Parliamentary Privilege

Introduction

Parliamentary privilege is the institution of rules and procedures, both formal and informal, that shape the way politicians are allowed to conduct themselves within the Parliamentary system.

extends to two areas; it is applicable to the Houses of Parliament (the House of Commons and the Senate or the Legislative assemblies in the provinces) and it applies to the Members of the Houses; both Members of Parliament and of the provincial bodies. Privilege allows the members and the Houses to be exempt from certain legal obligations, and to manage their internal proceedings so they can effectively conduct their legislative functions.

This article will outline the origins of Privilege, explain its function, and discuss the procedures for addressing breaches. Finally, the limitations of Privilege will be reviewed with reference to the Constitution and the Courts.

History of Parliamentary Privilege

Westminster Origin

The concept of has English origins rooted in the Westminster system. It comprises a series of privileges, immunities and powers that allow Members of Parliament and the Houses to conduct their legislative functions.

The doctrine of in the United Kingdom emerged out of a “history of conflict” amongst the various branches of government and the courts of justice.[1] Historically, Privilege was meant to prevent the King from interfering with the proper functioning of Parliament. In some cases, the King would imprison Members of Parliament if he took offence to their behavior in the House of Commons.[2] Privilege protected the House’s integrity by preventing outside influences from altering the proceedings of Parliament, either by allowing the House the power to discipline or to remove members from the House or by allowing Members to speak freely without fear of consequence.

In 1523, the King was petitioned for the recognition of rights for the House, especially freedom of speech.[3] In 1621, Members argued that they should have freedom of speech and be free from impeachment, imprisonment, and molestation for all declarations made regarding parliamentary matters.[4] In 1629, the King’s Bench, under Charles I, charged several Members for using seditious words in debate against the Speaker.[5] The Crown explained that Privilege did not apply to seditious language in the House and that the King’s Bench could intervene in these matters. The charges were later determined to be illegal and contradicted Privilege.[6] Statutory recognition of Privilege finally came in the *Bill of Rights, 1689*, which detailed the parameters for freedom of speech in Parliament.[7] Essentially, the

Bill was an agreement that meant Members could not be taken to court for matters discussed in the House.

Privilege was adopted in Canada with the *Constitution Act, 1867* (section 18).[8] At its core, the Constitution gives Parliament the right to create the laws that come to define privileges, immunities, and powers for Members and the House. However, Canada cannot introduce any new privileges or powers that exceed those that existed in the United Kingdom at the time the *Constitution Act, 1867* came into force.

Member and House Privileges

The purpose of Privilege is to allow legislators and legislatures to carry out the primary functions of deliberating, legislating, and holding the government to account. There are two categories into which Privilege is divided: those of the individual Members of Parliament and legislative Houses (MPs, MLAs, and Senators) and those of the House of Parliament and the provincial legislative assemblies.

Individual members have the following privileges, immunities, and powers:

- Freedom of speech: Members have immunity from prosecution for any comment made in the Chamber or in committee;
- Freedom from arrest in civil actions (this privilege does not apply to criminal actions);
- Exemption from jury duty: the responsibilities of an elected representative take priority over jury duty;
- Members do not have to appear in court as a witness.[9]

The House has the following privileges:

- Power to discipline: this includes punishing persons who are guilty of breaches of Privilege or of contempt, and the power to expel Members guilty of disgraceful conduct. Punishment can include the removal of an individual and imprisonment until the end of session;
- Regulation of its own internal affairs: Parliament does not have to abide by the interests or recommendations of external bodies, such as the courts;
- The right to make inquiries, call witness, and demand the order of documents;
- The right to administer oaths to witnesses: the oath is administered by the Speaker of the House, their chosen replacement, or a Committee chairperson;
- The right to publish papers containing defamatory material.[10]

Despite these rights, is often subject to changing circumstances. There are two modern-day developments that were quite significant in specifying the extent of Privilege. First is the case of *New Brunswick Broadcasting Co. v. Nova Scotia (Donahoe)*.[11]

Donahoe

The issue in *Donahoe* was whether television camera operators had the right, under the *Canadian Charter of Rights and Freedoms*, to film proceedings of the Assembly, or whether the Assembly had the right to exclude them from the galleries.[12] In this case, the Nova Scotia legislature refused to allow video cameras inside the Assembly, prompting the CBC to take the Speaker of the Assembly, Arthur Donahoe, to court.

The *Canadian Charter* guarantees freedom of expression, which was the defense used by the CBC.[13] However, the CBC lost its case because the "Supreme Court affirmed that is part of the Constitution, meaning the *Charter* does not apply".[14] Instead, the Supreme Court "discovered another source of : the 'inherent' privileges of provincial legislative assemblies".[15] The Court held that Canadian legislative bodies possess such inherent privileges as are necessary for their proper functioning, and though they are not part of the written Constitution, they are part of the fundamental law of the land, and are therefore, constitutional.

