HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

41st Parliament, First Session

The Standing Committee on Procedure and House Affairs has the honour to present its

FORTY-SECOND REPORT

Your Committee, which is responsible for all matters relating to the Standing Orders, procedure and practice of the House and its committees, pursuant to Standing Order 108(3)(*a*)(iii), has undertaken a study in relation to parliamentary privilege and access to information requests, and is pleased to report as follows:

Parliamentary privilege and access to government information are two fundamental tenets of the Canadian system of government ensuring that our democracy is, and remains, strong and healthy.

It is well established, in our Westminster parliamentary system, that the House of Commons and its Members enjoy certain rights, immunities and privileges to assure their independence in the performance of their constitutional functions. Parliamentary privilege, and the rights and immunities it confers, result from the centuries old struggle of the U.K. House of Commons in the assertion of its independence and the establishment of its distinct role within Parliament.

Enacted in 1982, the *Access to Information Act* embodies the principle that information held by the government should be made available to the public. It is a key instrument that renders meaningful certain rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, such as freedom of expression and the democratic rights. Access to government information is also an effective tool to ensure that politicians and public servants remain accountable to the public.

Parliamentary privilege may at times seem at odds with contemporary values and principles. However, your Committee believes that the rights and immunities afforded by parliamentary privilege continue to serve Members in the performance of their constitutional functions. At the same time, your Committee believes that parliamentary privilege can be exercised in a manner that will ensure that it does not needlessly impair other fundamental principles of our democratic system of government, such as freedom of access to information held by the government, even when that information relates to parliamentary proceedings.

Background

In June 2012, the Office of the Auditor General received an access to information request pursuant to the *Access to Information Act*, which sought "*[a]ll e-mails respecting the appearance of the Auditor General before Parliamentary Committees between 17 Jan 2012 and 17 Apr 2012*." On June 20 and 21, 2012, the clerks of five standing committees received third party notice pursuant to section 27 of the *Access to Information Act* in relation to records sought in the access to information request. On June 21, 2012, the House of Commons adjourned until September 17, 2012. Correspondence between the Auditor General and the Office of the Law Clerk and Parliamentary Counsel followed; the latter objecting to the disclosure as the materials sought were considered to form part of parliamentary proceedings and therefore protected by parliamentary privilege. On August 21, 2012, the House of Commons was informed of the Auditor General's decision to disclose the documents, notwithstanding the assertion of parliamentary privilege since parliamentary privilege was not among the enumerated exceptions to disclosure listed under the Act. On September 7, 2012, the Office of the Law Clerk and Parliamentary Counsel filed a notice of application for judicial review before the Federal Court on behalf of the House of Commons in order to prevent the disclosure of the documents, until the constitutional question of the application of parliamentary privilege in the context of access to information requests was resolved.

On September 17, 2012, the first sitting following the 2012 summer recess, the House of Commons resolved to waive its privilege in relation to the access to information request. It unanimously resolved:

> That, having considered the nature of a request made of the Auditor General under the *Access to Information Act*, the House of Commons waives its privileges relating to all emails pertaining to the Auditor General appearing before a parliamentary committee from January 17 to April 17, 2012; and that the Speaker be authorized to communicate to the Auditor General this resolution.

Immediately following the adoption of this resolution, the Speaker of the House of Commons made a special statement explaining that he and House officials had acted in accordance with past precedents in similar matters. He underlined that the role of the Speaker was to act as the guardian of the rights and privileges of the House and its Members. The Speaker also suggested that "a prompt and thorough review of the question by the Standing Committee on Procedure and House Affairs" be undertaken (*Debates*, pp. 10004–10006). Accordingly, the Committee decided to undertake a study on the matter.

