PROTECTION OF CONFIDENTIAL COMMUNICATIONS OF MEMBERS OF PARLIAMENT

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Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively and by members of each House individually. While part of the law of the land, privilege is to a certain extent an exemption from the ordinary law; However, its object is not to further the self interest of members. It is intended to protect them from harassment in the course of their legitimate activities in and out of the House. Any act which impairs, whether directly or indirectly, the independence of a member in the performance of his duties may be considered a breach of privilege. In recent years the question has arisen as to whether the interception of a member's confidential communications amounts to a breach of privilege. This article examines the issue in terms of statutory protection available to all citizens, evidentiary privilege available to members of certain professions, and in terms of strict parliamentary privilege.

At common law mere eavesdropping may have been a breach of good manners and possibly a breach of the peace, but it was not a criminal offence in Canada until 1976 when the *Criminal Code* was amended so that everyone who wilfully intercepts a private communication by means of any sort of device, without lawful excuse, or who discloses part or all of an intercepted private communication, without lawful excuse, commits a criminal offence. As a result private communications of members of Parliament are protected by statute from unauthorized interception, to the same extent as the private communications of the rest of the public.

The *Criminal Code* provides that interception and disclosure are lawful where at least one of the intended parties to the communication consents to the interception or where an authorization for the interception is given by a competent court. When a confidential communication is unlawfully intercepted and there is a conviction for the offence, the persons whose communication were intercepted have a right, under the *Criminal Code*, to punitive damages up to $5,000 from the person convicted. Police officers as well as servants of the Crown in the Right of Canada are subject to this sanction. Provincial *Privacy Acts* in British Columbia, Saskatchewan and Manitoba also provide for damages in cases of unlawful interceptions. Other legislation in Ontario, Quebec, Manitoba and Alberta provides that any person who, without lawful excuse or authorization, intercepts or discloses messages passing over telephone lines commits an offence under the legislation. The constitutional validity of such legislation has been affirmed in Ontario.[1]

In Quebec, it appears that the right of privacy is recognized by the civil law so that the unauthorized obtaining and disclosure of information amounts to a *delict*, at least where the conduct of the wrongdoers in obtaining and disclosing the information can be characterized as fault.

Mail, whether that of the public at large or members of Parliament, once posted, is protected by the provisions of the *Canada Post Office Corporation Act*[2] which make it illegal for anyone other than the addressee to open such mail unless authorized by the *Act*. The areas and grounds for authorization are limited and do not appear to provide any basis for the opening of a member's correspondence if he is not engaged in any illegal activity. There is no provision in the legislation

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which provides a member with any special protection merely by virtue of his status as a member.

EVIDENTIARY PRIVILEGE

Some confidential communications are not subject to compulsory disclosure at the instance of a court or other tribunal. The prime example is communications between lawyers and their clients. The rationale for such privileged communications is that the relationship in which the communication occurs requires full and frank disclosure between the parties. There are four criteria which must be satisfied before the common law courts of Canada will recognize the existence of a privilege of this sort:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

However, the mere fact that confidentiality is essential to the viability of the professional relationship under consideration is not, of itself, sufficient for the extension of evidentiary privilege to that relationship; confidentiality is merely a material consideration. Similar treatment is accorded the fact that the information was disclosed to the recipient in confidence.[3]

The specific question of the existence of a professional evidentiary attaching to the relationship between a member of Parliament and member of the public was considered by the Ontario Court of Appeal which held that there was no such privilege.[4] The issue arose in the context of the right of a member of the Ontario Legislative Assembly, Ed Ziemba, to refuse to disclose, in the course of criminal proceedings in which the member had been subpoenaed to testify as a witness, the source of certain information which he had obtained. However, the decision of the case is of general application. The courts held that no privilege entitling the member to refuse to testify existed by virtue of statute, in Ontario, and that the relationship between a member of a legislative assembly and a member of the public did not satisfy all four criteria referred to above. The court rejected an attempt to analogize the position of a member receiving information to that of a police officer or other authority receiving information — in the latter situation, the courts have held that the authority cannot be compelled to disclose the source of the information using a rationale of public interest in the efficient administration of justice.[5] The relevant statutes in Ontario are analogous to those existing in the remainder of the Commonwealth.

