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# An Introduction to Parliamentary Privilege

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by Terry Moore and James Robertson

*Parliamentary privilege refers to certain immunities from the law provided to Members of Parliament in order for them to do their legislative work. It also protects the right of Parliament to perform its constitutional functions. This article outlines the extent and limitations of parliamentary privilege and gives some examples of privilege and the process for dealing with such questions.*

**P**arliamentary privilege is a shorthand term. The term "privilege" usually conveys the idea of a "privileged class", with a person or group granted special rights or immunities beyond the common advantages of others. This is not, however, the meaning of privilege in the parliamentary context. Parliamentary privilege refers to the rights and immunities that are deemed necessary for the Senate and the House of Commons, as institutions, and Senators and Members representing constituencies, to fulfil their functions. It also refers to the powers possessed by each House to protect itself, its Members, and its procedures from undue interference, so that it can effectively carry out its principal functions which are to inquire, to debate, and to legislate. In that sense, parliamentary privilege can be viewed as special advantages which Parliament and its Members need to function unimpeded.

These rights and immunities emerged out of centuries of struggle between King and Commons in England culminating in the Bill of Rights of 1689. Freedom of speech, the most important right enjoyed by Members of the British House of Commons, was contained in Article 9 of the Bill. The passage of the Act was a great victory for democracy not only in Britain but also in Canada as we are inheritors of the Bill of Rights. In 1704 the British Parlia-

ment decided they would not give themselves any more privileges and basically the rights and immunities enjoyed by the two Houses of Parliament and parliamentarians today are those of 1704 with one important exception.

This exception grew out of the famous case of Stockdale versus Hansard in 1836, which fixed parliamentary privilege as part of the English Common Law. Stockdale sued Hansard, the printer of the British House of Commons, for libel over a report printed by Hansard by order of the House. The document contained defamatory remarks about Stockdale. Stockdale eventually won his case thereby forcing the British Parliament to pass the *Parliamentary Papers Act* of 1840 allowing both Houses of Parliament to publish libellous material.

## **Rights and Immunities of the Houses and of Individual Members and Senators**

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Let me turn now to the different types of rights and immunities. These can be divided into two categories: those extended to Members and Senators individually, and those extended to each House collectively. The list of those enjoyed by parliamentarians individually is short and very specific. The most important of the individual liberties is freedom of speech in the Chamber and other proceedings of Parliament. This is the freedom of a Senator or a Member to say what he or she wants to, it is not freedom to speak whenever one wishes. Through their Standing Orders and Rules, the Houses control who may speak, when, and for how long, and to a certain degree

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what may be said. For example, the Houses prohibit unparliamentary language, require that members be addressed in particular ways, and encourage members to refrain from criticizing non-members.

A second individual right where there is often some confusion relates to freedom from arrest. There was originally some protection against arrest for a civil action but that privilege disappeared centuries ago. There is absolutely no immunity from arrest for criminal matters. If a parliamentarian commits a criminal act he or she is liable to arrest. The only limitations are that the police must advise the Speaker that they have a warrant for the arrest of a member and seek his or her permission to enter the premises. In Westminster there have been cases where members were arrested in the Chamber (not while the House was in session). Parliament is not a sanctuary or a place where members can avoid the law.

A third right that applies to individual members is the exemption from jury duty. The courts have a huge list of people on whom to draw for jury duty. There is no need to call on a Member of Parliament or Senator as these individuals have public duties to perform, which take precedence over the requirement to serve on a jury.

Similarly Members and Senators are exempt from attending court as witnesses. That does not mean that parliamentarians do not appear in court. They may do it voluntarily if their testimony is absolutely required. That is the total sum of rights and immunities of Members of Parliament.

Collectively, each House has a number of rights and immunities. The first is the right to discipline, that is, the right to punish (by incarceration) persons guilty of breaches of privilege or contempts, and, in the House of Commons, the power to expel Members guilty of disgraceful conduct. Each House can censure its members or reprimand members of the public. Each House can imprison, although that has not been done in a long time. The House of Commons can expel its Members and can suspend its Members for a day or longer.

The second right of each House is the regulation and control of its internal affairs by making rules for itself and controlling the parliamentary precincts including who is allowed onto the precinct and who is not.

Each House also has the authority to maintain the attendance and service of its members.

Each House has the right to initiate inquiries and call witnesses and demand documents. Each has the right to administer oaths to witnesses and to publish papers containing defamatory material. That is the sum total of the rights and immunities of the House collectively.