Evidence

On October 16, 2012, the Deputy Clerk of the House of Commons, Mr. Marc Bosc, and the Deputy Law Clerk and Parliamentary Counsel, Mr. Richard Denis, appeared before the Committee. They provided the Committee with the relevant facts concerning this matter, and offered an overview of the rules governing access to information and its relation with parliamentary privilege. On November 22, 2012, the Information Commissioner of Canada, Ms. Suzanne Legault, and Mr. Michel W. Drapeau, Professor at the Faculty of Law of the University of Ottawa, appeared before

the Committee. Ms. Legault also provided the Committee with written submissions. Ms. Legault and Mr. Drapeau discussed the access to information regime in place in Canada. On December 6, 2012, the Clerk of the House of Commons, Ms. Audrey O'Brien, and, again, the Deputy Law Clerk and Parliamentary Counsel, Mr. Denis, appeared before the Committee.

This evidence presented to the Committee offered two different approaches with respect to the relationship between parliamentary privilege and access to information. Ms. Legault and Mr. Drapeau asserted that there is no legal basis to refuse the disclosure of parliamentary privileged records, as parliamentary privilege is not a listed exemption or exception under the *Access to Information Act*. By contrast, the Clerk, the Deputy Clerk, and the Deputy Law Clerk and Parliamentary Counsel of the House of Commons stated, in reference to the constitutional nature of parliamentary privilege, that the Act must be applied and interpreted in a manner consistent with the Constitution, and therefore must not infringe upon the House and its Members' privileges.

The Committee is grateful for the assistance provided by the witnesses.

Parliamentary privilege

Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament ("*Parliamentary Practice*") defines parliamentary privilege as "the sum of the peculiar rights enjoyed by each House collectively … and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals" (24th ed. (2011), p. 203).

In Canada, parliamentary privilege is rooted in the provisions of the *Constitution Act, 1867*, the preamble and section 18. Under the latter section, both Houses of Parliament have claimed the full extent of parliamentary privileges enjoyed by the UK House of Commons at the time of Confederation through section 4 of the *Parliament of Canada Act.* Since parliamentary privilege is rooted in the *Constitution Act, 1867*, it has constitutional status equal to the other parts of the Canadian Constitution, including the *Canadian Charter of Rights and Freedoms*.

Since parliamentary privileges form part of the Constitution, laws must be interpreted and applied in a manner consistent with them, and where there is a conflict between privileges and statutory provisions, the statutory provisions are "of no force and effect" to the extent of the inconsistency. This constitutional principle is a fundamental postulate and organizing principle of the Canadian constitutional structure, and is clearly set out in subsection 52(1) of the *Constitution Act, 1982* that provides: "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

Courts have recognized the special constitutional status attached to parliamentary privilege and the limitations it imposes over their own jurisdiction, and that of the executive. Courts have accepted that they cannot enquire into the merits of the exercise of a privilege once it has been established. Parliament is the sole judge of the appropriateness of the exercise of any of its privileges.

As part of its privileges, the House has the exclusive right to regulate its own internal affairs, which includes the control over its own proceedings as they relate to the House's constitutional functions. As noted by *Erskine May's Parliamentary Practice*, the House has "the exclusive cognizance of [its] own proceedings" and retains "the right to be sole judge of the lawfulness of [its] own proceedings, and to settle – or depart from – [its] own code of procedure" (24th ed. (2011), p. 227). This privilege has old roots in our parliamentary system. In 1689, the U.K. *Bill of Rights* recognized Parliament's exclusive jurisdiction over its proceedings by stating that "proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament" (Article 9). The control of the House over its proceedings is at the core of the fundamental constitutional separation of powers, guaranteeing the legislative branch autonomy from executive and judicial powers.

The exclusive right of the House to control its proceedings is a right which extends to its committees, and constitutes the authority for the oft-repeated proposition that committees are the "masters of their own proceedings" or "masters of their own procedures," subject, of course to any limitation imposed by the House. Parliamentary committees owe their existence to the House and are empowered only to the extent that the House has authorized, be it by standing or special orders. They are answerable of their proceedings to the House, and only to the House.

There is no single and definitive definition of "parliamentary proceedings" in Canadian *lex parliamentaria*.

