



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

OFFICE OF THE LAW CLERK AND PARLIAMENTARY COUNSEL
BUREAU DU LÉGISTE ET CONSEILLER PARLEMENTAIRE

November 9, 2011

Mr. Charlie Angus, M.P.
Room 900, La Promenade Building
House of Commons
Ottawa, ON
K1A 0A6

Dear Mr. Angus:

By letter dated November 2, 2011, you asked for a legal opinion on the motion made by Mr. Del Mastro in the Standing Committee on Access to Information, Privacy and Ethics (“ETHI”) requiring CBC to produce redacted and unredacted versions of documents that are the subject of a legal dispute between CBC and the Information Commissioner under the *Access to Information Act* (“the Act”). The motion, adopted by ETHI on November 1, 2011, reads as follows:

That, in order for the Committee to determine and assess exclusions, the Committee orders the production of the following documents pursuant to Standing Order 108 (1):

1. **From the CBC:** The redacted and un-redacted documents provided by the CBC for the access to information requests made by the Canadian Taxpayers Federation:

- If the CBC was in any way financially compensating prominent members of the lobby/advocacy group ‘Friends of the Canadian Broadcasting’.
- The financing of any programs or films concerning the Quebec Nordiques team
- The number of employees falling within various income categories

2. **From the CBC:** The redacted and un-redacted responses provided by the CBC to the requests made by Québecor Media Inc and referred to by Pierre Karl Péladeau at the meeting of Thursday, October 20, 2011, specifically:

- First the request about the CBC fleet of vehicles.
- Second request concerns CBC/Radio-Canada's 75th anniversary celebration planning budget.

That these documents be provided to the Committee without delay; And, that the Committee deal with the produced documents *in camera*.

The motion is part of a study by ETHI launched on September 20, 2011, “regarding the access to information dispute and resulting court actions concerning CBC.”

You seek an opinion on seven points set out in your letter. I shall respond to each of your points, though some of them overlap.

- 1. Is it beyond the role of this committee to compel the production of documents that are directly related to a case presently before the courts? As the courts have begun a hearing to interpret s. 68.1, will the members of the committee have been seen to preempt or improperly interfere with the exclusive jurisdiction of the Courts?**

Generally, the House of Commons and its committees may compel the production of any document that they believe necessary to carry out their parliamentary functions of legislating, deliberating or holding the government to account. However, while a matter is before the courts the decision to compel documents is usually tempered by the *sub judice* convention out of respect for the independence of the courts.

- 2. What are the conventions that delineate the role of Committee and the role of a Court in regard to the current dispute between CBC and the Access to Information Commissioner over the interpretation of s. 68.1 of the Access to Information Act?**

The relevant convention is the *sub judice* convention which is a rule of practice that the House applies to its proceedings and those of its committees though not legally required to do so. Under this convention, Members are expected to avoid commenting in debates on matters that are before the courts. As Speaker Milliken noted in 2005 on a matter that was pending before the Ethics Commissioner and on which some Members wished to comment:

Part of that discipline [waiting], it appears to me, is akin to the House abiding the *sub judice* convention: when a matter is before the court, the House will await the determination of the court before discussing the matter publicly in its proceedings.

A fortiori, this convention would apply to a motion that touched on a matter that was before the courts.

The *sub judice* convention is based on the principle that each branch of our parliamentary system of government should respect the functions of the other branches and not interfere or appear to do what belongs to one of the other branches to do. Our parliamentary system of government is based on a separation of the three basic governmental powers or functions: the executive, the legislative and the judicial. The judicial branch operates – and must be seen to operate – fully independent of both the executive and legislative branches. The credibility of the courts as impartial arbiters of legal rights and as interpreters of the law depends on a clear recognition by the other branches of their independence.

For their part, the courts accept limitations upon their judicial function vis-à-vis the parliamentary function while noting that parliamentarians are similarly constrained. In *New Brunswick Broadcasting* (1993), Madame Justice McLachlin (as she then was) said the following:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

In *Vaid* (2005), Mr. Justice Binnie, on behalf of the full court, said this

It is a wise principle that the courts and Parliament strive to respect each other's role in the conduct of public affairs. Parliament, for its part, refrains from commenting on matters before the courts under the *sub judice* rule. The courts, for their part, are careful not to interfere with the workings of Parliament.

Apart from the *sub judice* convention, there is also the well established practice or expectation, which might be described as a convention, that the House and, by extension, its Committees will not undertake studies, reviews or enquiries on matters that have been assigned by an Act of Parliament to an administrative tribunal or other public office, including Officers of Parliament, which in this case is the Information Commissioner. While ETHI may have an interest in the matter in dispute between CBC and the Information Commissioner, the expectation would be that ETHI not take an active interest in a particular dispute until it has run its course under the Act. To do otherwise may be seen as an interference by ETHI in the legal process established under the Act. Moreover, insofar as the courts have a role under the Act, ETHI could be seen as interfering and possibly undermining the judicial process established under the Act, which in some circumstances might be seen as a contempt of court.

