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A Question of Privilege:

The Speaker as Guardian of the House of Commons

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## **Introduction**

Canadian legislatures are currently facing a crisis of accountability. Executive dominance and strict party discipline have significantly weakened the ability of Members of Parliament (MPs) to effectively scrutinize government decisions,<sup>1</sup> resulting in a widespread loss of public confidence in the legitimacy of the House of Commons.<sup>2</sup> In the face of these growing challenges, this essay seeks to examine the role of the Speaker of the House in defending the authority of MPs to hold the government to account. An analysis of the leadership of the Speaker in the 43rd Parliament, Anthony Rota, finds that despite the theoretical powers that the position commands, his ability to exercise these powers in practice is constrained by factors both internal and external to the speakership. Specifically, the federal government is able to easily sidestep the Speaker's authority and his commitment to impartiality, while central to his role, prevents him from making timely rulings; combined, these factors create a significant impediment on the ability of the House to exercise its constitutional duties. The powers and role of the Speaker are first reviewed, then analyzed in the context of the battle between the government and the House over the firing of two scientists from the National Microbiology Laboratory in early 2021. In response to shortcomings of the role of the Speaker revealed by the case study, possible reforms are introduced that aim to increase the Speaker's power and improve the transparency of government, as well as its accountability to the House of Commons.

## **The Speaker of the House**

The role of the Speaker was inherited from the Westminster system and dates back to Medieval England, where they served as the spokesperson for the House before the Crown.<sup>3</sup> Over time, the position has evolved in ways that have significantly increased the Speaker's power in exercising leadership in the House.<sup>4</sup> Speakers today have three general duties: they preside over debate in the House and preserve decorum through interpreting and enforcing the

rules of procedure and practice; they are the chief administrative officer of the House, leading the chamber in the same way a cabinet minister would a government department;<sup>5</sup> they also serve as the representative of the House, speaking for MPs in their relations with other bodies.<sup>6</sup>

The last role is the focus of this essay: as described by parliamentary scholar C.E.S. Franks, Speakers act as “the guardian of [the House’s] privileges, and the protector of the rights of all members.”<sup>7</sup> Parliamentary privilege, defined as the rights and immunities of the House and MPs “without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals,”<sup>8</sup> is a deeply entrenched constitutional principle essential to the practice of responsible government.<sup>9</sup> The core function of the House is to keep the government accountable for its actions,<sup>10</sup> a duty that requires that MPs have access to adequate information in order to effectively investigate government decisions.<sup>11</sup> When obstruction or interference arise that impede the ability of the House to execute its legislative work, the Speaker has the authority to assert parliamentary privileges on behalf of the House.<sup>12</sup> This power is symbolized by the mace, which is carried by the Sergeant-at-Arms as the Speaker enters and leaves the House.<sup>13</sup>

In order to maintain the confidence of the House in acting as its representative, Speakers are required to conduct themselves with absolute impartiality.<sup>14</sup> They are elected by the House through a secret ballot at the beginning of each Parliament, with all MPs except for ministers and party leaders eligible for the position.<sup>15</sup> Although they remain an MP while in the Chair, they do not attend caucus meetings, participate in debate, or vote, except to break a tie.<sup>16</sup> The Speaker’s political neutrality allows them to be the authoritative voice of the House in safeguarding its interests, particularly when the government attempts to evade accountability for its decisions.<sup>17</sup>

### **Case Study: The Winnipeg Lab Affair**

The tension between the House’s constitutional function of holding the government to account and the government’s duty to “conduct the country’s business”<sup>18</sup> was on clear display in

the power struggle between the government and the House over access to unredacted documents relating to the firing of Dr. Xiangguo Qiu and Dr. Keding Cheng from the Winnipeg National Microbiology Laboratory in January 2021 and the two scientists' transfer of viruses to the Wuhan Institute of Virology in March 2019.<sup>19</sup> The following case study analysis focuses on the role that Anthony Rota played in this conflict as Speaker of the House, outlining how constraints intrinsic to the role prevented him from being an effective voice for the House of Commons.