Given the reasoning in the *Ziemba* case, it appears that the common law principle which applies to protect confidential communications between the public and government officials and to internal governmental communications and documentation is not applicable to a member of Parliament acting solely in that capacity. Historically, this principle has been referred to as a "Crown privilege", or "prerogative" and the claim of privilege asserted by the government or one of its agencies.[6] There do not appear to be reported cases in the Commonwealth where the principle was applied to information possessed and obtained by a member of the legislative assembly acting solely in that capacity.

There are, however, recent judicial pronouncements in England which indicate that the principle traditionally referred to as the "Crown privilege" or "prerogative" is not accurately described in this fashion. Rather, the principle is one of disclosing or protecting information on the basis of the public interest in the non-disclosure of the information in issue. The position appears to be that the involvement of the Crown seems merely to be evidence from which it can be concluded the public interest is involved.[7]

Although the *Ziemba* case refers to the public interest principle, the case decides only that no general professional evidentiary privilege exists for the relationship between a member of Parliament and a member of the public. The case does not determine that a member of Parliament, as a member, cannot come into possession of information whose non-disclosure might injure the public interest and assert a claim of privilege on that basis in respect of such information in judicial or quasi-judicial proceedings.

There have been judicial pronouncements that the categories of public interest are not closed and evolve with society, altering from time to time. If that is so, it may be that at some future date the courts of Ontario will reconsider the decision in the *Ziemba* case and that the courts of other Commonwealth jurisdictions, assuming they now would find the reasoning of the Ontario Court of Appeal persuasive, would render a different decision if the question of the legislative evidentiary privilege were in issue.

In that respect, it is worthwhile noting that the conception of the duties of the member of Parliament

appears to be expanding beyond that of mere legislation; legislation being only one of a number of duties which now include mediation between government and citizen.[8] This mediation or ombudsman function might, at some future date, form the basis for an extension of the evidentiary professional privilege to members of Parliament acting in that capacity.

PARLIAMENTARY PRIVILEGE

Parliamentary privileges exist, in Canada, by virtue of statute. For the House of Commons and the Senate, they exist by virtue of the *British North America Act*, and the *Senate and House of Commons Act*, which, in essence, provide that both Houses have the privileges, immunities and powers possessed by the United Kingdom House of Commons in 1867 to the extent such privileges, immunities and powers are not inconsistent with the BNA Act, and such privileges, immunities and powers as are defined by an Act of Parliament not exceeding those of the United Kingdom House of Commons. The status of privilege in the provincial legislatures is analogous.

While it is not open to Parliament, at present, to create new classes of *privilege*, the types of act which can amount to *contempt* are not closed and are not limited to those for which there are existing precedents. Accordingly, the fact that electronic surveillance was not contemplated by the Parliament of the United Kingdom in 1867 does not preclude such conduct from amounting to a breach of a right attaching to Parliament or to its members.

In recent years, Special Committees on Privilege of the Yukon and the British Columbia Legislative Assemblies have concluded that any electronic surveillance — wiretapping — of their members' legislative office telephones by the police, at least without the consent of the Assembly, where the member is not implicated in criminal activity, is contempt of that Assembly and a breach of the privileges of speech (Yukon) and of freedom from obstruction (Yukon and British Columbia).[9] The British Columbia Committee came to the same conclusion with respect to wiretapping of a member's constituency office telephone where the matters discussed are "intimately" involved with the member's functions in the Legislature.[10]

In 1957 a British Committee of Privy Councillors examined the question of the interception of communications. They concluded that the unauthorized interception of a member's confidential communications *could* constitute a breach of privilege but that the *government* might, in accordance with applicable law and procedure, intercept the telephone communications of a member without this necessarily constituting a breach of privilege. The Committee further stated: "a member of Parliament is not to be distinguished from an ordinary member of the public, so far as the interception of communications is concerned, unless the communications were held to be in connection with a Parliamentary proceeding".[11]

The following propositions appear to flow from the conclusions of the Committee: (1) there will be no breach of privilege where there is a valid interception by the government where the communications are not in connection with a proceeding in Parliament; (2) there will be a breach of privilege in any other circumstances; and (3) whether or not there is a breach of privilege, the government is nonetheless entitled to intercept the confidential communications of a member, if the interception is authorized by the laws determining the legality of such conduct.