This decision did not settle the application of Privilege at the federal level, except by inference. It would take the judgment of the court in the *Vaid*[16] case to fully deal with these issues regarding Parliament's authority to determine the privileges and immunities of the House of Commons and the Senate.

Vaid

On July 10th, 1997, Satnam Vaid, a chauffeur for various speakers of the House of Commons, filed a grievance under the *Parliamentary Employment and Staff Relations Act* (PESRA). He claimed he had been fired due to discrimination on the basis of race, colour, and national or ethnic origin. The Canadian Human Rights Commission (CHRC) accepted his complaint and referred him to a tribunal, but the Speaker and the House challenged the tribunal's jurisdiction; they felt the Speaker's power to manage employees was privileged, and therefore immune to review.

The House sought judicial review at the Federal Court but was refused. The position advocated by the lawyers of the Commons was that the management of all employees was covered under Privilege and, therefore, the CHRA did not apply. The court ultimately rejected this view. The appellants failed to establish the privilege they were arguing for and it was affirmed that the *Canadian Human Rights Act* (CHRA) does apply to Parliament, as does all statute law. "On examination the Court found that the parliamentary privilege asserted in *Vaid* had not been established against the doctrine of necessity".[17]

The doctrine of necessity is "the foundation of every privilege of parliament".[18] The test of necessity is used to determine whether or not the matter falls under "parliamentary" or

"legislative" jurisdiction.[19] The Court will only inquire into questions regarding Privilege if the matter hinders the efficiency and dignity of the House. The test of necessity states that the powers must be necessary to the legislative body's ability to function as such, and to uphold the dignity of the House.[20]

The appellants argued that permits the Senate and the House to conduct their employee relations free from interference from any body outside Parliament itself.[21] The Court rejected the government's arguments based on the fact that the CHRA applies to all employees of the federal government.

Though it is clearly understood that the Parliamentary system could not function effectively without the use of its hard-won privileges, *Vaid* established that Parliament cannot use Privilege as a method to avoid abiding by the ordinary laws of the land; laws that would not hinder the functioning of the parliamentary process and mandate. An important role of the courts, then, is to ensure that claims of Privilege do not immunize the members or the House from the consequences of their conduct in areas that exceed the necessary scope of Privilege.

Breaches of Privilege and Contempt

A breach of Privilege includes any disrespect of, or assault on, the privileges, immunities and powers of the House and its Members, either by an outsider or by a Member of the House.[22] Contempt is not always a breach of Privilege while a breach of Privilege is always contempt. This is because a breach of Privilege is a clear violation of the privileges, immunities or powers included in . However, contempt is a more general concept that applies to anything that causes an inability to carry out Members' duties. A breach of Privilege is more common and tends to warrant minor punishment, such as an apology.

A breach of Privilege or contempt issue can be raised in a variety of ways depending on the circumstances. When a Member believes that the Government is in breach, it files a motion of contempt with the Speaker of the House. In general, contempt refers to conduct that offends the authority or dignity of the House.

For instance, it can be an act or omission that has the intent to obstruct the House or a Member.[23] In 2011, then Speaker Peter Milliken found the federal government in contempt of Parliament for failing to provide documents requested by the Procedure and House Affairs Committee and for failing to provide a satisfactory explanation for doing so.[24] As a result of not providing the documents, committee members could not carry out their work. Consequently, a vote of non-confidence on a contempt of Parliament motion was held and resulted in the defeat of the Government and an election.[25] This is the only instance in Canadian history where the Government has been found in contempt of Parliament.

Milliken's ruling may serve as an important precedent regarding Parliament's right to information. The House has a right to demand documents in the government's possession since this is vital for their proper functioning.

In another example, in 2013, allegations of breach of Privilege were made against the Royal Canadian Mounted Police (RCMP) for failing to allow a witness to testify before a Senate committee that was investigating harassment within the RCMP. [26] The breach involved the RCMP's new policy that forces its employees who were on sick leave to ask for permission before traveling. The witness, who was on sick leave, was told by the RCMP that if he was fit enough to travel then he was fit enough to return to work. This placed the witness in an awkward position. Liberal Opposition Leader James Cowan of the Senate noted that the use of intimidation to deter a witness from testifying violates Parliament's right to hear from witnesses.[27] In his view, "the right of witnesses to appear before Parliament unobstructed and the right of parliamentarians to hear from witnesses are fundamental rights in the parliamentary process".[28]

In order to provide a greater understanding of the process of raising a breach of Privilege issue, the next section will review the difference between processes used in the United Kingdom and Canada.

