

Report of the Special Committee on Privileges of the Yukon Legislative Assembly document tabled in the Yukon Legislative Assembly, 3rd session 24th Legislature, 1980 29 p. and appendicies.

Parliamentary privilege is undoubtedly one of the most abused and debased terms in use in Parliament today. One has only to read the daily *Hansard* to realize how many fraudulent questions are proposed, largely as a means of obtaining the floor to make a speech which otherwise would be out of order. Nevertheless, occasionally, a question arises which should, and does, arouse interest and at least on the surface appears to bear some relationship to the true meaning of the words.

Last year the Legislative Assembly of the Yukon had such a case, and in the middle of the year, a special committee reported. The question involved the wiretapping of a member's telephone while a parliamentary "stranger" was under investigation. The Committee reached four conclusions.

The wiretapping was a breach of the member's privilege of freedom of speech.

The action was a contempt as it obstructed all members in the performance of their duties.

The action was a contempt as the Speaker was not informed that the police were acting.

The Speaker must be informed when wiretapping is carried out, but does not give or withhold consent for the action. He may judge whether or not to inform the House.

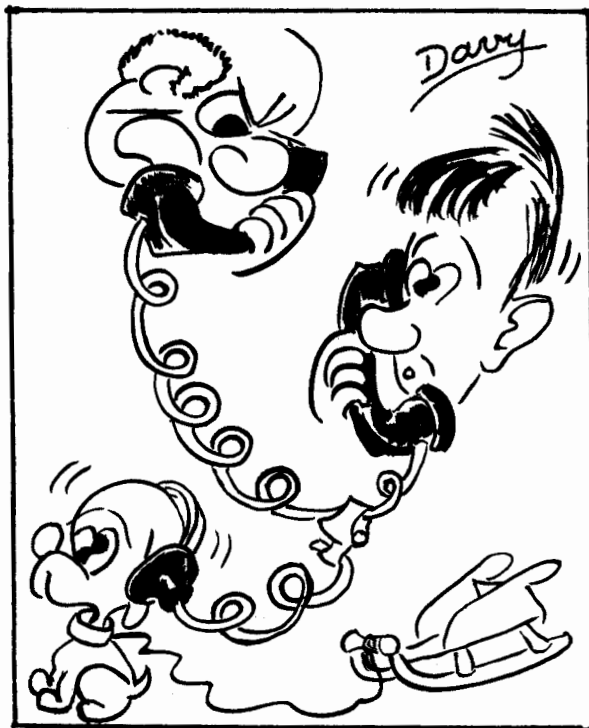
In reaching its findings the committee sat *in camera* and its deliberations are not, therefore, contained in the report. It did submit to the House twenty-four pages of reasoning, eight pages of extracts from the Yukon *Hansard* as background, the report of a British Columbia committee on a similar case, and nearly sixty pages of

advisory opinions from a number of outside authorities.

The materials submitted by the committee well illustrates how difficult the whole question of privilege may be, for even on the most basic question the outside experts do not agree. Mr. Michael Clegg (Clerk of the Alberta Assembly) for instance claims that the Yukon has the full range of powers over privilege and contempt exercised by other legislatures in Canada although from his letter, their statutory base appears to have been repealed. Mr. Joseph Maingot (Parliamentary Counsel in Ottawa) takes a more strict interpretation from Erskine May and denies the more extreme powers such as punishment for contempt.

Even if one is to assume (as the Yukon Assembly obviously does) that the right to deal with such a privilege exists, the offence itself is open to question. There is little evidence except bald assertions, that wiretapping is *per se* a breach of privilege. The British Columbia case, included as an appendix

to the report, concludes only that wiretapping during a session is a breach of privilege and merely "disapproves" of similar wiretapping when the House is not sitting. The committee also does not address the basic question of whether all phones leading to a member (including at home or in a constituency office) are equally sacrosanct. If freedom of speech (i.e. free communication between a member and his constituents) is the issue here, and not the precincts of Parliament, then presumably all telephonic communication with a member must be protected. In establishing the wiretapping of a member to be a breach of privilege, it is unfortunate that the committee did not consider in addition to May (who says nothing specific on the subject) the Report of the British Committee of Privy Councillors appointed to inquire into the interception of communications (Cmnd. 283) which categorically denies that wiretapping or interception of mail addressed to members is a breach of privilege. Similarly the committee might have noted that during the Second World



War both wiretapping and censorship were applied to Members of Parliament without raising a question of privilege (and so far as the evidence is available, without the knowledge of the Speaker).

