the Speaker took the matter under advisement.[22] On June 16, 2010, the Government House Leader tabled a memorandum of understanding in the House.[23]

On June 17, 2010, the Speaker delivered his ruling on the question of privilege raised by Mr. Harris. He stated that the memorandum of understanding tabled by the Government House Leader made it apparent that a consensus had been reached among three of the parties and that it was not for the Chair to examine the details of the agreement or to compare it to the agreement in principle tabled on May 14, 2010. The Speaker concluded that the requirements of the ruling of April 27, 2010, had been met and that, accordingly, there was no new *prima facie*

question of privilege. He concluded by stating that he would allow time for the processes and mechanisms described in the agreement to be implemented.[24]

On July 10, 2010, as per the agreement and the memorandum of understanding, an *ad hoc* committee composed of one Member and one alternate from each of the three parties signatory to the agreement, having been sworn to secrecy, began to examine the approximately 40,000 pages of text related to Afghan detainees. In addition, as agreed, an arbitration panel composed of three retired Justices of Supreme Courts was named. The committee and the panel continued their work throughout 2010 and into 2011. On March 26, 2011, the Fortieth Parliament was dissolved.

On June 22, 2011, a few weeks after the opening of Forty-First Parliament, John Baird (Minister of Foreign Affairs) tabled copies of approximately 362 documents totalling over 4,000 pages, and a report of the panel of arbiters, relating to the detention of combatants by Canadian Forces in Afghanistan. By unanimous consent, some of the documents were tabled in English or French only, without translation.[25]

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1. Third Report of the Special Committee on the Canadian Mission in Afghanistan, presented to the House on November 27, 2009 (*Journals*, p. 1101).
2. *Journals*, December 10, 2009, pp. 1193-7.
3. *Debates*, December 10, 2009, pp. 7872-7.
4. *Journals*, March 3, 2010, p. 9.
5. *Debates*, March 5, 2010, pp. 79-80.
6. *Debates*, March 16, 2010, p. 491, *Journals*, p. 85.
7. *Debates*, December 1, 2009, p. 7449.
8. *Debates*, March 18, 2010, pp. 607-17.
9. *Debates*, March 25, 2010, p. 909, *Journals*, p. 137.
10. *Debates*, March 25, 2010, pp. 919-24.
11. *Debates*, March 31, 2010, pp. 1219-29.
12. *Debates*, April 12, 2010, pp. 1351-62.
13. *Debates*, April 1, 2010, p. 1239, *Journals*, p. 175; *Debates*, April 26, 2010, p. 972, *Journals*, p. 284.
14. The word "the" is missing from the published *Debates*.
15. The published *Debates* read "for" instead of "from".
16. The published *Debates* read "2nd" instead of "3rd".

17. *Debates*, May 11, 2010, p. 2637.
18. *Debates*, May 14, 2010, pp. 2847-8, *Journals*, p. 381.
19. *Debates*, May 14, 2010, pp. 2848-9.
20. *Debates*, May 31, 2010, p. 3157.
21. *Debates*, June 15, 2010, pp. 3837-8.
22. *Debates*, June 15, 2010, pp. 3842-6.
23. *Debates*, June 16, 2010, p. 3926, *Journals*, p. 536.
24. *Debates*, June 17, 2010, p. 4021.
25. *Debates*, June 22, 2011, pp. 615-6, *Journals*, p. 133.