It appears to be the opinion of the Special Committees on Privilege of the Yukon and British Columbia Assemblies, contrary to that of the Committee of Privy Councillors, that the interception of their members' confidential communications is *per se* a breach of privilege or contempt in the absence of any evidence that the member, himself, is engaged in criminal activity. The British Columbia Committee referred to a requirement that there be "evidence that the member is directly implicated in the commission of a crime" if there is not to be a breach of privilege or contempt.[12] Given that the wiretaps and circumstances resulting in the Yukon Committee involved a police investigation into the conduct of someone other than the member, and the Committee concluded that a breach of privilege and contempt had occurred, the requirement as to criminal conduct on the part of the member seems necessarily implicit in the Committee's conclusions.

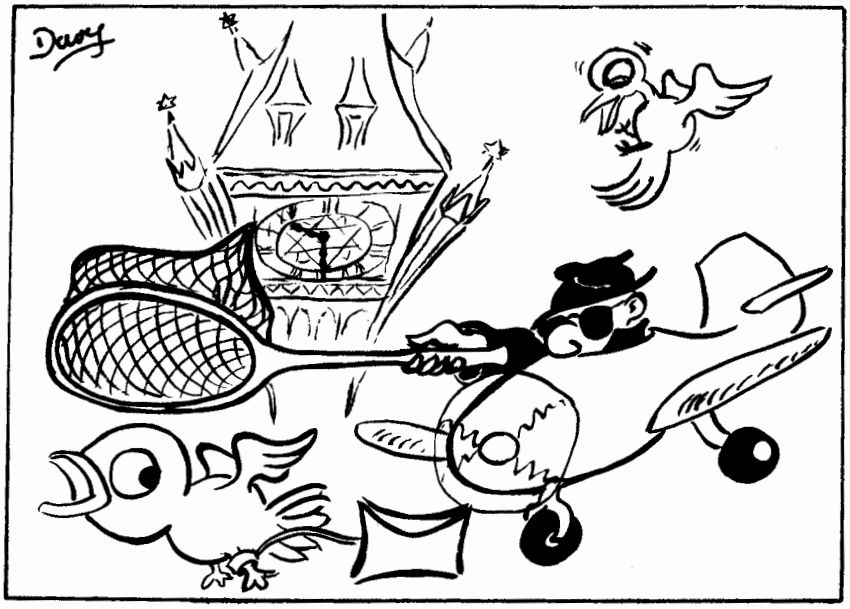
Since, for Canada, criminal conduct on the part of the person whose telephone lines are "wiretapped" is not a necessary prerequisite to a legal interception of his confidential communications, interceptions which would not be either contempt or breach of privilege if the law is as suggested by the Committee of Privy Councillors would be such if the law is as suggested by the Yukon and British Columbia Committees. It appears from their Reports that neither of the British Columbia or Yukon Committees considered it relevant that the interceptions were authorized under the *Criminal Code*. The Reports contain no discussion of the effect of such an authorization on the question of privilege or contempt.

Assuming, then, that an interception of the confidential communciations of a member of Parliament may, in the appropriate circumstance, amount to a breach of privilege or contempt of Parliament, the question is: what protection is given such communications by the fact that the person or agency responsible for the interception may be found in contempt of Parliament or in violation of a parliamentary privilege? Parliament, and legislative assemblies in the common law system, have the power to punish parties whose conduct is contempt of Parliament or is a breach of a Parliamentary privilege. Parliament may commit to jail, reprimand or admonish. Only once, in 1913, has the Parliament of Canada, in that case the House of Commons, committed anyone to jail.[13]

An interesting conundrum arises where the interception was authorized under the *Criminal Code*. As indicated, the conclusions of the Special Committees on Privilege of the Yukon and British Columbia Legislative Assemblies seem to indicate that the person(s) involved in the interception will breach a privilege or be in contempt of the Assembly notwithstanding that the interception was authorized under the *Criminal Code* if the basis of the interception was other than an investigation into criminal conduct on the part of the member. Would any legislature be willing to hold the police, for example, in contempt in such a situation? The British Columbia Committee avoided the problem by finding that the police had no knowledge that their actions in wiretapping the member might be a breach of privilege or contempt and by recommending that no action be taken against the police.