Raising a Privilege Issue

To determine whether Privilege has been violated, a number of circumstances can be considered, such as the nature of the breach, and the importance of the violated privilege for the functioning of Parliament.[29] Obstruction of the Member's constituency work does not constitute a question of Privilege.[30]

The process for raising a breach of is more formal in the United Kingdom than in Canada. In the UK, a complaint that Privilege has been breached is taken quite seriously and is likely to result in a motion that identifies a breach. For example, in the British Parliament, a Member will raise a question of Privilege by making a motion. The Speaker must then find the motion to be of great importance and there must be enough evidence to debate the question. Once this is done, the Speaker will refer the matter to the Committee on Privilege that will investigate and determine the outcome.[31] The Committee on Privilege will carry out an investigation and the House will determine if a breach occurred.[32] Moreover, the House has the power to punish in the case of a breach.[33] Punishment can range from an apology to detainment or arrest. A recent example of the complaint process in the UK occurred in 2010 when the Committee on Standards and Privileges found Withers LLP in contempt of the House.[34]

Canada, on the other hand, has adopted a less formal process for raising an issue of Privilege whereby Members raise a complaint that may not result in a motion.[35] There has been a tendency in Canada to raise 'points of order' (a grievance) as Privilege. This means that the complaint from the Member does not satisfy the expectations observed by the Speaker in the formal process.[36] Because the grievance fails to meet the Speaker's guidelines, the process for passing a motion ends and what was raised as a question of Privilege is not seen as a serious matter. Raising a question of Privilege does not have the same significance in Canada as it does in the United Kingdom.

Therefore, questions of Privilege are raised more often in Canada but rarely result in a

motion, whereas they are less common in the United Kingdom but more likely to result in a motion. The failure of questions of Privilege to result in a breach in Canada means that valid breaches of Privilege or contempt are rare.[37] Thus, questions of Privilege are often used in Canada as a way to make remarks or comments about other Members without a serious intent to punish that Member.

Limitations of Privilege

There is potential for conflict between and human rights, such as in *Vaid*. The *Vaid* decision affirmed that the *Canadian Human Rights Act* does apply to Parliament. In reality, while the privileges, immunities and powers included in Privilege may appear to provide Members and the House with a lot of influence, they are subject to various limitations. Privilege was not created as a way for Members to be above the law. Members will be criminally charged if they break the law and they are subjected to all of the same processes an ordinary member of the public would be. Constitutional restrictions also limit Privilege by preventing the creation of new privileges, immunities and powers. Furthermore, the courts have also clarified the scope of Privilege and helped define what constitutes Privilege.

Clarification from the Courts: Judicial Review

Court decisions have clarified the privileges, immunities, and powers of Members and the House. For example, they have found that Privilege only applies to someone when they are functioning as a Member and partaking in Parliamentary proceedings.[38] Privilege only applies when Members make comments regarding other Members or outside bodies, such as individuals or companies, when acting in their capacity as a member within Parliament. This means that a Member cannot make a defamatory comment to another Member, business, or other body if it does not relate to Parliamentary business.[39] Moreover, a Member can only make defamatory comments within the confines of the House, Parliamentary committees, or Parliamentary publications. Comments made to the press or speeches outside of Parliament are not protected by Privilege.[40]

The courts have also outlined the scope of Privilege when creating a test of necessity, which must be considered when dealing with questions of Privilege.

A further clarification was made in 2000 when the United States placed a ban on imports of Prince Edward Island (PEI) potatoes after discovering potato wart disease in October. This case pitted the federal government against the PEI Legislature; a Committee of the PEI Legislature tried to summon officials from the Canadian Food Inspection Agency. However, the federal government claimed that the Committee overstepped its power and they asked the Court to quash the summons.

Nevertheless, the Committee was supported by the Speaker of the Ontario Legislative Assembly who argued that the right of a committee to require attendance of witnesses and production of documents is included as an inherent privilege of the Assembly.[41] In fact, “the Court concluded that it is difficult to imagine how the legislative assembly could properly conduct an inquiry within its constitutional jurisdiction without the power to

summon witnesses and require the production of records and documents."[42] Furthermore, it was found that Committees are natural extensions of the House, whereby the House naturally functions through them. Therefore, there is no doubt that the Committee has the power to issue the summons in question – it derives that power from the legislative assembly.

