
Electronic Surveillance and Members' Privileges

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Parliamentary rights and immunities are priceless possessions. While not enshrined in a single authoritative document, they nonetheless form part of the doctrine by which legislatures function. Occasionally they undergo internal scrutiny and periodic adjustment to reflect the realities of the times.

Professor W.F. Dawson once described parliamentary privilege as "essentially the defensive weapon of a legislature which has been used to protect itself against interference." But are today's legislatures adequately equipped to combat the subtle pressures imposed upon their privileges by the employment of modern electronics? Incidences involving the practice of electronic surveillance are of particular concern.

"Today, technology enables the interception and recording of private communications of individual members without their knowledge or consent."

Overtaken by technological advance, most jurisdictions are incapable of resisting these unauthorized electronic intrusions and equally unable to effect punishment upon offenders. Serious attention should be given to this disquieting phenomenon and its impact upon parliamentary authority. Until this matter is addressed and resolved, the

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confidentiality of members' communications cannot be assured.

Complaints of wiretapped telephones have been received in at least three Canadian legislatures. The member for Nickel Belt, John Rodriguez, rose in the House of Commons on March 16, 1978, to allege that his telephone calls had been intercepted by the RCMP and asked that the matter be referred to the Standing Committee on Privileges and Elections. The motion was rejected on division several days later.

In the British Columbia Assembly on March 5, 1980, the Minister of Consumer and Corporate Affairs rose to move that a Special Committee be appointed to consider allegations relating to the interception of his communications. In its report the Committee concluded that, while actions of the RCMP constituted a breach of privilege and a contempt of the House, no action should be taken because there was no evidence that the police were aware their actions might constitute a breach of privilege or contempt of the House.

The committee also emphasized the full time role of the modern legislator noting that his legislative and constituency duties extended beyond the session and, in many instances, into his home. It further went on record, "in the strongest possible terms as disapproving of these practices, particularly bearing in mind the right of the public to have free and uninhibited access to their elected members." In addition committee members were also unanimous in their opinion that fear of intercepts obstructed members in the performance of their legislative duties.

The report concluded, "Your Committee restates that the beneficiary of the law of privilege is the constituent and the public-at-large... a member does not have 'special status'. The member holds his privilege in trust for those who elected him and privilege exists only to the extent it is interwoven with his role as a legislator. Your Committee believes that parliamentary democracies flourish only when member and constituent can communicate freely, openly and without having the spectre of interception such as the one examined by your Committee."

In the Yukon Assembly it was learned that the telephone of the Minister of Justice had been subject to a wiretap. The matter was referred to a Special Committee on Privileges in April 1980. The Committee solicited information and opinion from a number of authorities, including Robert Fortier, former Clerk of the Senate:

I should think it would not be too difficult to argue that since the telephone is one of the most basic means of communication at the disposal of a member of parliament, and since it is normally used by a member in the legitimate and lawful discharge of his duties, conversations over the telephone relating to any business before the House or one of its committees, are covered by the term 'proceedings in parliament' and that consequently any attempt to interfere with or intercept a member's communications, would constitute a breach of that member's privilege.

In another response, former Counsel to the House of Commons, Joseph Maingot, noted:

A legislature must balance the otherwise lawful activity of the police which it requires to administer justice and which it is permitted to do by the code, with the corporate right of a legislature to administer its precincts and assist it and its members to perform their legislative tasks, the infringement of which may invoke the legislature's penal jurisdiction.

Following extensive examination, the Yukon committee recommended that electronic surveillance of the member's telephone constituted a breach of privilege and should be recognized as a contempt of the House. It further observed that failure of the RCMP to notify the Speaker that it intended

to place a member's telephone under electronic surveillance also constituted a contempt.

Interestingly, this Committee was able to elicit a commitment from the Solicitor General of Canada for the development of a new operational policy to be followed by the RCMP when seeking to intercept members' communications. In consideration of this, the Committee recommended that no disciplinary action be taken and the Speaker be directed to communicate with the Solicitor General of Canada on the subject and report back to the House. In 1983 the Speaker was provided with a final draft of a document entitled *Ministerial Directive on Legislators Privileges and Immunities, Part IV. I of the Criminal Code*. It should be noted that the directive applies only to the activities of the RCMP.

"Each incidence of unauthorized interference with the communications of a member in the performance of his duties threatens the very fabric of parliamentary independence and authority as we know it today."

In the search for an overall solution to this dilemma, consideration should be given to Criminal Code amendments, reflecting the spirit inculcated in the ministerial directive and in line generally with existing provisions regarding the immunities of solicitors. The advisability of seeking amendments to federal, provincial and territorial Evidence Acts might also be considered when examining questions of member privilege.

I urge members everywhere in Canada to give some thought to the importance of this matter and to seeing that measures are taken in respect to the use of electronic surveillance which will ensure that the privileges of the peoples' elected representatives are known and respected.■