Challenging the Chair

by Tim Mercer

Impartiality is a prime prerequisite for occupants of the Chair in Westminster style parliaments but there are some cases in Canada and in other Commonwealth jurisdictions that have resulted in famous challenges to the authority of the Speaker. The most notable of these occurred during the so-called "Pipeline Debate" in the House of Commons in 1956. Centered around the federal government's proposal to assist in the construction of a natural gas pipeline from Alberta to Quebec, the acrimonious and disorderly debate lasted eighteen days and produced twenty-five appeals from rulings of the Speaker and Chair of Committee of the Whole. It resulted in the first and only motion of censure, albeit unsuccessful, of a Speaker in the history of the Canadian Parliament. Although appeals have been abolished in most legislatures this article looks at other avenues open to Members when they feel the Chair has erred in his or her interpretation of the rules or, more seriously, rendered a decision based on partisan or personal interests.

What options are available to Members who wish to challenge the Chair, either on a particular ruling or more generally? The rules and practices differ somewhat from jurisdiction to jurisdiction. Generally speaking, five possibilities exist, varying between procedurally pure, to informal to those that might constitute a serious breach of parliamentary privilege. For this reason, I have labeled them 'possibilities' as opposed to 'options'! They are:

- Formal Appeal;
- Substantive Motion;
- Criticism Outside the House;
- Disobedience;
- Threat and Intimidation.

The intention is not to suggest that each of these possibilities should or can be considered by Members, but rather to generate a discussion about what type of challenge a Presiding Officer might face and how they, and the House, might respond.

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Formal Appeal

The ability to appeal a ruling of the Speaker ended in the House of Commons in 1965. Similar prohibitions exist today in most Canadian jurisdictions. By way of example, the Rules of the Legislative Assembly of the Northwest Territories state:

> In deciding points of privilege, order or practice, the Speaker shall state the applicable Rule or other authority. The Speaker's decision shall not be subject to debate or appeal.[1]

In discussing this rule with Members, some have asked "but what if the Speaker's ruling is wrong?" This is obviously a difficult question for a Clerk to answer but in attempting to explain the concept, I have sometimes been tempted to draw an analogy, albeit limited and arguably preposterous, to the teachings of the Catholic Church with respect to papal infallibility.

The doctrine of papal infallibility was expressly defined at the First Vatican Council in 1870. It proposes that the Pope is preserved from error when he solemnly pro-

mulgates, or declares, to the Church a decision on faith or morals. It follows that anyone who deliberately dissents with an infallible declaration is outside the Catholic Church. The doctrine does not go so far as to conclude that the Pope is divinely inspired or that he is exempt from sin. Rather, it establishes that when he is acting in the official capacity as spiritual head of the Church, his teachings and conclusions are final and binding on the Church as a whole. In addition, in making an infallible declaration, he cannot contradict anything the Church has taught officially and previously.

So it is, in a limited sense, with decisions of the Speaker. With few exceptions in Canada and the Commonwealth, the prevailing parliamentary law can be summarized by the following pronouncement of Speaker Jean-Pierre Charbonneau in the Québec National Assembly in June of 2001:

> Our parliamentary law, in its wisdom, holds that one may not impugn the conduct of a Member unless it be by recourse to a formal procedure, to wit a substantive motion. […] Parliamentary law is even more stringent when the conduct of a Presiding Officer is concerned. Not only is it forbidden to impugn the conduct of a Presiding Officer otherwise than by means of a substantive motion, but to do so may even place one in contempt of the Assembly.[2]

This ruling was in response to a series of points of order challenging the impartiality of each of the deputy speakers of the House during a heated debate on the issue of civic amalgamations in Quebec. The Presiding Officers had initially taken the points of order under advisement. However, when Speaker Charbonneau issued the above-noted pronouncement, he made it clear that, henceforth, the Chair would decline to entertain any further points of order regarding decisions of the Chair. In other words, unless a Member is willing to give notice of and introduce a substantive motion in the House, any dissent from a ruling of the Speaker, or a reflection on his or her impartiality, is strictly forbidden.

There are exceptions to the rule against appeals in the Canadian context. Both the Senate of Canada and the Legislative Assembly of Manitoba allow Members to appeal rulings of the Speaker to their respective Houses. These challenges are to be decided forthwith and without debate. In Alberta, a Member may ask the Speaker to explain the reasons for his or her ruling but may not subsequently challenge or appeal it unless by way of substantive motion. In the United Kingdom, a Member may use a point of order to request the Speaker to reconsider a matter, although such requests are seldom entertained.

Prohibitions on appeals to the rulings of the Speaker do not necessarily apply to those occupying other chairs. This is likely a reflection of the lower standard of impartiality imposed on deputy speakers and the chairs of committees. In Committee of the Whole, for example, it is generally accepted that decisions of the Chair may be appealed to the House. Practices differ as to whether appeals require majority support to proceed or simply the support of a single Member. The question normally put by the Speaker to the House once such an appeal is reported is "Shall the decision of the Chair be sustained?" The question is typically non-debatable and, once concluded, the House is resolved back into Committee of the Whole to continue its business.

In standing, select and special committees of the House, the general rule is that any matters arising of a procedural nature should be settled within the committee itself. Any appeal to the Speaker or the House, if permitted, would normally be made by way of a report of the committee to the House. In New Brunswick, a recent rules amendment allows any two members of a standing or select committee to appeal the ruling of the Chair to the Speaker who may render a decision even when the House is not sitting.