Where the authorization for interception of the member's communication is an order of a court, the interception is not merely legal in the sense of not illegal, that is, not contrary to law. It has been permitted by a positive act of a court. For Parliament to then declare such conduct improper and punish or attempt to punish is to have Parliament impugn the court. The assumption must be made that the court granting the authorization took into account the fact that the interception was to be of a member's communications in its decision as to whether to authorize the interception. The police are placed in an unenviable position if their conduct sanctioned by a court and legal under the *Criminal Code* nevertheless exposes them to penalty. However, if the legality of the interception under the *Criminal Code* does not derive from an order of a court, then this concern does not exist and there does not appear to be any necessary impediment to the interception amounting to contempt or breach of privilege.

Where the interception is the result of some action within the precincts of Parliament taken by the party making the interception and permission for that action has not been obtained from the House or Senate or at least the Speaker of the appropriate House, in advance, then the interception may amount to contempt[14], given the entitlement of Parliament to exclude "strangers" and the requirement that "strangers" present within the precincts of Parliament have the consent of Parliament. However, if the interception is contempt on this basis, it is contempt because of the conduct producing the interception, and not because of the fact of the interception itself. There is some question as to whether the consent



of the Speaker will be sufficient or whether the House itself must consent. In 1973 the House of Commons, Report of the Standing Committee on Privileges and Elections indicated that the Speaker's consent is sufficient. The Report of the Special Committee on Privileges, 1980, of the Yukon Assembly concludes that only the Assembly itself can consent. Where the purpose of the legal surveillance is to permit the covert interception of a member's telephone communications, it seems paradoxical to require that the House consent. It is difficult to see how the member in issue could be kept unaware of the request for the House's consent.

If, in certain circumstances, interception of confidential communications between a member and some other person may amount to a breach of a privilege, merely by virtue of the member's status as a member, it is appropriate to consider what the essential characteristics of such circumstances would be. Clearly, not all interceptions of a member's confidential communications would amount to a breach of privilege, or contempt, whether or not the interception is legal or illegal under the *Criminal Code*. The communication would have to be, at least, in connection with a proceeding in Parliament, and a communication by the member in his capacity as a member. This has been held to mean the exercise of his proper functions as a member. It is difficult to conceive how criminal conduct by a member could satisfy this requirement. Accordingly, there can be no protection for communications relating to such conduct.

The meaning of "proceeding in Parliament" has been considered in the context of the freedom of speech privilege enjoyed by members which grants the member of Parliament certain immunities with respect to anything done or said in the course of proceedings in Parliament. The exact scope of "proceedings in Parliament" is not settled.

There appears to be both a subject matter and a geographical aspect to the "proceedings in Parliament" qualification, although this duality sometimes appears to be overlooked. With respect to subject matter, "proceedings" includes all business of Parliament and its committees. "Proceedings" has been defined by Erskine May to mean some formal action, usually a decision, taken by Parliament in its collective capacity extending to the forms of business in which Parliament takes action, the principal part of which is debate. Proceedings of a committee of Parliament are considered to be within the meaning of "proceedings in Parliament". It appears from the Report of the British Columbia Special Committee on Privilege, 1980, that the Committee may have thought the constituency duties of a member were within the area of matters protected by parliamentary privilege; however, no authorities were cited for this opinion, if it was that.

The ambit of the geographical aspect of "proceedings in Parliament" — the ambit of "in Parliament" — appears unsettled. There is no dispute that this includes proceedings within the walls of the House itself, and its committee rooms. There are now decisions of the courts and conclusions of parliamentary committees which extend the ambit of "in Parliament" to locales beyond the House or its committee rooms on the basis that the proper functions of a member cannot be restricted to conduct occurring on the floor of the House or within the walls of its committee rooms. A judge of the Ontario Court of Appeal has stated that the "modern judicial concept of the meaning and application of the phrase "proceedings in Parliament" is broader than "... in the past" and that there is justification for this expansion in "the development of the complexities of modern government and in the development and employment in government of the greatly extended means of communication."[15] There is a decision of the Quebec courts (the Ouellet case) which is capable of being construed to restrict the geographical aspect of "proceedings in Parliament" to the floor of the House or within the walls of its committee rooms.[16] However, the better view of the Ouellet case, which involved a citation of contempt of court as a result of comments made by Mr. Ouellet in the lobby of the House to a journalist about a judge and a judgment, is that it was concerned only with the question of whether the member was acting in the course of a proceeding — the subject matter aspect. Accordingly the true basis of the decision is that Mr. Ouellet's conduct, as merely a *casual conversation*, was not in the course of a "proceeding" in Parliament and not that the action would have been in the course of a "proceeding", had the proceeding occurred within Parliament but, in the circumstances, was not "in Parliament".

