

Ruling on Parliamentary Privilege

Counsel for Mr. Arar seeks to introduce into evidence extracts of *Hansard* containing answers given during Question Period in the House of Commons by Ministers of the government who will be called to testify at the Inquiry. They also seek to introduce minutes of parliamentary committee proceedings at which one or more of the Ministers participated.

For the purposes of this Ruling, it is not necessary to distinguish between the extracts in *Hansard* and the minutes of the committee meetings. Hereafter, for simplicity, I will refer to the information sought to be introduced into evidence as statements made in Parliament.

The House of Commons (the "House") opposes the introduction of this material on the basis of parliamentary privilege protecting freedom of speech in Parliament. In written submissions, the Office of the Law Clerk and Parliamentary Counsel describes the privilege as follows:

"Over the centuries this privilege has come to be accepted to mean that what is said in the House of Commons or its Committees cannot be referred to or used outside of the House of Commons in any way that may require Members to reflect upon, comment upon or justify anything that

they have said in the House of Commons or its proceedings. As well, the words said in proceedings cannot be used as evidence that may itself be subject to submissions, debate, measuring or interpretation.”

The House argues that I should not admit evidence of statements made in Parliament if the result would be that this Inquiry would question or assess the accuracy of those statements and thereby impugn the credibility of the speaker. The rationale underlying this privilege is that Members must be able to speak freely in Parliament without concern that what they say may be used against them in legal or other proceedings outside Parliament to attack their credibility.

In response, Mr. Arar’s counsel raises two arguments. First, he argues that parliamentary privilege protecting freedom of speech in Parliament is limited to providing immunity from criminal prosecution or civil liability. The scope of the privilege does not extend, as the House contends, to protecting statements made in Parliament from impeachment in proceedings outside Parliament. In the alternative, he submits that the purpose for which he seeks to introduce the parliamentary statements is to show the history of what was said and not to impeach or question the accuracy of those statements or to challenge the credibility of the Ministers who made the statements.

For the reasons that follow, I am not prepared to admit the evidence of the parliamentary proceedings at this stage of the Inquiry. At the outset, I want to emphasize that excluding this evidence will not impair the ability of this Inquiry to investigate the matters referred to in the mandate. The matters covered by the parliamentary statements in issue will be fully canvassed in the evidence of the Ministers who made the statements, and in the evidence of government officials who were involved in the relevant activities. There is a significant amount of evidence dealing with these matters. I am satisfied that I will be able to properly assess the credibility of the Ministers and the officials involved without the need to refer to what was said in Parliament or its committees.

Let me now turn to the reasons for excluding the statements. I do not accept the argument that the parliamentary privilege protecting free speech is limited to immunity from criminal or civil action. In my view, the privilege extends as well to protect parliamentary speech from attack in legal or other proceedings that are separate from those conducted in Parliament.

In this regard, I agree with the decision of Tremblay-Lamer J. in *Gagliano v. House of Commons*, [2005] F.C. 576 at paragraphs 66-97. I accept, for sake of argument, that the parliamentary free speech privilege, with the scope I have referred to above, has not been authoritatively established in Canada. I am satisfied, however, that the doctrine of necessity requires that statements made

in Parliament must be immune from challenge in other tribunals. It is necessary that Members of Parliament be free to express themselves in parliamentary debate without concern that some other tribunal – in this case a public inquiry – will at a later date assess or call into question the accuracy or credibility of statements they made in Parliament. Parliament has its own procedures and powers for addressing challenges to parliamentary statements. In this regard, it is the master of its own house. In my view, the need to ensure that Members are able to express positions and ideas in Parliament free from outside interference is so closely and directly connected to the proper functioning of Parliament that it is necessary to extend the parliamentary privilege in the manner I have described.

As for the second point made by Mr. Arar's counsel, I have difficulty understanding what evidentiary value the statements sought to be introduced would have other than to show that those statements were inaccurate. There will be a significant body of evidence dealing with the same matters as those referred to in the parliamentary statements. It has not been suggested that the parliamentary statements sought to be introduced contain facts that could only be established through the introduction of those statements. If the statements are consistent with the other evidence, there would be no need to admit them into evidence. The difficulty arises because of the risk that the statements will be contradicted by or inconsistent with other evidence introduced in the Inquiry.

I recognize that Mr. Arar's counsel has indicated that he will not seek to challenge the statements by way of cross-examination. In this way, he seeks to distinguish this situation from that in *Gagliano, supra*. However, impeachment of statements can result from more than cross-examination. The introduction of conflicting evidence would inevitably lead to questioning or assessing the credibility of parliamentary statements, particularly if they had been entered into evidence in the same proceeding. Submissions based on conflicting evidence, and indeed findings in my report, that are inconsistent with the parliamentary statements would be ways in which those statements could be impeached or questioned by this Inquiry. In my view, the scope of the privilege protecting free speech in Parliament includes challenges to parliamentary statements by means other than cross-examination.

Mr. Arar's counsel points out that, at this stage, we do not know if there will be evidence that conflicts with the parliamentary statements. I agree. However, I think it is prudent to conduct this Inquiry so as to avoid the unacceptable outcome of breaching the privilege should such evidence be introduced. The way to do this, in my view, is to not admit the statements at this time. There is no need to do so. As I pointed out, Mr. Arar's counsel does not intend to cross-examine on these statements for credibility, but only for clarity, if necessary. When all of the evidence has been called, counsel for Mr. Arar may apply, if he

chooses, to have the parliamentary statements admitted. I would be inclined to admit them if there was no evidence conflicting with those statements, and if it can be shown that there is some utility to doing so.

Given my conclusion on the scope of the parliamentary privilege, I do not find it necessary to address the House of Commons alternative argument that a Member of Parliament is not at liberty to give evidence of statements made in the House absent permission being granted by the House.

May 30, 2005

"Dennis O'Connor"

Commissioner Dennis O'Connor