The question which seems to have interested the committee as much as any other was whether the Speaker must be informed of a wiretap on a member's phone. In this instance the tap had been applied for under the law and a proper warrant had been issued. The tap itself was placed some distance from the Legislature and not within the building. The committee relies heavily on the statement of the Committee on Privileges in Ottawa which contended in 1973 that permission of the Speaker is necessary before outside police forces may enter the precincts of Parliament while on duty. This is a weak reed to depend on, for even that committee did not establish any proper base for its assertion. Far from being "well understood" that permission was necessary, the R.C.M.P. and the Ottawa Police issued instructions to their personnel only after the privilege case had been raised. The evidence in the committee indicated that the police were indeed expected to approach the parliamentary protective staff when entering the building, but also that every visitor was supposed to follow the same procedure.

Clearly, one area of practice needs to be clarified — the responsibility of a member to his constituents, (and its relationship to privilege) for on this the whole question of freedom of speech depends. Proceedings in Parliament are not as clearly defined as Mr. Robert Fortier (Clerk of the Senate) and the Supreme Court, in the *Roman* case might indicate. Certainly Mr. André Ouellet found limits on his freedom of speech and was convicted of contempt of court. Similarly, Mrs. Simma Holt in 1978 discovered that her representation of her constituents did not extend to appearances before the C.R.T.C. It is a large question that should be answered with more certainty that at present,

before individuals acting within the law are condemned to legislative censure.

Perhaps the most distressing feature of this report is its dependence on the catch-all definition of contempt based on May and expounded by others. In brief, to be a contempt, an act need not actually obstruct a member of the House, it need only tend to accomplish the act. Clearly, if this is taken at face value, any action may fall under such a definition. It might be better if the committee and others using this definition were to look not only at the definition in May but also the chapter that expands on it, and realize that the cases cited are reasonable and do not stretch the words of the definition out of all recognition. Clearly, the molestation of a member on his way to the House may not prevent him arriving, but may be designed to do so. Tampering with witnesses, bribery, and similar actions can be considered under this heading. It may be noted also that the premature publication of a committee's proceedings and report also appear in this chapter as contempts. It would be interesting to see the results if any legislature in the country took action against an enterprising newspaper reporter who was so bold as to publish what he knew in this line.

In summary, this is not a satisfactory report. Throughout, the emphasis is on the protection of the member as representing his constituents. It is hard to see quite where an arbitrary exercise of power such as this report represents, fits the picture. It may be used as a strong argument for further study of privilege, or for the amendment of the laws relating to wiretapping. It falls short of a stirring defence of the citizen's liberties.

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A SELECTION OF PUBLICATIONS

"What's an MP worth? The Review of the Salaries and allowances of Canadian Senators and MPs", by Alf Hales, **The Parliamentarian**, vol. 61, (October 1980)

"Power Requires Representation", by William Irvine, **Policy Options**, vol. 1, (December-January 1980-81)

"The Overhaul That's Overdue", by Greg Fyffe, **Policy Options**, vol. 1, (December-January 1980-81)

"What Your MP Thinks About Your Problems", by Hawley Black, **Canadian Business**, vol. 53, (November 1980)

Ontario Royal Commissions and Commissions of Inquiry 1867-1978, by Susan Waitman and Ana Tampold, Toronto, Legislative Library, Research and Information Services, 1980.

Unelected Representatives: Congressional Staff and the Future of Representative Government, by Michael Malbin, Basic Books, New York, 1980.

Report of the Senate Standing Committee on Legal and Constitutional Affairs on Certain Aspects of the Canadian Constitution, (Carl Goldenberg, Chairman) document tabled in the Senate on November 26, 1980.