CONCLUSION

The unauthorized interception of confidential communications of a member of Parliament, where the communications relate to the member's capacity as a member and are in connection with a proceeding in Parliament, appears to be a contempt of Parliament as well as a breach of the member's individual parliamentary privilege. Members of Parliament do not have, nor do they require, any special immunity to the interception

of confidential communications provisions of the *Criminal Code*. Whether or not the unauthorized interception of members' communications, as members, constitutes a contempt of Parliament or a breach of parliamentary privilege, there is no evidentiary privilege under statute or common law, attaching to confidential communications in a relationship involving a member of Parliament carrying out his duties as a member, merely by virtue of the status as a member, which entitles a member to refuse to divulge in court or before any other competent tribunal confidential information received by the member by virtue of and in his capacity as a member.

The relationship of a member of Parliament with his constituents or the public is not one which, in the opinion of at least one appellate court, requires confidentiality to ensure viability. There is legislation of general application to all private communications making it an offence to intercept such communications without lawful authorization. Such legislation is applicable to members of Parliament acting in their official capacities as well as their private capacities and extends to their official communications all the protection provided by the legislation, albeit in their personal not parliamentary capacities.

NOTES

1. *R.* v. *Chapman and Grange* (1973), 34 D.L.R. (3d) 510 (Ont. C.A.)
2. Bill C-42, 1st Sess., 32nd Parliament, 29-30 Eliz. II, 1980-81, Royal Assent April 23, 1981, repealing the *Post Office Act*, R.S.C. 1970, P-14.
3. *Inter alia. Reference Re Legislative Privilege* (1978), 83 D.L.R. (3d) 171 (Ont. C.A.).
4. *Reference Re Legislative Privilege, supra.*
5. *Reference Re Legislative Privilege*, 83 D.L.R. (3d) at 168-171.
6. Sopinka and Lederman, *The Law of Evidence in Civil Cases*, Toronto, Butterworths, 1974, at 237-261.
7. *Rogers* v. *Home Secretary*, (1973) A.C. 388 at 400 (H.L.) and *D.* v. *N.S.P.C.C.*, [1977] 1 All E.R. 589 at 601-02, 605 *et seq.* (H.L.).
8. Yukon, Legislative Assembly, *Report of the Special Committee on Privileges*, 1980, at 16. See also, *A.G. of Ceylon* v. *De Livera*, [1963] A.C. 103 at 125 (P.C.).
9. Yukon, *Report of the Special Committee on Privileges*, 1980, and British Columbia, *Report of the Special Committee on Privilege*, 1980.
10. *Report of the Special Committee on Privilege*, 1980, at 4.
11. United Kingdom, *Report of the Committee of Privy Councillors*, 1957, Cmnd. 283, at 27-28.
12. British Columbia, *Report of the Special Committee on Privilege*, 1980 at p. 5, and Yukon, *Report of the Special Committee on Privileges*, 1980, at p. 17.
13. See Canada, House of Commons, *Debates*, 1912-1913, at pp. 3357 ff., 3451 ff., and 3645 ff. Where a person is so committed, he must be released when the House of Commons prorogues, if not released earlier: Erskine May (1976) at pp. 127-128.
14. Canada, House of Commons, *Debates*, September 19, 1973, v. II, at p. 3; Canada, House of Commons, *Report of the Standing Committee on Privilege and Elections*, 1973; Yukon, *Report of the Special Committee on Privileges*, 1980, at pp. 20-24, 25; British Columbia, *Report of the Special Committee on Privilege*, 1980.
15. *Roman Corp. Ltd.* v. *Hudson's Bay Oil and Gas Co. Ltd.*, (1972), 23 D.L.R. (3d) 292 at 299 (Ont. C.A.) affirmed on other grounds (1973), 36 D.L.R. (3d) 413 (S.C.C.).
16. *Re Ouellet* (No. 1) (1976), 67 D.L.R. (3d) 73 (Que. Sup. Ct.), affirmed (1977), 72 D.L.R. (3d) 95 (Que. C.A.).