



Department of Justice
Canada

Ministère de la Justice
Canada

Assistant Deputy Minister's Office
Public Law Sector
254 Wellington Street, #M-3008
Ottawa, Ontario K1A 0H6

Bureau de la sous-ministre adjointe
Secteur du droit public
254, rue Wellington, #CE-3008
Ottawa (Ontario) K1A 0H6

Telephone / Téléphone: (613) 957-4843
Facsimile / téléc.: (613) 957-1409

December 9, 2009

Robert R. Walsh
Law Clerk and Parliamentary Counsel
House of Commons of Canada
180 Wellington Street
Ottawa, ON K1A 0A6

Re: Application of Acts of Parliament to Officials of the Government of Canada

Dear Mr. Walsh:

It has come to our attention that you have provided legal advice on the question of the application of the *Canada Evidence Act* in the context of the proceedings of a parliamentary committee, and that in the course of that opinion, you have been called upon to speculate as to the legal position of the Department of Justice on this matter. I would like to take this opportunity to dispel any ambiguity you may have perceived in this regard.

In our system of parliamentary democracy, there are several basic constitutional principles that must always be borne in mind.

The first of these fundamental principles is the rule of law. No one is above the law and everyone—including government officials, the law officers of the Crown, and the members of parliamentary committees—must abide by the law. All governmental authority must be exercised in accordance with the law.

The second of these principles is parliamentary sovereignty. Under the Constitution, the federal legislature, the Parliament of Canada, is composed of the Queen, the Senate and the House of Commons, and only the Parliament of Canada—not the executive, nor an individual House, nor a parliamentary committee—can amend the application of a legal requirement enacted by Parliament.

A third principle is that of responsible government. The Ministers of the Crown must maintain the confidence of the House of Commons and be accountable to the House for their actions and those of their departments.

A fourth principle is the separation of powers. Each of the three constitutional branches of government—the executive, the legislative and judicial branches—must respect the legitimate sphere of action of the other branches. A web of constitutional conventions protects the operation of the principles of responsible government and the separation of powers.

These principles and conventions are essential to the functioning of parliamentary democracy in a state respectful of the rule of law.

The Department of Justice of Canada has great respect for the work of parliamentary committees, and Ministers, government officials and the law officers of the Crown strive to provide them with information in a full and transparent manner. However, government officials are sometimes under a legal requirement, imposed by a law of Parliament such as the *Privacy Act* or the *Income Tax Act*, not to disclose certain information without the consent of those to whom a duty of confidentiality is owed. Legal counsel may also be bound by well-established requirements of the common law, such as solicitor-client privilege, not to release information.

It may be that an Act of Parliament will apply to the Houses of Parliament, expressly, as in the case of the *Official Languages Act*, or implicitly, as in the case of the *Canadian Human Rights Act*. In *House of Commons v. Vaid*, [2005] 1 S.C.R. 667, the Supreme Court of Canada rejected the argument that the *Canadian Human Rights Act* had no application to the House of Commons because it did not so expressly provide; the Supreme Court held that that argument was "out of step with modern principles of statutory interpretation accepted in Canada", and that the proper approach was to construe the words of the Act in their entire context, having regard to the scheme, object and remedial purpose of the Act.

Of course, there may be instances where an Act of Parliament will not be interpreted to apply to the Houses of Parliament (or their committees). However, that does not mean automatically that government officials—who are agents of the executive, not the legislative branch—are absolved from respecting duties imposed by a statute enacted by Parliament, or by requirements of the common law, such as solicitor-client privilege or Crown privilege. This is so even if a parliamentary committee, through the exercise of parliamentary privilege, may extend immunity to witnesses appearing before it. A parliamentary committee cannot waive a legal duty imposed on government officials. To argue to the contrary would be inimical to the principles of the rule of law and parliamentary sovereignty. A parliamentary committee is subordinate, not superior, to the legislative will of Parliament as expressed in its enactments.

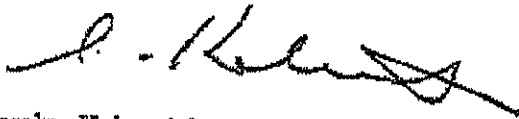
The *Privacy Act*, for example, clearly states in section 8 that "[p]ersonal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section." Exceptionally, personal information may be disclosed, *inter alia*, "for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information". A parliamentary committee is certainly not a court; nor is it "a body with jurisdiction to compel the production of information". Faced with an apparent refusal to provide information, the appropriate recourse for a parliamentary committee is to report the matter to the House for its consideration.

The Parliament of Canada has established important rules under the *Canada Evidence Act* in relation to the handling or disclosure of information concerning international relations, international defence or national security. Under section 37, a "Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest." Again, a parliamentary committee is not a body with jurisdiction to compel the production of information, so it is not in a position to oblige the release of information of this kind, but clearly, the values underlying Parliament's intention in these provisions—to protect the national security of Canada from harm by the unauthorized disclosure of sensitive information—must inform the actions of Ministers and officials.

Fundamental conventions protecting the principles of the separation of powers and responsible government also govern these questions. Conventions are political rules, informed by principle and precedent, which bind the conduct of political actors. Joseph Maingot, in his treatise, *Parliamentary Privilege in Canada* (Second Edition, 1997 at p. 191), states that "With respect to federal public servants who are witnesses before committees of either House, the theory of the compellability of witnesses may come into conflict with the principle of ministerial responsibility. By convention, a parliamentary committee will respect Crown privilege when invoked, at least in relation to matters of national and public security." While section 38 of the *Canada Evidence Act* has no application to parliamentary committee proceedings, the values that inform legislation passed by Parliament, such as the *Canada Evidence Act* and the *Security of Information Act*, are consistent with the parliamentary convention that injurious information should not be disclosed in a parliamentary setting. The process under section 38 of the *Canada Evidence Act* has served as a useful standard for identifying information that should not be disclosed to a parliamentary committee, because its disclosure would be injurious to national security, national defence or international relations. This is consistent with parliamentary convention.

In closing, the Department of Justice wishes to reiterate that it has the greatest of respect for the work of parliamentary committees. However, the Department and the Government of Canada are also bound to adhere to the fundamental constitutional principles of our parliamentary democracy, and to ensure respect for the national interest in accordance with the rule of law.

Yours sincerely,



Carolyn Kobernick
Assistant Deputy Minister
Public Law Sector