ETHI might also cause the confidentiality required under the Act to be breached. For example, if an unredacted document provided by the CBC to ETHI were to come into the hands of third parties such as a party who made one of the applications for information under the Act or should otherwise enter into the public domain, this would breach the confidentiality that is fundamental to the legal regime established by the Act. In the circumstances, ETHI (or some members of ETHI) might be accused of causing this loss of confidentiality and of causing the legal process under the Act to be rendered pointless.

Looking further down the road, as it were, if CBC were to refuse to provide documents to ETHI and ETHI were to seek an enforcement order by the House, the order might be subject to review in the courts. The relationship between the House of Commons and the courts is not simply a matter of ensuring deference for their respective constitutional functions. Whenever the House seeks to enforce its orders by the exercise of its privileges or powers against non-parliamentary actors, the courts have jurisdiction to determine whether the privilege or power being exercised exists as a matter of (constitutional) law and if it does, its scope. In this regard, the Court included the following among the 12 propositions that it listed in *Vaid* as "accepted both by the courts and by the parliamentary experts":

11. The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament [the House of Commons] or its officers and employees that exceeds the necessary scope of the category of privilege.
12. Courts are apt to look more closely at cases in which claims to privilege have an impact on persons outside the legislative assembly than at those which involve matters entirely internal to the legislative.

Proposition 12 makes it clear that enforcement of ETHI's order against the CBC could be the subject of close review by a court as the enforcement action would be taken against a party (the CBC) who is outside Parliament. In this regard, the Supreme Court added the following comment which I think has some relevance to the matter at issue between ETHI and CBC:

It should be emphasized that a finding that a particular area of parliamentary activity is covered by privilege has very significant legal consequences for non-members who claim to be injured by parliamentary conduct, including those whose reputations may suffer because of references to them in parliamentary debate, for whom the ordinary law will provide no remedy.

In other words, when actions by the House impact upon the rights of third parties (in this case, the CBC), these actions will be given especially close scrutiny by the courts if they are brought before the courts by an affected party.

3. Does Mr. Del Mastro's motion represent a possible/probable breach of the *sub judice* convention that ensures Parliamentary committee do not undermine the rights of those who are before the courts?

As a general rule, concerns about offending the *sub judice* convention are resolved if the matter at issue is addressed *in camera*. Subject to my comments in response to your 4th point below, if the documents are considered by ETHI at *in camera* meetings, the *sub judice* convention would not be offended. The convention might be offended, however, should any of these *in camera* deliberations be made public or the documents come into the possession of third parties.

4. Given that the matter in dispute is currently before the Federal Court of Appeal does Mr. Del Mastro's motion overstep the division of powers set out in the Constitution Act, 1867? What are the inherent risks of overstepping this division?

The House of Commons and its committees, being part of the legislative branch at the federal level, legislate and review the findings of the courts and statutory decision makers to determine if legislation is adequate. The executive, and those designated by statute, apply the laws. The courts, for their part, interpret the law and ensure that statutory decision makers have applied the law correctly and in accordance with the governing legislation. As a principle, each branch is careful to not interfere with the other's constitutional role. It is a well established parliamentary principle that the House of Commons and its committees do not make legal determinations which are the responsibility of the courts.

At the same time, a House committee acts within its function when generally inquiring into matters of public policy or public administration, such as, conducting a legislative review of the *Access to Information Act*, including the adequacy and appropriateness of section 68.1. Because Mr. Del Mastro's motion calls for making an assessment of whether the redactions made by CBC are in accordance with section 68.1 of the Act ("to determine and assess exclusions"), it seems to me that the motion calls upon ETHI to address a particular legal question. While ETHI may be looking at the legal question within a larger policy question of possible legislative action, it is nonetheless addressing a legal question that ought to be left to the courts to decide.

In my view, ETHI's demand for documents for purposes of assessing CBC's actions under section 68.1 of the Act is comparable to a demand for a taxpayer's income tax returns with related documents to assess whether the taxpayer has paid all the taxes required under the *Income Tax Act* or a demand that a corporation provide its financial statements and related documents to determine whether it has met its obligations under its employee pension plan or a demand that a bank provide its internal records to determine whether it is in compliance with the *Bank Act* or the regulations made under that Act. In each case, the documents would be sought for the purpose of addressing a legal question pertaining to a particular individual or corporation. In my view, such initiatives are not within the constitutional functions of the House or, by extension, its committees and the use of the House's powers to demand the production of documents for such purposes could be found to be invalid and unenforceable at law.

In addition, there is the underlying constitutional principle of the separation of powers as between the executive function (the Government), the legislative function (for our purposes, here the House of Commons) and the judicial function (the Courts). A House Committee should not, in my view, take on the role of a court – or even appear to take on the role of a court – by addressing whether particular actions taken by a party are permissible under the Act. To do so is to encroach upon – or to appear to encroach upon – the constitutional function of the courts. Such an encroachment would offend the separation of powers between the judicial and legislative functions and possibly call into question the validity of ETHI's proceedings.

5. What is the proper role of this Committee in regard to the interpretation of s. 68.1 of the Access to Information Act in light of the ongoing litigation before the Federal Court of Appeal? Is it improper for the committee to be determining how to interpret legislation, which is the function of the Courts?