Joseph Maingot's *Parliamentary Privilege in Canada* explains that: "[a]s a technical parliamentary term, 'proceedings' are the events and the steps leading up to some formal action, including a decision, taken by the House in its collective capacity. All of these steps and events, the whole process by which the House reaches a decision (the principal part of which is called debate), are 'proceedings". Maingot also refers to all events necessarily incidental to the enactment of laws, and other procedure as petitions, questions, notices of motions, etc., as part of the "proceedings in Parliament" (2nd ed., (1997). p. 80).

House of Commons Procedure and Practice (2nd ed., (2009), pp. 91-92) and Maingot (2nd ed., (1997). p. 80) also refer to the definition of *Erskine May*'s *Parliamentary Practice*:

> The primary meaning of proceedings, as a technical parliamentary term [...], is some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of article IX [of the *Bill of Rights, 1689*]. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of motion, or presenting a petition or report from a committee, most of such action being time-saving substitute for speaking.
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> Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Members of the public also may take part in the proceedings of a House, for example by giving evidence before it or one of its

committees, or by securing the presentation of a petition (24th ed. (2011), pp. 235-236).

In sum, "parliamentary proceedings" include all actions accomplished in the course of the transaction of business by the House and its committees, and any actions accomplished for that purpose or incidental to it. Speeches (debates), notices of motions, giving of evidence orally and through written submission are examples of actions that are part of the proceedings. Documents prepared in anticipation of the transaction of business by the House of a committee such as briefing or speaking notes, and correspondence from or to House or committee officials also form part of parliamentary proceedings (see *Erskine May*'s *Parliamentary Practice*, 24th ed. (2011), pp. 237-238).

Process for Access to Information Request

The House of Commons is not subject to the provisions of the *Access to Information Act*. It nonetheless does, from time to time, receive third party notices under section 27 of the Act when the materials sought from a government institution contain information relating to the business of the House. In those cases, the records sought are in the possession of a government institution subject to the Act, but may nonetheless form part of Parliament's proceedings. This was the case with respect to the materials that were the subject of the third party notice received from the Office of the Auditor General earlier this year. The established practice of the House has been to decline to consent to the disclosure of records that formed part of the proceedings of the House or its committees, as such records are protected by parliamentary privilege, and to notify the government institution that any requests for records relating to parliamentary proceedings were to be made directly to the House of Commons. Except in the most recent case involving the Office of the Auditor General, government institutions have always accepted the House's constitutionally based position. Ms. Legault and Mr. Drapeau, during their appearance before the Committee, took the same position as the Auditor General; short of a legislated exemption or exception permitting refusal of disclosure, parliamentary privileged records, they argued, ought to be disclosed despite objections by the House.

The Committee is concerned that this position ignores the constitutional nature of parliamentary privilege and the constitutionalism principle entrenched in subsection 52(1) of the *Constitution Act, 1982*. Just as the *Access to Information Act* must be interpreted and applied in a manner consistent with the Constitution, including the *Canadian Charter of Rights and Freedoms*, the Act must also be interpreted and applied in a manner consistent with parliamentary privilege. The position advocated by the Auditor General, Ms. Legault and Mr. Drapeau would seriously impair the independence of the House and its committees by potentially jeopardizing their ability to accomplish their constitutional functions. It could, for example, render meaningless the decision of a committee to hold its meetings *in camera*, as an access to information request could render public any record under the control of a government institution that relates to such a meeting.

Records forming parts of the parliamentary proceedings of the House and its committees ought to be considered as exempted under the Act; they ought to be disclosed only with the permission of the House or its committees and in accordance with guidelines adopted by the House as those contemplated by this Report. In order to assert its constitutional privileges, the House and its

committees must be notified when records sought may form part of their parliamentary proceedings. While the third party provisions of the Act do not expressly contemplate notice to the House or its committees when privileged records are sought, providing such a notice is in line with the spirit of the Act and it allows the House to exercise its constitutional privilege to control its proceedings.

Ms. Legault and Mr. Drapeau expressed concerns as to the absence of any reference to parliamentary privilege in the Act. The Committee, for the reasons expressed above, cannot subscribe to the conclusion they draw in this regard.