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## Contempt

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Any disregard of or attack on the rights, powers and immunities of one of the Houses and its members, either by an outside person or body, or by a member of that House, is referred to as a "breach of privilege" and is punishable by the House. There are, however, other affronts against the dignity and authority of Parliament, which may not fall within one of the specifically defined privileges. Thus, the Houses also claim the right to punish, as a contempt, any action which, though not a breach of a specific privilege, tends to obstruct or impede the House in the performance of its functions; obstructs or impedes any member or officer of the House in the discharge of their duties; or is an offence against the authority or dignity of the House, such as disobedience of its legitimate commands or libels upon itself, its members, or its officers. The power to punish contempts, whether contempt of court or contempt of Parliament, exists so that the courts and the two Houses are able to protect themselves from acts which directly or indirectly impede them in the performance of their functions. In that sense, all breaches of privilege are contempts of the House, but not all contempts are necessarily breaches of privilege.

*In the course of a Parliament more accusations of contempt of parliament than breaches of members' individual privileges are raised.*

In *Erskine May* contempt is defined as follows: any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any member or officer of such house in the discharge his duties or which has a tendency to directly or indirectly to produce such results.

In another work on British parliamentary practice entitled *Parliament: Functions, Practice and Procedures*, the authors have provided a list of examples of what the British view as contempt<sup>1</sup>:

- The misconduct of individuals in the presence of the House or its committees (for example, persistent misleading of a committee by a witness)
- Disobedience of the rules of the House or its committees (refusal of a witness to attend)
- Presenting forged or falsified documents
- Misconduct (meaning corruption) of Members or officers of the House
- Constructive contempts (speeches or writing reflecting badly on the House; premature disclosure of

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committee proceedings or evidence; fighting in the lobbies of the House)

- Obstructing Members in the performance of their duties (impeding entrance; intimidating, molesting or insulting Members)
- Obstructing officers of the House in the performance of their duties
- Obstructing witnesses (who have full protection of privilege when engaged as witnesses).

We do not have such a list in Canada but in fact many of the actions listed above would be and have been considered contempts and have led to such matters being raised. Let us now turn to the question of how the House of Commons deals with such issues when they are raised.

### **Bringing an Issue of Privilege or Contempt Before the House**

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Prior to 1958 there was no written procedure as to how to deal with questions of privilege in the Canadian House. In that year the 4<sup>th</sup> Edition of Beauchesne's *Rules and Forms of the House of Commons* was published. It laid out the practice of the British Speaker in dealing with questions of privilege. Speaker Michener decided that henceforth the House of Commons would follow the practice at Westminster and Speakers of both Canadian Houses since have followed this.

In 1977, however, the British House of Commons completely changed the way they deal with questions of privilege so we no longer follow British practice. At Westminster, a Member who feels that his or her rights have been breached will send a letter to the Speaker. The Speaker will consult with the Member and decide if there is a valid question of privilege. If this is the case, the Member is informed and in the House will move a motion, usually to refer the matter to committee. The House with little or no debate generally adopts such motions.

In Canadian practice, there are two important things for an individual to remember in raising a matter of privilege. First, he or she must do so at the earliest opportunity and, second, the member must convince the Speaker that on the first impression (*prima facie*) there is a question of privilege.

The Speaker's role is quite limited. Is the matter being raised of such a nature as to require priority over all other business? If it is, the House must take the matter into immediate consideration. So the Speaker is not deciding if there is in fact a matter of privilege or if a Member's rights have been breached, but only if there appears to be a breach, which warrants putting aside other business in order to consider it.

When can this be done? If the issue of privilege arises out of something that happens in the House of Commons it must be raised immediately without notice. The Member raises and describes to the Speaker what privilege has been breached or the nature of the contempt. To facilitate the work of the House the Speaker does not normally allow matters of privilege to be raised at certain times. Such matters cannot be raised during Statements by Members, Question Period, Royal Assent, the Adjournment Debate (the Late Show) or recorded divisions.

If something happens outside of the House that a Member considers a matter of privilege, then he or she has to proceed in a particular way. At least one hour before raising it in the House, a written notice must be sent to the Speaker indicating that the Member intends to raise a question of privilege. The notice should contain four elements. It should indicate that the Member intends to raise a question of privilege in the House. It should state that the matter is being raised at the earliest opportunity. It must describe what privilege has been violated or the nature of the contempt. And the Member should include the text of the motion he or she will move if the Speaker accepts there is a *prima facie* case of privilege. With this information the Speaker will be prepared to deal effectively with the issue when the Member raises it in the House. Questions of privilege for which written notice has been given are raised at specific times, namely: on the opening of the sitting; following Routine Proceedings but before Orders of the Day; immediately after Question Period; and occasionally, during a debate.