In my view, given the *sub judice* convention and the principle of the separation of powers, ETHI should delay any review of the CBC documents relative to section 68.1 of the Act until court proceedings have been completed. Although by conducting its proceedings *in camera*, ETHI will avoid breaking the convention or appearing to take on the role of the courts, past experience has shown that it is difficult to ensure the confidentiality of *in camera* committee deliberations as well as the confidentiality of documents received for *in camera* purposes. It would seem prudent to await the conclusion of the court proceedings as this would show respect for the independence of the judicial function and dispense with the need to ensure the confidentiality of the Committee proceedings and of the documents provided by the CBC.

6. Are there longer-term implications that may not have been considered by Mr. Del Mastro that would undermine the constitutional divisions of authority between parliament and the courts? Is there a precedence that could be set and what are the implications of such precedence?

When one considers "longer-term implications," one is entering into speculation about possible future developments which is, at best, risky business as you know. Suffice it to say that if ETHI goes to the House for an order compelling CBC to produce the documents and the House takes steps against the CBC to enforce its order, the House could find itself in court defending its actions. This scenario may seem highly improbable, but warrants being mentioned if only to put matters in their legal context.

The argument might be made that the enforcement actions of the House are unlawful as they are done for a purpose that is beyond the constitutional functions of the House. The powers and privileges of the House are meant to assist the House in carrying out its constitutional functions.

To the extent that the documents are sought to enable ETHI to determine a legal question, as explained above in answer to your 4th point, the enforcement actions of the House could be ruled unlawful.

The longer-term implication here, though perhaps unlikely, is the risk of a jurisdictional conflict between the House and the courts which could be injurious to the constitutional relations between the House and the courts and put in jeopardy the House's constitutional privileges under the law.

7. Is there existing case law or committee precedent that would speak to issue?

There have been two Supreme Court of Canada decisions on the effect of non-observance of the *sub judice* convention. In *Canada (Minister of Citizenship and Immigration) v. Tobiass* (1997), the Court commented that the *sub judice* convention is essential to respect the courts' role in administering the law:

Though the [*sub judice*] rule is a matter of Parliamentary convention and not of statutory law, . . . parliamentarians should act in a way that does not render more difficult the administration of the law by judges.

In *R. v. Vermette* (1988), the Supreme Court ordered a new trial for an accused after the Premier of Québec at the time went on a lengthy tirade against the accused during Question Period while his trial was going on in the Québec Superior Court. The judge commented on this breach of the *sub judice* convention:

It is in the public interest that such accusations be scrutinized by the judiciary. I cannot accept that the reckless remarks of politicians can thus frustrate the whole judicial process.

There have been Speaker's rulings in the past that have consistently found that the Speaker, and to an extent, Standing Committees, cannot be expected to make findings of law and should not be authorized to do so. I would refer you to rulings made by Speaker Fraser on March 17, 1987, by Speaker Parent on February 16, 1995 and by Speaker Milliken on June 7, 2005.

More recently, there have been rulings by Committee Chairs that have determined that it is not within a committee's mandate to make determinations of facts on particular cases and that this is the constitutional role of the judicial branch of government. These rulings were made in the Standing Committee on Procedure and House Affairs on September 11, 2007 and in the Standing Committee on Justice and Human Rights on March 11, 2008.

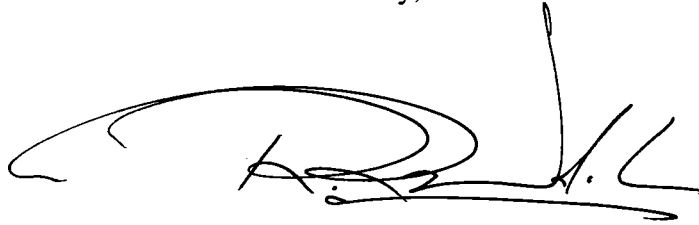
Summary

Although the matter for which documents are sought from the CBC is presently before the courts, ETHI might avoid offending the *sub judice* convention by conducting its proceedings on this matter *in camera*. Beyond this, there is the risk that if any steps were taken by the House to compel CBC to produce the documents unredacted, the matter could be taken to court and the outcome could be adverse to the interests of the House. I know of no legal precedent for the argument I have made based on constitutional functions of the three branches of government.

Nonetheless, I feel that the constitutional framework of our parliamentary system of government, where the judicial function operates independent of, and without any interference by, the legislative branch – that is, the principle of the separation of powers – is sufficiently important in constitutional terms that a court might see the merits of the argument and rule against the House. In my view, respect for the constitutional framework of our parliamentary system of government is part of the rule of law which is the over-riding legal principle that makes a democratic system of government such as ours workable and credible.

I trust that this will be of assistance to you in your understanding of the legal issues involved. If you have any further questions please contact me.

Yours truly,

A handwritten signature in black ink, appearing to read 'R. R. Walsh'. The signature is fluid and cursive, with a large loop on the left side and a vertical stroke on the right side.

R. R. Walsh
Law Clerk and Parliamentary Counsel