There have been many decisions made by the courts on the issue of alleged privileges, at both the federal and provincial level. Indeed, "the New Brunswick Broadcasting decision was the first time that the Supreme Court dealt with the issue of parliamentary privilege in nearly 100 years and the very first time that court had before it a question concerning the *Charter* and parliamentary privilege."[43]

This trend is concurrent with a culture of rights that is apparent in Canadian society. It is a healthy phenomenon but it carries significant challenges for Canadian legislatures. Justice McLachlin acknowledged that the *Charter* had affected the balance of powers between the legislative and the executive branches on one hand, and the courts on the other, by mandating judicial review of laws and government action.[44] In fact, she affirmed that was not subject to the *Charter* as are ordinary laws. Both are "essential parts of the Constitution of Canada" and therefore neither prevails over the other. [45]

Conclusion

The federal Houses of Parliament and the provincial legislative assemblies enjoy a set of powers that are necessary for their capacity as legislative bodies. While these powers, known collectively as , remain integral to the functioning of government, the Constitution has prevented the introduction of new privileges, immunities and powers, and the Courts have clarified the scope of Privilege. Furthermore, it seems that few breaches of Privilege are found to be valid when brought forward in Canada, since MPs do not follow the formal procedure for invoking Privilege. Instead, some may argue that Privilege is being evoked more and more for the purposes of political gain or chastising other Members, and thereby belittling its significance. Using the formal procedure for a breach, as done in the United Kingdom, may be a way to restrict the complaints that do not result in a motion.

Even though Courts have clarified the use of technology in proceedings, such as in *Donahoe*, the future may bring up more questions regarding the role of technology. For example, will members be allowed to participate in proceedings by computer? It is not unprecedented that this could force a reexamination of the application of Privilege. In sum, despite the importance of Privilege to the functioning of the parliamentary system, there is always room to redefine and clarify it, which is to the benefit of all Canadians.

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[1] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, (1993 SCC). .

[2] Robert Marleau & Camille Montpetit, "Chapter 3: Privileges and Immunities" *House of*

Commons Procedure and Practice (2000), online: Parliament of Canada . Online: <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch03&Seq=2&Language=E&Print=2>.

[3] Erskine May, *Parliamentary Practice*, 21st ed (London: Butterworths & Co., 1989) at 72 [May].

[4] *Ibid*.

[5] *Ibid* at 73.

[6] *Ibid*.

[7] *Bill of Rights*, 1688 (UK).

[8] *The Constitution Act*, 1867, 30 & 31 Vict, c 3, S. 18.

[9] *Marleau*, *supra* note 2.

[10] *Ibid*.

[11] *Donahoe*, *supra* note 1.

[12] *Marleau*, *supra* note 2.

[13] Neil Morrison, ": A SCOC Precedent?" *CBC*. (9th January 2009). Online.

[14] *Ibid*.

[15] *Donahoe*, *supra* note 1, cited in Warren J. Newman, ", the Canadian Constitution and the Courts" *Ottawa Law Review* (2008) at 581.

[16] *Canada (House of Commons) v. Vaid*, 2005. .

[17] Alison Clegg, "Implications of the national human rights consultation for the powers and proceedings of parliament" (Autumn 2011) 26:2 *Australian Parliamentary Review*, Online.

[18] *Vaid*, *supra* note 16 at para 29.

[19] Gary Levy, "The Right of Provincial Legislatures to Summon Federal Officials", *Canadian Parliamentary Review*. . Online: < http://www.revparl.ca/english/issue.asp?art=10&param=58>.

[20] *Vaid*, *supra* note 16 at para 29.

[21] *Ibid* at para 11.

[22] *Marleau*, *supra* note 2.

[23] *Ibid*.

[24] "MPs' report finds government in contempt" *CBC News*. (21March 2011). Online.

[25] *Ibid*.

[26] "RCMP travel limits breach parliamentary privilege, senator says" *CBC News*. (7 May 2013). Online.

[27] *Marleau*, *supra* note 2.

[28] *RCMP travel*, *supra* note 26.

[29] Joseph P. Maingot, *in Canada*, 2nd ed (Canada: House of Commons and McGill-Queen's University Press, 1997) at 235 .

[30] *Ibid* at 236.

[31] *Ibid* at 217.

[32] *Ibid* at 220.

[33] *Ibid* at 221.

[34] Andrew Sparrow. "Law firm was in contempt of Parliament, Commons committee says" *The Guardian*. (25 February 2010). Online: < http://www.theguardian.com/politics/2010/feb/25/law-firm-contempt-of-parliament>.

[35] *Maingot*, *supra* note 29 at 217.

[36] *Ibid* at 220.

[37] *Ibid*.

[38] *Ibid* at 82.

[39] *Ibid* at 84.

[40] Parliament of Canada. ": Limitations of Privilege" *House of Commons* (2007) Online.

[41] *Levy*, *supra* note 19.

[42] *Ibid*.

[43] *Maingot*, *supra* note 29 at preface.

[44] *Newman*, *supra* note 15 at 590.

[45] *Harvey v. New Brunswick (Attorney General)*, 1996 CanLII 163 (SCC), at para. 69.