Why Privilege is Sacred

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The idea of the sacred is quite simply one of the most conservative notions in any culture, because it seeks to turn other ideas—Uncertainty, Progress, Change—into crimes.

– Salman Rushdie, « Is Nothing Sacred? »

These are the words of an author who dared believe literature was a privileged arena of free speech. Harold Pinter delivered them to a live audience on his behalf on February 6, 1990. Rushdie paid for his delusion with a decade of his life during which Iran's theocratic state forced him into hiding.

In 2006, Alexander Litvinenko was duped into drinking tea laced with radioactive polonium. The former KGB spy wrote two books exposing Putin's Russia, while living as a political asylee in the United Kingdom.

Recently, Amnesty International Media Award winner Julian Assange has faced death threats over the work of his whistleblower foundation, Wikileaks. U.S. prosecutors have summoned Twitter.com to disclose the private information of Assange and his supporters. Tom Flanagan, the Canadian political scientist featured in the Fall, 2010, issue of the CBA's *National* magazine, declared on CBC television: "I think Assange should be assassinated, actually. I think Obama should put out a contract and maybe use a drone or something." Flanagan has since retracted the comments. Yet what he spoke was true. The nation state is hard-wired to swat an embarrassing scribe like a mosquito supping its last meal.

Rushdie, Litvinenko and Assange are outlaws. The term was coined by the Romans to describe enemies of the state summarily sentenced to the brutal fate of having the protection of the law withdrawn. The vengeful sovereign, to borrow from Austinian legal theory stripped bare, is an empire of words backed by force or kept secret by force. State privilege, be it a literary portrait of the Prophet, the inner workings of the Kremlin, or U.S. diplomatic cables, is a zone of privacy considered necessary for exercise of state power. Cross the line into the zone, and all privileges may be terminated.

Outlawry, abolished by *habeas corpus*, has come back with a vengeance in the Information Age. Outlaws live (or die) in legal limbo between celebrity and political prison. Publication of political secrets appeals to a public disenchanted by representative government, and is the power of the Sixth Estate. (The traditional press being the Fourth, and pundits such as Flanagan being the Fifth.) The water-cooler debate over "Cablegate" has a serious dimension. Is the Wikileaks model of Open Government guerrilla info-terrorism, or is it the next level of political franchise? Are there a Left and a Right? Is it "irresponsible" because it exposes the workings of government, or is it "responsible" for the same reason?

Rushdie, in equating the sacred with criminalization, contradicted himself by advancing literature as a sacred medium for individual expression. The *Satanic Verses* author foretold the clash we are about to witness between freedom and power. Lawyers must help the world harness the populist impulse wanting to know the leaked information. Should lawyers side with states as the sufferers of embarrassment, or call for legal protections for the publisher? The question is far from easy. The OBA has a responsibility to engage lawyers from all sectors in this debate.

Lawyers' associations in the modern era have favoured mechanisms for greater public participation. Last December, I proudly led an OBA delegation, which met with the Hon. R. Roy McMurtry and delivered recommendations for his review of the *Public Works Protection Act* (the 1939 Act meant to protect public buildings from sabotage, under which the G-20 Regulation was made prior to the recent Toronto summit). The OBA prepared an impressive written proposal for replacing the outdated statute with a legal framework for protecting public spaces as places of democratic participation. It would showcase 21st Century Canadian values, the next time the world's gaze is upon us. The OBA advocated balancing protection of dignitaries and institutions with the desire of people to be heard by world leaders.

The battle lines are drawn between ideas of privilege. In Canada, "privilege" defines a right to conceal information, or to disclose with impunity, or to suspend others' rights in favour of one's own. Consider the following examples:

- A *point of personal privilege* is a rule of parliamentary debate. The assembly suspends its deliberations to address the interest of one member.
- Recent decades have witnessed reforms of privacy law relating to personal information. Nevertheless, *privacy* does not equate to privilege. Most private documents are capable of judicial compulsion under civil discovery or criminal disclosure orders.
- Utterances in Parliament or in court are beyond the reach of defamation law or the law of contempt.
- Defamation law allows no immunity to literature and the press. Such expression is tolerated by the doctrine of Fair Comment. Fair comment is a limited defence, not a privilege.
- The Supreme Court of Canada, in its 2010 decision in *Globe and Mail v. Canada (Attorney General)*, held reporters' sources are not protected by a stand-alone privilege. The Fourth Estate is not a safe haven for whistleblowers. Instead, an informant bears a real risk of being outed by the courts and "thrown to the dogs."

Tell a lawyer a secret, and the court will not compel disclosure. *Lawyer-client privilege* is sacred to lawyers for many reasons, not the least of which is a marketing advantage. Fee-paying clients want to tell their story and receive advice. Lawyers are not beyond a good internecine tussle to undermine the one true privilege not belonging to the state. Last summer, the case of *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* pitted the CBA against the Criminal Lawyers' Association (CLA). The CLA sought, *inter alia*, a public interest override to obtain solicitor-client privileged records in the hands of the Crown relating to a murder case. The court upheld the near-absolute status of the privilege. This status, having fended off challenges from statutory and constitutional law, bears witness to the vigilance of bar associations such as the CBA.

The last time Canada led on a transformational geopolitical phenomenon was Lester Pearson's championship of United Nations Peacekeeping (the Blue-Helmet Brigade). Today, Canada can choose to join the chorus of nations calling for the outlawry of the Wikileaks model of the Sixth Estate. Or it can opt to provide the legal infrastructure for a new and difficult-to-govern building block of civilization. If the future of Open Government begins on these shores, it will need rules of engagement with existing political institutions. It will need an army of lawyers, maybe including *you*.