The Public Health Agency of Canada (PHAC) was ordered to produce the requested unredacted records twice by the Special Committee on Canada-China Relations (CACN) in early 2021 to assist the committee in its investigation into why Dr. Qiu and Dr. Cheng were fired,<sup>20</sup> as well as the possible national security and global health questions arising out of the virus transfer they oversaw.<sup>21</sup> While committee members recognized the sensitivity of the information they were requesting by directing the Law Clerk and Parliamentary Counsel of the House to redact all sensitive information,<sup>22</sup> the consensus among members was that parliamentary privilege granted them the power to order the production of any documents they required to fulfill their constitutional functions.<sup>23</sup> However, the PHAC did not comply with the CACN's orders, as only redacted versions of the documents were sent to the committee: Iain Stewart, PHAC president, justified this decision by asserting that his legal responsibility to protect national security interests and privacy rights constrained the rights of the House to view sensitive documents.<sup>24</sup>

As a result of the PHAC's non-compliance, Conservative MP Michael Chong introduced a motion in the House on June 1st for an order that the PHAC release unredacted versions of the requested documents:<sup>25</sup> this motion was passed the day after with the unanimous support of all opposition parties.<sup>26</sup> This order was once again ignored by the PHAC, with Stewart maintaining that complying with the request would compromise his security standards: instead, unredacted documents were released to the National Security and Intelligence Committee of

Parliamentarians (NSICOP),<sup>27</sup> a body created in 2018 with the specific purpose of reviewing sensitive material and consisting of MPs and senators with top security clearance.<sup>28</sup>

Opposition Leader in the House, Gérard Deltell, raised a question of privilege in the House on June 7th in response to the government's non-compliance with the June 2nd order.<sup>29</sup> He further stated that the release of unredacted documents to the NSICOP was not an acceptable alternative: he called the committee a “puppet of the government” because of the Prime Minister’s significant control over membership and the content of its reports.<sup>30</sup> The rules of the House state that an MP can raise a question of privilege when they believe that parliamentary privileges have been violated such that their ability to carry out their legislative functions has been impaired.<sup>31</sup> If the Speaker determines that there has been a prima facie breach of privilege, the MP raising the point makes a motion for the House to debate and vote on, in order to determine the appropriate sanctions.<sup>32</sup> On June 16th, Rota delivered his ruling on Deltell’s question of privilege and found that there was a prima facie breach, holding that there are no limits on the sensitivity of documents that the House has the power to request.<sup>33</sup> His position was based on precedent set by former Speaker Peter Milliken in 2010 over the Afghan detainee issue, where the Harper government refused to produce unredacted documents relating to the Canadian military’s transfer of Afghan detainees to Afghan authorities. These documents were requested by the Special Committee on the Canadian Mission to Afghanistan to supplement their investigation into reports that detainees were subject to torture after being handed over to Afghan authorities.<sup>34</sup> Milliken’s ruling on a question of privilege upheld the absolute right of the House to order the production of documents.<sup>35</sup> Rota also agreed that the issues about the NSICOP pointed out by Deltell and other members made it clear that documents submitted to the committee could not fulfill an order of the House because it “is not a committee of Parliament.”<sup>36</sup>

Rota’s ruling on Deltell’s question of privilege is a clear example of his important role in protecting the rights of the House and its ability to effectively hold the government accountable

for its actions. His finding of a prima facie breach allowed Deltell to introduce a motion calling for the PHAC to be found in contempt of the House for its repeated failure to obey House orders; it also called for Stewart be summoned to the House to be admonished by the Speaker and to deliver the documents as ordered by the House on June 2nd.<sup>37</sup> The motion passed with unanimous opposition support on June 17th<sup>38</sup> and on June 21st, Stewart became the first private citizen to be reprimanded by the Speaker in more than a century.<sup>39</sup> However, it is at this point that two constraints on Rota's powers as Speaker began to present themselves in ways that severely undermined his ability to exercise his duty as guardian of the House. The first constraint was that the government could sidestep Rota's authority without any consequences, save for the political risk from potential public backlash. This was clearly evidenced by the government's repeated refusals to produce the documents requested by the House, even going so far as to file an application in the Federal Court of Canada to prevent disclosure.<sup>40</sup>