The Committee does, however, agree that at the very least for reasons of administrative convenience it would be desirable to reflect through legislative amendments the constitutional obligations imposed on government institutions in respect of records forming part of the proceedings of the House and its committees. Such an amendment would facilitate the handling of access to information requests by government institutions; it would also serve an informative and instructional purpose by educating and making government institutions aware of parliamentary privilege.

While the constitutional right of the House and its committees over their parliamentary proceedings is unquestionable, the Committee believes that a more transparent and functional approach could be taken by parliamentary committees in their dealings with third party notices under the *Access to Information Act* without compromising parliamentary privilege.

The Committee therefore recommends a new process for access to information requests in which the House is a third party. Under this proposed process, documents that form part of the proceedings of the House would be classified into four distinct categories. These categories would guide the responses of House officials to third party notices. In cases of doubt, House officials would ultimately defer to the House committees themselves the decision as to whether or not a document should be disclosed. It is important to underline that, in all cases, whether such records are disclosed or not, the House would make it clear that it considers that the documents remain subject to parliamentary privilege. By agreeing to disclose documents, the House in no way would be waiving its privileges and the usual protections afforded to its Members, its staff or its witnesses would remain.

The four categories proposed by the Committee are as follows:

- **Public and accessible records**

Public and accessible records include, for example, proceedings of House of Commons committees already published, broadcasted or posted on the Parliamentary website, such as the *Evidence* and *Minutes of Proceedings* of committee meetings. Speaking notes and documents distributed by witnesses to committees as part of their appearance or any brief submitted to a publicly accessible proceeding of the committee in relation to a public study are also included in this category. House officials would always consent to the disclosure of such documents, as they are already public and accessible, and disclose the documents in a timely way.

- ***In camera* records**

In camera records include, for example, transcripts of *in camera* meetings, draft reports or documents prepared for or distributed at an *in camera* meeting, or any document referring to *in camera* parliamentary proceedings or documents from which the proceedings at an *in camera* meeting may be deduced. Consent to the disclosure of these records should never be given by House officials. Moreover, the disclosure of *in camera* materials constitutes a breach of the privilege of the House, and could lead to a finding of contempt of Parliament. Accordingly, House officials should indicate, in such cases, that the House objects to the disclosure of such documents.

- **Other records that are not publicly accessible and are not part of an *in camera* proceeding**

The disclosure of records that are not publicly available, but are not part of an *in camera* proceeding, would be made on a case-by-case basis depending on the content of the records sought.

We recommend that House officials should not consent to the disclosure of records that they have determined to be of a sensitive nature. These would include, for example, procedural advice from the committee clerk to the chair, a Member, staff, or government officials. Another such case would be responses from potential witnesses that contain personal information (relating to an illness, for example). In assessing the sensitivity of information, House officials should be guided by exceptions to disclosure outlined in information and privacy laws.

Other records that are not determined to be sensitive in nature by House officials, such as routine correspondence on administrative matters, may be disclosed with the authorization of the responsible committee when the disclosure would not cause any prejudice to the House, its committees or anyone who participated in the parliamentary proceedings. In these cases, the decision as to whether or not a record should be disclosed or disclosed with redactions should be taken by the applicable committee, as custodians of the record, and the matter should be dealt with during an *in camera* committee proceeding. The decision should also be taken in a timely fashion so as to respect the time lines under the *Access to Information Act* as much as possible. If the committee which had possession of the record no longer exists, as in the case of a legislative committee following its report on a bill committed to it, then the matter should be dealt with by the Standing Committee on Procedure and House Affairs. Regardless of which committee is responsible, consent to disclosure of such records shall require unanimous consent from the committee. This requirement for unanimous consent shall, in no way, limit the ability of the House to deal with such a matter. If, however, such matters arise during prorogation or dissolution periods (as opposed to lengthy periods of adjournment such as the summer recess), then the Speaker of the House of Commons, as the guardian of the rights and privileges of the House and its Members, will decide whether or not a record should be disclosed.