Depending on the circumstances, the Speaker can delay consideration of the question to a later time or date if, for example, it involves more than one Member and one of them is absent. If there is more than one question of privilege being raised the Speaker decides in what order he or she wishes to deal with them.

The Speaker will recognize the Member who raised the question of privilege and hear what he or she has to say. He may also recognize other Members wishing to participate in the discussion. When the Speaker has heard enough to allow a decision he will end the discussion and make a ruling or he may elect to take the matter under advisement and make his decision at a later date. If the matter is urgent the Speaker usually seeks consent to suspend the House in order to have an opportunity to study the matter and make a decision.

If the Speaker decides there is no *prima facie* case of privilege, that is the end of the matter and the House goes back to its regular business. If the Speaker decides there is a *prima facie* question of privilege, then the Member who raised the matter must be ready to move his or her motion. The usual form of the motion is to refer the matter to committee for study, but it may provide for some

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other action to be taken. The motion must be seconded, is debatable and amendable and it has priority over Orders of the Day – that is, Government Orders and Private Members' Business. Routine Proceedings, Statements by Members, Question Period and the Adjournment Proceedings take place. Debate on the privilege motion may be limited by the adoption of closure. Members may move the adjournment of the House or of the debate. At the conclusion of the debate the House may adopt or defeat the motion. If the motion is adopted it becomes an order of the House.

### **Procedure Dealing with Matters Arising from Committees**

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The House has not given its committees the power to punish any misconduct, breach of privilege, or contempt directly. Committees cannot decide such matters; they can only report them to the House. Except in the most extreme situations, the Speaker will only hear questions of privilege arising from committee proceedings upon presentation of a report from the committee, which directly deals with the matter and not as a question of privilege raised by an individual Member. Most matters, which have been reported by committees, have concerned the behaviour of Members, witnesses or the public.

Once the committee report has been presented, the House is formally seized of the matter. After having given the appropriate notice, any Member may then raise the matter as a question of privilege. The Speaker will hear the question of privilege and may hear other Members on the matter, before ruling on the *prima facie* nature of the question of privilege. Should the Speaker rule the matter a *prima facie* question of privilege, the Member who raised the question of privilege may then propose a motion asking the House to take some action. Should the Speaker rule that there is no *prima facie* question of privilege, no priority would be given to the matter. As with any committee report, any Member may still seek concurrence in the report by following the normal procedures during the Daily Routine of Business.

When the House sits as a Committee of the Whole, a Member may raise a question of privilege only on matters that have occurred in the Committee. In a Committee of the Whole, a Member may not raise, as a question of privilege matters affecting the privileges of the House in general or something, which has occurred outside the Chamber, but may move a motion that the Committee rise and report progress in order that the Speaker may hear the question of privilege. If the motion is adopted, the Chairman will rise and report to the Speaker who will then hear the Member.

### **The Execution of Search Warrants**

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As custodian of the rights and privileges of the House of Commons and head of its administrative structure, the Speaker oversees the management of the precinct of the House. Cases have arisen where representatives of outside police forces have wanted to enter the precinct of Parliament for purposes of making an arrest, conducting an interrogation or executing a search warrant. The Speaker has the authority, on behalf of the House, to grant or deny outside police forces permission to enter the precinct. Well-established parliamentary tradition provides that search warrants may only be executed within the precinct of Parliament with the consent of the Speaker. The Speaker may withhold or postpone giving his or her consent if it is determined that the execution of the search warrant will violate the collective and individual privileges, rights, immunities and powers of the House of Commons and its Members by interfering with the proper functioning of the House of Commons.

*Parliamentary privilege is not the privilege of an élite group but rather a necessary component of what is required for the Canadian electorate's representatives to conduct public business on behalf of all Canadians free from interference and intimidation.*

A search warrant must be executed in the presence of a representative of the Speaker who ensures that a copy of it is given to any Member whose affairs are subject of the search, at the time of the search or as soon as practicable thereafter. The *Parliament of Canada Act* and the by-laws of the Board of Internal Economy make the Board responsible for determining the acceptability of a search warrant when dealing with matters involving the investigation of the use by a Member of funds, goods, services or premises granted by the House. The Speaker, with the assistance of the Law Clerk and Parliamentary Counsel, examines every search warrant that the police wish to execute within the precinct. In the examination of a search warrant, there are two major considerations which the Speaker takes into account: the procedural sufficiency of the search warrant and the precise description of the documents sought under the search warrant. Essentially, the Speaker's role in reviewing a search warrant is restricted to an examination based on form and content.