The second constraint on Rota's authority was his commitment to impartiality. On the same day that Stewart was reprimanded, Deltell rose on another point of privilege, alleging that Stewart failed to fully comply with the June 17th order of the House because he did not produce the requested documents.<sup>41</sup> He pointed out that very little had changed in the circumstances surrounding the issue since Rota ruled on his first point of privilege and stated that, should Rota find another prima facie breach, he would move to either direct the Sergeant-at-Arms, who maintains order in the House,<sup>42</sup> to enter into the premises of the PHAC to "search for and seize the documents which were ordered to be produced by the House... and by the [CACN]" or to refer the matter to the Standing Committee on Procedure and House Affairs to consider other appropriate enforcement mechanisms.<sup>43</sup> His position was supported by other Conservative MPs and the NDP: specifically, Chong noted that the call for the seizure of the ordered documents had precedent in Milliken's 2010 ruling, which "made clear that it is the grand inquest of the nation that [the House] has an unfettered, absolute right to call for the production of papers."<sup>44</sup> On June

23rd, Conservative MP Blake Richards emphasized the importance of the timely release of the unredacted documents and inquired as to the status of Rota's ruling on Deltell's question of privilege, noting that "there is very clear evidence there that [Deltell does] have a prima facie case, so [Richards] would have expected to see a ruling."<sup>45</sup> In response, Rota stressed the importance of careful consideration of the issue in order to ensure that his ruling "merits the position that [he] is in,"<sup>46</sup> a clear reference to his duty to maintain the House's confidence in his impartiality. However, the result of his measured approach to decision-making was that the House adjourned for the summer without a ruling from Rota and, accordingly, still no access to the documents it requested.<sup>47</sup>

Considering the unity of the four opposition parties in passing the two previous House motions and their vocal support for Deltell's intended motion, it is argued that, had Rota found a prima facie breach of privilege, Deltell's motion to order the Sergeant-of-Arms to seize the unredacted documents would have easily passed and the House would have finally secured access to the documents it required in order for MPs to fulfill their constitutional duties. This is not to say that Rota was acting in a partial manner, or that his actions represented a departure from what would normally be expected from a Speaker; rather, the attention he paid to ensure his rulings did not appear biased for or against anyone, a central component of the speakership, served as an internal constraint on his ability to effectively protect the privileges of the House.

The nearly three-month endeavour of the House to obtain access to documents central to the CACN's investigation into the firing of Dr. Qiu and Dr. Cheng from the Winnipeg National Microbiology Laboratory ended without a definitive conclusion, as Rota never delivered his ruling on Deltell's point of privilege. However, no response can be a powerful response; analyzing Rota's role as Speaker of the House throughout the duration of the Winnipeg Lab Affair clearly shows that, despite the power he has on paper, he was not able to serve as the authoritative voice of the House in protecting its parliamentary privileges. The House of

Commons remained consistently resolute in their request for the production of unredacted documents relating to the firing of the two scientists, and Rota's inability to effectively safeguard their interests in the face of government opposition exposes clear weaknesses in the speakership in withstanding external pressures and being a strong advocate for MPs in the House.