- **Documents prepared by government institutions for a parliamentary proceeding but never submitted**

As noted above, materials such as briefing notes, speaking notes, draft statements that were prepared by government institutions *solely* for the purpose of witnesses appearing before a committee or participating in any other parliamentary proceeding are protected by privilege. While such material may not be formally presented to the committee, and may only be known to the witness and the government institution, such preparation for committee appearances is expected and designed to assist committees in their business. This material forms part of the parliamentary proceedings and hence is protected by parliamentary privilege. However, the House does not object to the disclosure of this material which will therefore be released unless excepted or exempted under the Act.

In all cases, the materials, when released, are made available on the condition, set out below, that the requestor be advised that the records and their content remain protected parliamentary privilege.

However, in the event that any materials in the sole possession of a government institution were prepared in relation to, or to refer to, *in camera* proceedings, the committee has a primary interest in the protection of its privileges and the material cannot be disclosed under any circumstances.

Protecting Privilege over Documents Disclosed

Since the House or its committees have no means of knowing the reason for any access to information request, or what use may be made of any document disclosed, the disclosure of any document must remain subject to the protection afforded by parliamentary privilege. In the same way that materials published either in print or on the parliamentary website remain protected through parliamentary privilege, documents made public through an access to information request also remain protected by parliamentary privilege. For example, while the parliamentary debates (*Hansard* and committee *Evidence*) are made available publicly, parliamentary privilege continues to protect Members, as it does any person participating in the parliamentary proceedings, from any legal action arising therefrom. As indicated above, the House is the sole judge of its own proceedings, and any person participating in the proceedings of the House is answerable only to the House.

Upon disclosing the documents, the government institution is encouraged to inform the requestor that these remain covered by parliamentary privilege.

Conclusion

For all these reasons, the Committee recommends that the "Process for Access to Information Request" explained above be adopted by the House and govern the handling of access to information requests where the information forms part of a parliamentary proceeding.

The process recommended by the Committee is aimed at safeguarding the independence and autonomy of the House in the conduct, and control, of its proceedings, while addressing current expectations of the public in regard to access to information. The Committee is conscious of the importance of the values and rights at stake, and will actively monitor the implementation of the proposed process to make necessary adjustments to it as the need arises.

Request for Government Response

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (*Meetings Nos 46, 50, 51, 52, 54, 55, 57, 58, 60, 61 and 62*) is tabled.

Respectfully submitted,

JOE PRESTON

Chair

APPENDIX

SUPPLEMENTARY OPINION – NEW DEMOCRATIC PARTY OF CANADA

The New Democratic Party members of the Standing Committee on Procedure and House of Affairs respectfully submit this supplementary opinion:

Summary

While we recognize that there is a constitutional protection for the privileges of the House of Commons, we believe that this does not mean that the House or the Senate should automatically assert itself over another quasi-constitutional right, namely that of access to information.

In September of 2012 the House unanimously agreed that the records related to an Access to Information Act request filed with the Auditor General should be released. We think that in the future the House should continue to release records in similar circumstances.

The New Democratic Party members of the Standing Committee on Procedure and House of Affairs also believe that the House should pursue, as a matter of priority, amendments to the Access to Information Act to more clearly set out what documents are encompassed by privilege and what definition of parliamentary privilege should be added to statute law.

Debate over law vs constitutional norms

The New Democratic Party members of the Standing Committee on Procedure and House of Affairs recognize that there is legitimate debate over how far one may go in reading into a statute mechanisms or actors that Parliament could easily have expressly included but failed to do.

For example, interpreting a statute in accordance with Charter rights knows certain limits, and the same in all likelihood is the case for constitutional privileges. There are well-founded policy reasons, including those grounded in the rule of law, for limits on the power of courts, statutory officers, and civil servants to read missing provisions into a statute in the name of the principle that statutes are presumed to comply with the Constitution.

One such reason is that citizens must be able to know, through reasonable effort, the scope and content of a statute when seeking to make use of this statute; the Information Commissioner placed some importance on this reason.

