Guest Editorial

Democracy in the 21st Century: The Need for Codification of Parliamentary Privilege

The current adherence of our House of Commons and all other Canadian parliamentary assemblies to the body of law known as "Privilege" is neither convention nor happenstance. Privilege is an essential component of our parliamentary democracy.

Since it is buried in the foundations of our complex modern government one could also say that it is only the "plumbers and engineers" who ever see it in operation or have to work with it.

Nevertheless, privilege is certainly alive, since we could not operate a Parliament of the type we have now without it. Arguably it is just as important to Parliament as the Ten Commandments are to the Judeo-Christian faiths. However, privilege has not had the benefit of being written down on tablets as the Commandments were. The absence of a comprehensive codification of this legal construct has allowed for flexibility and adaptation to changing times. But, I would also argue that this circumstance has produced new challenges, including such effects as being misunderstood (perhaps the least worrisome), public ignorance, conflict with other laws and conflict with other institutions. By far the most troublesome, for a political institution in a democracy, is minimal awareness and uncertainty that it has support of the citizenry.

In further exploring the current status of privilege, which remains firmly based on principles of institutional necessity and free speech, I would like to examine three areas in more detail:

- The lack of knowledge or understanding of privilege, not just on the part of the public, and not only among lawyers, but among legislators themselves.
- The term "privilege" itself which is an unfortunate "brand name" in modern times and is needlessly suggestive of elitism and special status for elected persons.
- The need for codification.

The practice of parliamentary law and privilege might be commonplace for Speakers, Clerks and a few Parliamentarians, however it clearly suffers from a lack of public understanding. Public knowledge, lawyerly knowledge and even judicial knowledge of the law and application of privilege are abysmally low. The level of awareness and knowledge of parliamentary privilege across the country is probably in about the same range as knowledge of Canon Law. The average lawyer probably knows more about meteorology.

I am not aware of any law school in Canada which teaches parliamentary law. If I am wrong, my lack of awareness is just as telling. Surely there is a law school in this country capable of undertaking an attempt to modernize, codify or reform this area of privilege law. Such a project would be helpful to legislative houses across Canada.

I attended law school in Ontario in 1970 and practiced law for about 15 years before being elected to the House of Commons. I do not remember ever hearing of privilege until I came to the House. Most Members of Parliament and MLAs would say something similar. So we have now, as we did at Confederation, parliamentarians entering legislatures and subject to a distinct legal construct of which they know almost nothing.

This means a person can become a judge, go through half a career and then have to learn about it, sometimes from counsel who just learned about it two days before from a legal brief prepared by a law student four days earlier. This general ignorance of the law of privilege also means we lack a critical mass of citizens who accept and support it. Privilege is constitutional in nature and cannot change on a whim, but even constitutions can change if the people take a mind to do so.

When there are instances of conflict or competition between laws, the absence of knowledge and of general support for a law could lead to difficulty in any of our courts or tribunals. Our goal should be to pre-empt conflicts where possible, ensure clarity and good legal decisions which respect the place and role of parliamentary assemblies.

The very term parliamentary privilege I find unhelpful, and I believe inhibits public understanding. Firstly, the word "privilege" has a different meaning in modern language than it had centuries ago and no longer describes to the layman a body of law. Rather the public equates it with a bundle of special arrangements for an elite. This is perhaps ironic, given that it was originally created as a body of protections for the Commons, to protect those Members from the elites of that time.

Secondly, the roots of privilege can be traced back to the beginnings of parliamentary government. It is an ancient concept, with freedom of speech for parliamentarians being codified in the *United Kingdom Bill of Rights, 1689*. In fact, there are roots going back to the *Magna Carta* of 1215. But for most of our legislatures there does not exist a codification in current or colloquial language.

As a result, there are real barriers to public understanding. Even a simple newspaper editorial on the subject using this kind of language, runs the risk of putting the reader to sleep or making him angry.

We need to change the term "privilege". Perhaps call it Parliamentary Law. The laws governing parliamentary free speech could be broken down into "bite size" components and re-styled as confidentiality, immunity, compellability, subpoena, and so forth.

One of the oddest characteristics of modern day privilege in this and perhaps other countries, is that even those who work it, seem to have fallen into a pattern of describing privilege by reference to quotes not from parliamentarians, but from judges even though Parliaments have historically prohibited Courts from tinkering with privilege.

So modern benchmarks in this area of law are now found in Court judgments and not rulings of the Speakers. Shame on us. Parliamentarians should never allow this body of law to be turned over to Judges and the Courts. It seems to me that was the whole point of creating parliamentary law in the first place. This is a dangerous road to be traveling. The only way I see out of this is to attempt a modern codification.

Other Parliamentary democracies have moved to modernize privilege. Australia has taken the step of legislating privilege, with the *Parliamentary Privilege Act of 1987*. In my opinion, legislation is neither required nor desired. The United Kingdom on the other hand has taken steps to modernize and move toward codification as seen in the First Report of the Joint Committee on Parliamentary Privilege in 1999. We could take a similar approach here in Canada, but it would be a big project.

I would propose we take steps towards a codification of the law of privilege (preferably under another name). This move could benefit all Houses in Canada and provide better understanding of the separate and individual elements of privilege law for the public, media and Members of Parliament themselves.

Such an undertaking would have to be comprehensive and rigorous. Parliament would have to review the entire body of privilege, codifying in modern language the rights and immunities that allow parliament to work effectively, while possibly eliminating outdated terms or practices that are not applicable to current legal infrastructure, and are out of step with modern law, modern language and current concepts of citizen rights in Canada. Since the workings of Parliament are dependent on this body of law being comprehensive and firm, the boundaries of the applications of this law should also be clear and defined. Clear definition will allow privilege to function in a healthy robust way, while providing the public understanding necessary in these times of transparent and open democracy.

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