## **Reforms**

The Winnipeg Lab Affair exposes clear deficiencies in the ability of the House to effectively scrutinize government decisions and the powers of the Speaker in protecting this authority: in response to these issues, three reforms are proposed. First, a standing committee in the House specifically dedicated to reviewing sensitive information should be established. Doing so would reflect the concerns raised by MPs about the NSICOP during the Winnipeg Lab Affair<sup>48</sup> and would avoid future disputes over access to unredacted information, thereby increasing the government's accountability to the House. A second reform would adopt the recommendations of the 2009 report of the Standing Committee on Public Accounts: in order to ensure that government and its lawyers understand the proper scope of parliamentary privilege, policies and training should be revised such that they "reflect the legal right of parliamentary committees to demand the production of documents and records."<sup>49</sup> The dispute over the production of the unredacted documents rested primarily on conflicting opinions over the limits of parliamentary privilege and if any existed at all; resolving this dissonance would ensure that the struggle faced by the CACN and the House as a whole does not repeat itself in the future.

A more radical reform proposes to emulate the Westminster tradition of the speakership, where the Speaker resigns from their party upon being elected.<sup>50</sup> This is not a novel idea: former Speaker Lucien Lamoureux resigned from the Liberal Party in 1968 and was re-elected that year and in 1972 as an independent MP.<sup>51</sup> The complete removal of partisanship could have given a Speaker in the same situation as Rota in June 2021 the latitude to make a more timely ruling on

Deltell's second question of privilege and in doing so, act as "a true guardian of the health of our parliamentary democracy."<sup>52</sup> Instead of having to take time balancing the considerations of all parties involved in order to maintain the appearance of neutrality, the sole focus would be on zealously advocating for the rights of the House. The House had the absolute right to compel the timely production of the unredacted documents, and any action by the government contradicting this right had already been established by Rota's first ruling to be a prima facie breach of parliamentary privilege. Rota had the power to act to ensure that the House received the documents it required from the government, and his exercise of this power through ruling in points of privilege could have been decisive and without delay. However, an important caveat of this reform is that its success is contingent on other parties agreeing not to run candidates against sitting Speakers in general election. A lack of political will in this area resulted in independent speakers being a short-lived experience after Lamoureux first made the switch in 1968<sup>53</sup> and present a barrier to its potential future implementation.

The driving force behind each of these proposed reforms is a recognition of the constraints facing anyone sitting in the Speaker's Chair and an understanding of the harmful effects that a weak speakership can have on the core tenets of Canadian parliamentary democracy. Can a government truly be accountable to the people if it evades accountability with impunity? As clearly shown by the Winnipeg Lab Affair, a government unresponsive to the House – the only elected representatives of the people in federal government – calls into question the stability of responsible government in Canada and the ability for MPs to effectively exercise their parliamentary privileges in carrying out their constitutional responsibilities.

## **Conclusion**

The declining role of MPs in Canadian parliamentary democracy is reflected in the Speaker's lack of power in defending the ability of the House to hold the government to account.

While the House's accountability function is much more robust in minority parliaments – as was the case during the Winnipeg Lab Affair – where a united opposition constitutes a majority,<sup>54</sup> Rota's powers were still inhibited by factors both internal and external to the speakership. The government's repeated refusal to comply with orders of the House and its application to Federal Court to block the House's repeated attempts to access unredacted documents exemplify their extensive ability to evade the Speaker's authority. It was clear that the government did not want the unredacted documents to be released to the House, either because national security could be jeopardized or because they wanted to conceal deficiencies in their oversight over the transfer of viruses from Winnipeg to Wuhan in 2019.<sup>55</sup> Further, although Rota was very vocal about his support for the unfettered right of the House to order the production of documents, he failed to translate this into concrete action due to the significant pressure he was under to maintain the confidence of the House in his impartiality. Rota's extensive theoretical powers as Speaker of the House were continually inhibited, rendering him unable to adequately ensure the ability of the House to carry out its constitutional responsibilities to investigate governmental decisions. Thus, a strengthening of the powers of the speakership is required in order to ensure that when questions of privilege arise, Speakers are able to act as zealous advocates for the rights of the House and its members.

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