A Procedural Note on the Recent Use of Parliament's Power to Summons

by Derek Lee, MP

In December 2007 the Canadian House of Commons had to deal with a matter of Privilege involving its power to "send for persons, papers and records." The Standing Committee on Access to Information, Privacy & Ethics was studying a question of ethics following public reports that a former member /Prime Minister had received large cash payments from an individual at the end of the Member's mandate about 15 years ago. The Committee sought the attendance at public meetings of both that former Member and the cash donor, Karlheinz Schreiber and following passage of appropriate motions, the committee Clerk sent invitations and served orders to attend (styled as a summons). Both parties (after discussions through counsel and agents) indicated they would attend. But the fact that Mr. Schreiber was then actually in custody at a provincial facility under a federal judicial extradition order appeared to raise complications in arranging his attendance. It was also believed his removal to an overseas state and outside the jurisdiction of the Committee was imminent. This article raises some concerns about possible unintended consequences of the process that was used in the Schreiber case.

The power to Send for Persons, papers and Records (similar to a power of subpoena in civil procedure) is one of Parliament's undoubted privileges and is reconfirmed in each new Parliament during the Throne Speech proceedings. Its roots are centuries old[1] but like so much of the British common law and Parliamentary heritage, the procedure has not been codified. In the Canadian House of Commons, that full power without any reservation (unless the House order otherwise) been given under Standing Order 108 to each of the standing committees.

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However, in most of their work, there is no need to use the formal "persons, papers and records" power since most committee witness appearances are by request and invitation. The House itself rarely uses that power. So it might be observed that a power of that scope, which is not codified, and rarely used, could easily be the subject of some misunderstanding.

The Committee was under several real time constraints, including the probable removal of Karlheinz Schreiber under the extradition process, where custodial authorities, 400 kilometers away in Toronto felt bound by the judicial order and were genuinely unfamiliar with the weight and priority of the Committee Parliamentary order. It was in this complex circumstance that the committee decided to seek the help of a "Speaker's warrant" in an attempt to pre-empt some of the uncertainty. To do this, the Committee reported its request to the House and the House concurred in that report, thus enabling the Speaker to prepare and send that document to affected parties. A Speaker's warrant is best seen as a "facilitat-

ing" document, reflecting the will of the House and the Speaker on its behalf, and directed to parties implicated in the process. In marshalling the authority of the House in support of the committee's order, the legally complex questions did clarify themselves (helped in some measure by the apparent willingness of Mr. Schreiber to attend) and the witness (still in custody and subject to the extradition process) properly attended as required.

This course of action chosen by the Committee (resort to the use of the Speaker's warrant) possibly raises a real underlying concern, so far unaddressed on the public record. Although that warrant was sought to buttress the earlier Committee order in the face of jurisdictional complexity, its use may raise two large unintended complications.

First, the request for and use of the warrant may have resulted in a public perception that the Committee order on its own was weak, ineffective or incapable of execution. Any acceptance of this perception in Parliament or more broadly raises concerns about respect for future Committee "persons, papers and records" orders. Remember that this power is fully delegated by the House to the Committee so that a "persons, papers and records" order from a Committee has the same legal weight as a similar order from the House. And because the "persons, papers and records" procedure is not codified, even one misuse or mistake could become a precedent on which future Houses or the public rely[2]. Should the Committee's decision be taken and used out of context, it could arguably undermine perceptions of the authority and weight of all future Committee "persons, papers and records" orders.

Secondly, the Committee's quick resort to the House to seek the Speaker's warrant occurred in the environment of a "minority parliament". Opposition members held a majority of seats, both on the committee and in the House, and working together, those parties were able to overcome possible resistance by Government members and quickly produced a House Order authorizing the Speaker to act with a "warrant". It is far from clear that a "government-controlled" House would have cooperated and responded so quickly in this case and concurred in this committee request. In summary, Speaker's warrants will not always be so readily attainable and should not therefore be seen as a routine component of a Committee "persons, papers and records" order.

It might be useful to note that in the event a witness refused to attend on the order of the House or of a Committee, that refusal would likely be a contempt, and in both cases, the refusal and contempt would have to be taken to the floor of the House for enforcement procedures. Enforcement of House and Committee orders (contempt, arrest etc.) remain the authority of the House and have not been delegated to Standing Committees.

While it is clear that the body of parliamentary privileges under our Constitution cannot be diminished unless explicitly altered by the House, it is also probably true that a House could over time, by precedent, diminish the scope and usage of the privileges. So in that sense, the health of future Parliamentary processes may depend on the health of our own Parliament. The Standing Committee on Access to Information Privacy and Ethics in the above example, acted properly and within the rules and accorded respect to the witnesses and properly served public and Parliamentary interests. But the decision to seek the assistance of the Speaker in the case of the witness Karlheinz Schreiber should not be seen as undermining the fully valid authority of its own original "persons, papers and records" order but rather as helping to clarify the complexity of the dual jurisdiction custody and time constraints present in that instance.

Notes

1. "That the privileges of the House involved in the inquiry before the Court were indisputable, because, 1st, That House, which forms the Great Inquest of the nation, has a power to institute inquiries, and to order the attendance of witnesses, and in case of disobedience…. Bring them in custody to the Bar for the purpose of examination; and 2nd, If there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer it, and a willful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody, and to be brought to the Bar to answer the charge; and further, the House, and that alone, is the proper judge when these powers, or either of them, are to be exercised." – *Gosset v. Howard* (1847)(Court of the Exchequer) 10 Q.B. 411, at 451.
2. One recalls the case, where a Member of the Canadian House was stood at the bar "in 1992" and admonished for grabbing at the Mace at the end of a sitting. However, parliamentary precedent clearly showed that Members are required to "stand in their own place" for discipline procedures, and only members of the public stand at the bar. Given the rarity of such events, the question is whether this incorrect procedure will become a precedent for future Member discipline in Canada's House. (See *Debates* Oct 31, 1991, p.4309).