Ultimately, a Member of the House of Commons is not "above the law". The Member is, however, entitled to the

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full protection of the law, including the application of both corporate and individual parliamentary privilege and is subject to the criminal law and the protection it provides.

### **Matters of "Personal Privilege" in the House of Commons**

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While in House practice, there is no point of personal privilege, although Members occasionally rise and use this terminology. The Speaker may sometimes grant leave to a Member to explain a matter of a personal nature. This is considered as an indulgence by the Chair and is completely at the discretion of the Speaker. Members may cite personal privilege in the following circumstances: to make personal explanation; to correct errors made in debate; to apologize to the House; to thank the House or acknowledge something done for the Member by the House; to announce a change in party affiliation; or to announce a resignation. The Member gives notice to the Speaker in writing or in unusual circumstances orally but privately. He or she is recognized by the Speaker and rises in his or her place and makes a statement. This statement is not meant to be used for general debate and Members are expected to confine their remarks to the point they wish to make. No other Members are recognized to speak on the matter.

### **How Committees Deal with Privilege**

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Most questions of privilege are referred to a committee for detailed study and investigation. In the Senate, this means the Standing Senate Committee on Privileges, Standing Rules and Orders, while in the House of Commons, such matters are referred to the Standing Committee on Procedure and House Affairs.

Usually parliamentary committees deal with policy or legislation, but in cases of privilege these committees are engaged more in a fact-finding and adjudicative exercise: they have to determine what happened, why, and what should be done about it. Their role is to determine whether in fact a breach of privilege or contempt of Parliament occurred and, if so, to recommend the appropriate sanctions.

The procedures of the Senate and House committees in privilege cases are similar. An issue referred to the committee will generally be taken up on a priority basis. Circumstances will dictate whether the committee can complete its work quickly or whether the issue may take several months to investigate. If there are outside activities such as court or administrative proceedings that are relevant to the question, this may affect the timing of hearings.

Committees investigating a question of privilege have the same powers as any other committee. They have the power "to send for persons, papers and records." They can invite or summon witnesses, and require the production of documents. If a person refuses a summons, the committee can report the fact to the full chamber, and it is up to the chamber to issue an order to attend or to provide documents.

The first witness is usually the Senator or Member who raised the question of privilege in the chamber. He or she will often reiterate what they said earlier, but may also give more information than during the initial discussion in the House. The committee may also want to hear from experts in parliamentary procedure, such as the Clerk of the House or the Law Clerk. The person or persons whose conduct led to the complaint will usually be called, and given an opportunity to explain what happened and why it should not be considered a breach of privilege. Other evidence may be sought, depending on the case.

Because of the fact-finding nature of the inquiry, and the consequences that can result, there may be a requirement that witnesses testify under oath. By tradition, Members of Parliament and Senators are not required to testify under oath, on the basis that they have taken a general oath of office which is considered sufficient. Sometimes, however, they will agree voluntarily to be sworn in so as to testify on the same basis as other witnesses.

The issue before the committee is whether there has been a breach of privilege or contempt of Parliament. The committee, however, does not make the final decision. It makes findings of fact and recommendations which are reported back to the chamber. By concurring in the report of the committee, the chamber will adopt the report of the committee.

If the committee finds that a breach of privilege has occurred, it will report to the Senate or House and include some recommendation for a remedy to punish the person or persons who committed the breach and ensure it does not happen again. There are various options open, ranging from a reprimand and censure, to suspension, expulsion, or even imprisonment. In recent years, most of the cases where a committee has found a breach of privilege, the issue has not been one where there was a deliberate attempt to undermine the work of the Senate or the House of Commons so the more drastic remedies have not been used. The more frequent course of action is for a reprimand.

A committee has no obligation to report on a matter of privilege that is referred to it but it generally will do so. If a committee finds there is no breach of privilege, it will still submit a report to the chamber and the chamber may

concur in the report or, considering there was no breach, it may simply decide to do nothing and the matter is closed.

In general, the scope of privilege has been very narrowly construed by committees of both the House and Senate. For example, a few years ago a newspaper printed an article suggesting that compensation paid to Senator Pat Carney for some documents relating to her time as Minister that had been inadvertently destroyed was unwarranted and inappropriate. The Speaker of the Senate found that the newspaper article constituted a *prima facie* case of privilege. The Committee heard from the Senator, from the journalist who wrote the story, and from experts in parliamentary privilege. It concluded that although the newspaper article was misleading, incomplete and inaccurate, it did not infringe Senator Carney's activities or her ability to function as a Parliamentarian.