Another reason is that a statute may protect or partly protect other constitutional norms than those (here, parliamentary privilege) that are being argued to be implicit in the statute. In such situations, it may be necessary for a conflict of constitutional norms to be acknowledged – and to require Parliament to be the one to resolve the conflict through amending legislation rather than have courts or officials read missing text into the statute.

While freedom of information may not be a free-standing Charter right, it is closely connected to both the freedom of expression and right to vote norms, as well as to the broader notion articulated in R. v. Oakes (Supreme Court of Canada) that the values and principles of a "free and democratic society" recognized by section 1 of the Charter are the genesis of the specific Charter protections.

It is no doubt partly because of freedom of information's connections to the Charter in the above described ways – and perhaps also the fact that international human rights law applicable to Canada protects freedom of expression and freedom of information alongside each other in the same provisions (e.g. article 19 of the International Covenant on Civil and Political Rights) – that Parliament ascribed characteristics to the Access to Information Act that led to the Supreme Court of Canada determining the Act is a "quasi-constitutional" statute.

While the constitutional right of the House and its committees over their parliamentary proceedings is unquestionable, NDP members of the committee believe that a more transparent and functional approach could be taken by parliamentary committees in their dealings with third party notices under the Access to Information Act without compromising parliamentary privilege.

Amendments to the Access to Information Act

We believe that due to the differing interpretations of existing law and constitutional norms presented by witnesses for this study, the House should consider amending the Access to Information Act to include a new discretionary exemption for parliamentary privilege.

This would be consistent with the recommendations of the 1987 Report of the Standing Committee on Justice and Solicitor General entitled "Open and Shut: enhancing the right to know and the right to privacy" as well as the 2002 Task Force report entitled "Access to Information: Making it Work for Canadians".

Other Westminster systems have similar exemptions in place. Such an amendment would prevent costly legal battles, and would provide statutory basis for the House of Commons to act.

Such an exemption would also prevent government institutions from using parliamentary privilege in a way that would exclude their own documents.

Without a statutory provision, and with an overly broad interpretation of privilege, government departments may try to exempt or exclude information that relates to Parliament. This could include the Question Period cards of Ministers, briefing notes for officials who have been asked to appear before committees, or even observations about what has happened in Parliament.

The history of the Access to information Act in Canada shows that even minor exemptions or exclusions will be interpreted in an overly broad way without clear language in the statute and without political leadership that favours disclosure over secrecy.

It would be important that such an exemption be discretionary (namely that access could be granted by the House) and also that the exercise of the discretion would be weighted in favour of disclosure to the public.

Definition of privilege in statute law

At the December 6, 2012, meeting Richard Denis, Deputy Law Clerk and Parliamentary Counsel, proposed "an amendment to the Parliament of Canada Act, which is a statute, but one that recognizes the privileges of the House, just as the Constitution does itself. The link to the Constitution and the fact that privilege has that nature would still be maintained and clearly expressed: that it must supercede, if you wish, and be recognized by the operation of the different statutes or in situations when privilege was raised as an issue".

We believe that Parliament should consider defining parliamentary privilege in a statute, ideally the Parliament of Canada Act, in a way that is consistent with the Constitution and can clearly be referenced against both existing and future legislation.

Conclusion

This study was illuminating and educational for the Members of the Standing Committee on Procedure and House Affairs. As our Chair noted on several occasions, every point brought up by witnesses raised more questions. We certainly agree.

This study should only be the beginning of a discussion on the subject of Access to Information and the Parliament of Canada. There must be ways for Parliament to modernize and provide greater transparency to the public.

While steps have been taken in terms of the greater release of information on spending by the House of Commons and also in terms of internet access to committee proceedings, more must be done. For example, digitization of government answers to order paper questions has not yet resulted in online searchability of those answers; this could be a useful next step in transparency.

Parliamentary privilege is important in protecting freedom of speech by Members of Parliament and protecting them from intimidation, but when it is used to hide information that the public would expect to be available, its invocation becomes a detriment to the standing of Parliament.