

*Official Secrets Act*

Mr. MACKENZIE KING: I had better read it:

Brais & Campbell

Royal Bank Building,  
360 St. James Street West,  
Montreal, March 12, 1946

E. K. Williams, Esq., K.C.,  
G. H. Fauteux, Esq., K.C.,  
Justice Building,  
Ottawa, Ontario.  
Secret and Confidential

Dear Sirs:

You have asked my opinion whether:

(a) A federal member of parliament who would have committed a crime under the Official Secrets Act can be arrested either during the coming session of parliament or within the few days which remains before its opening on the 14th instant?

(b) If question (a) is answered in the affirmative, whether it would be advisable or inadvisable to obtain the issue of a warrant of arrest against this member at the same time as that to be issued against the individual who divulged to this member certain important war secrets for the benefit of a foreign power:

(a) I have not been informed of any of the activities of the member in question save what appears from the deposition of the individual whose arrest we discussed over the week-end.

That statement does clearly show that the member obtained important information and declared that it was for the use of a foreign power.

It would appear clearly, therefore, that a charge could be laid against the member under section 3 C and probably 4(1) A and B, 4(2), 4(3), of the Official Secrets Act.

No specific penalty is provided in the act for the commission of the above offences and the offender would therefore be subject to section 14 which declares them to be indictable.

Chapter 147, R.S.C., "An Act Respecting the Senate and House of Commons," sections 4 and 5 provide:

"4. The Senate and the House of Commons respectively, and the members thereof respectively, shall hold, enjoy and exercise,

(a) such and the like privileges, immunities and powers as, at the time of the passing of the British North America Act 1867, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom, and by the members thereof, so far as the same are consistent with and not repugnant to the said Act; and

(b) such privileges, immunities and powers as are from time to time defined by Act of the Parliament of Canada, not exceeding those at the time of the passing of such act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof respectively, R.S.C., 10, s.4.

5. Such privileges, immunities and powers shall be part of the general and public law of Canada and it shall not be necessary to plead the same, but the same shall, in all courts of Canada, and by and before all judges, be taken notice of judicially. R.S., c. 10, s.5."

Bourinot's "Parliamentary Procedure", third edition, page 143, chapter 2, under the heading [Mr. Coldwell.]

"Privileges and Powers of Parliament," discusses "the privileges, immunities and powers" to be enjoyed by members. After discussing the origin of privileges, he declares that it is a general principle of English parliamentary law that . . . "the privilege has been always held to protect members from arrest and imprisonment under civil processes, whether the suit be at the action of an individual or of the public; but it is not claimable for treason, felony, breach of peace or 'any indictable offense'."

Bourinot further states that a member may be committed for contempt of court when it is of a quasi-criminal nature, "and the English house has not of recent years deemed it expedient to interfere in cases of an open or gross character."

The right of courts to enquire into the question of privilege is discussed by Bourinot at page 147 as follows:

"As parliamentary privileges rest on statutory as well as customary law it follows that they can be inquired into and determined by courts of law like any other rights. In the words of an authority: 'It seems now to be clearly settled that the courts will not be deterred from upholding private rights by the fact that questions of parliamentary privilege are involved in their maintenance; and that, except as regards the internal regulation of its proceedings by the house, courts of law will not hesitate to inquire into alleged privileges, as they would into local custom, and determine its extent and application.'"

It would appear clear that a member who has committed an indictable offence is therefore liable to arrest at any time and any place except on the floor of the house when it is sitting.

(b) Would it be advisable or inadvisable to charge the member at the same time as the individual from whom the information was obtained.

The failure to charge the member at the same time would appear highly inadvisable. The origin of the trouble, the cause of the temptation and downfall of the individual in question arises entirely and exclusively from the actions of the member. The failure to charge the latter at the same time and bring him before the courts if possible would inevitably give rise to a reaction which in my opinion would be entirely prejudicial to the proper disposal of the complaint.

Obviously at the present time and in so far as my information goes, the only evidence against the member would be the testimony of the individual who gave him information. The member might see fit to offer his own testimony and deny the whole story. The court might then have to decide between the credibility of a witness and an accused. The fact, however, that the witness has incriminated himself by the story and is himself separately charged should, in my opinion, lead any judge to conclude that the version cannot be untrue, the more so in that there is nothing to indicate any unfriendliness whatsoever between the two persons.

Obviously they would have to be separately charged. There should be in my opinion, added a count of conspiracy referring to the substantive offences themselves.

I have not before me all the information arising out of the cases and it is quite possible that certain facts may lead one to another conclusion, but relying for the moment solely on