*The determination that a prima facie question of privilege exists does not always lead to a finding that a breach occurred or a contempt has been committed. In many cases, the mere referral of a matter to a committee is significant. It is then up to the committee to make a determination following an investigation.*

The *prima facie* cases of privilege that have been referred to committees of the Senate and the House of Commons over the last several years can be grouped into several general categories:

**Leaking of Committee Reports and Other In Camera Material:** In recent years the premature release of committee reports before they are tabled has been raised as questions of privilege in both the Senate and the House of Commons. In the House, Speakers have consistently ruled that unless it is possible to identify the individual who leaked the report, they were unable to find a *prima facie* case: there needs to be more than just a general complain or allegation. The House of Commons Standing Committee on Procedure and House Affairs did end up investigating the issue of leaked House reports, but as an order of reference rather than as a result of a motion of privilege.<sup>2</sup> The main difference in dealing with issues this way is that they do not get the same priority over other business as if they were dealt with as a matter of privilege. The Senate took a different approach to the matter of leaks. Several cases of leaked draft committee

reports were found to be *prima facie* breaches of privilege, and referred to the Standing Senate Committee on Privileges, Standing Rules and Orders, which made recommendations to minimize such problems in the future and a procedure for investigating such leaks that occur.<sup>3</sup>

**Intimidation or interference of witnesses before committees:** A woman who had appeared before a House of Commons committee looking at abortion showed an extract from a CBC television programme as part of her testimony. She was later contacted by a producer from the CBC who objected to her using the material in such a political context. The committee decided that a letter of reprimand should be sent to the CBC executive. More recently, in the Senate, there was a case of an official from Health Canada who testified before a Senate Committee on the use of Bovine Growth Hormone. He was subsequently given a five-day suspension without pay by the Department of Health, which he claimed was a result of his testimony to the Senate. After looking into the issue, the Standing Senate Committee on Privileges, Standing Rules and Orders determined that it could not make a direct link between the demotion and the testimony so no finding of privilege was reported.

**Impeding Member's access to Parliament:** During the furore over the GST legislation during the early 1990s there was a protest by taxi drivers on Parliament Hill which impeded members from using the minibuses to get from their offices to the Centre Block. This was raised as a question of privilege and the Speaker agreed that there was a *prima facie* case of interfering with members ability to attend to business in the Chamber. The matter was referred to committee but it was not pursued. Another case involved strikers who picketed parliamentary precincts and buildings, as part of a protest by public sector unions. The Committee determined that this was a technical breach of privilege and that the strikers should be reminded that they cannot interfere with the ability of Members of Parliament to enter and leave the precincts.

**Disturbances in the House:** Several years ago, a Member of Parliament grabbed the Mace on the table in the chamber, and this resulted in motion of censure against him. In another case, students protesting increases in university fees pelted Members of Parliament from the gallery with macaroni.

**Failure of government ministers to provide or table information:** The House of Commons Standing Committee on Justice and the Solicitor General wanted access to confidential reports relating to the escapes from prison of certain inmates. The committee was provided with ed-

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ited documents. The issue was whether a breach of privilege had been committed in not providing complete and unedited version. The committee decided that Parliament had the right to request any unexpurgated information that it wants and was not bound by the *Access to Information or Privacy Acts*. The matter was subsequently resolved by making the documents available at an *in camera* briefing of the Justice Committee and not allowing any documents to leave the room.

**Other *prima facie* cases of privilege:** Acrimonious political debates have lead to several questions of privilege in recent years: for example, during the last Quebec referendum, a Quebec MP wrote to Quebec Members of the

Armed Forces asking them to report to Quebec City after the result of a successful referendum, while another issue involved criticism of the Speaker of the House over the issue of displaying flags on desks in the House.

#### Notes

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1. J.A.G. Griffith and M. Ryle, *Parliament: Functions, Practice and Procedures*, London, Sweet and Maxwell, 1989, pp. 93-4.
2. See Douglas Fisher, "The Problem of Confidentiality of Committee Reports", *Canadian Parliamentary Review*, Vol. 22, No 3, 1999, pp. 11-13.
3. See Jack Austin, "The Confidentiality of Committee Reports", *Canadian Parliamentary Review*, Vol. 24, No 1, 2001, pp. 5-7.