Substantive Motion

The prohibition against appealing a ruling of the Speaker in most jurisdictions does not mean that they are above reproach. The Speaker is no different from other Members of the House in that his or her conduct may be questioned by way of a substantive motion. *Marleau and Montpetit* define substantive motion as follows:

> Independent proposals which are complete by themselves, not incidental to or dependent on any proceeding before the House. They are used to elicit an opinion or action of the House. They are amendable and must be drafted in such a way as to enable the House to express agreement or disagreement with what is proposed. Such motions normally require written notice before they can be moved in the House.[3]

The principle that the conduct of the Chair may only be challenged by way of substantive motion has the distinct advantage of preventing the disruption of debate with frivolous appeals. As the following comment by former Speaker of the House of Commons Lambert indicates, such appeals are often motivated by matters having nothing to do with parliamentary procedure:

> One of the chief difficulties with the business of Parliament over the past ten years has been the somewhat indiscriminate use of appeals against Speakers' rulings, not on points of jurisprudence or points of procedure, but for political effect.[4]

What types of substantive motions, then, are within the realm of possibility? The Rules of the NWT Legislative Assembly make specific reference to a motion to re-

voke the appointment of the Speaker, Deputy Speaker or a Deputy Chair of the Committee of the Whole. Such a motion is one of the few instances that our rules expressly prohibit any waiving of the usual 48-hour notice period, even with unanimous consent. Our Rules further stipulate that such a motion must be decided without debate.

The only example of a provincial or territorial Speaker having resigned as a result of a substantive motion occurred in 1875, in the House of Assembly of Nova Scotia. The resignation of Speaker John Barnhill Dickie was secured following a successful motion that a new Speaker be elected. The Speaker of the day subsequently tendered his resignation and a new Speaker was selected. While there have been other motions of censure levied against Speakers, none have been successful.

As mentioned earlier, the Pipeline Debate in the House of Commons in 1956 witnessed an unprecedented motion of censure of then Speaker Beaudoin. While the motion was soundly defeated Mr. Speaker, following a subsequent question of privilege regarding his impartiality, offered his resignation before the House to take effect at the pleasure of the House. No motion to accept the resignation was ever made and Speaker Beaudoin remained in office for the balance of the Parliament.

It is debatable whether a substantive motion that succeeds in reversing a decision of the Speaker on a purely procedural matter would constitute an expression of non-confidence, if carried. Much would rest on the precise wording of the motion, the composition of the House, the seriousness of the issue and the "gut feel" of the Speaker. During the Filmon minority government in Manitoba in 1988, a number of successful appeals were made of the rulings of then Speaker Rocan but these did not result in his resignation. Similarly, a successful motion of dissent of the Speaker of the Australian Capital Territory on a ruling that the word "furphy" was unparliamentary did not induce Mr. Speaker to fall upon his sword.

Thankfully, the frequency of these types of motions is on the decline. All Speakers, and particularly those who preside over non-party or minority government assemblies, should be aware of the rules and conventions in their own jurisdictions and give some thought, if only for academic reasons, to the standards they would apply in the event of a successful substantive motion vis a vis their conduct or impartiality.

Criticism Outside the House

A third possibility whereby the conduct of Presiding Officers could be challenged involves criticism outside the House. Again, I use the word "possibility" as opposed to "option", as any reflection on the character or actions of the Speaker, other than by way of substantive motion, could and has frequently been interpreted by the House as a breach of privilege. While criticisms of Presiding Officers by members of the public or the media have been considered breaches of privilege, they are for the most part ignored and not responded to in the House. A notable exception occurred in the House of Commons on December 22, 1976 when a motion was adopted declaring an editorial published in the *Globe and Mail*, which criticized the impartiality of then Speaker Jerome, to be a "gross libel on Mr. Speaker and a gross breach of the privileges of this House."

Public criticisms of the Speaker by a sitting Member of the House are a more serious matter. In the Saskatchewan Legislature, four questions of privilege were raised between 1977 and 1985 regarding comments made by Members to the media that impugned the impartiality of the Speaker. In each case, a *prima facie* breach of privilege was found to have occurred and the offending Members were disciplined. In other instances, such breaches have been resolved by way of a retraction of the comments by the Member in the House.

While public criticism of the Speaker or other Presiding Officer outside the House may result in disciplinary action, criticism of a more private nature may be more palatable and common. I would venture to say that every Speaker has been on the receiving end of private criticism with respect to their duties in the Chair. So long as the tone of such criticism is characterized by discretion and respect and void of any form of threat or intimidation, it may be not only tolerated, but even welcomed and encouraged.

In the Northwest Territories, the absence of political parties provides a forum for the discussion of the conduct of any Member in the Caucus. These meetings are private affairs, chaired by a Regular Member and attended by all Members and the Clerk of the House. These meetings have, on occasion, been used to express concern with the conduct of sitting Speakers inside the House and out. In each of these cases, the tone has been respectful and constructive and the details have not ventured outside the walls of the Caucus meeting room.

The distinction between public and private criticism is that the former not only brings disrepute to the Chair and its occupant, but also to the institutions they represent. While the standard of impartiality for Deputy Speakers and other Presiding Officers is not as high as it is for the Speaker, the consequences of challenging the actions and integrity of these officers, other than by way of substantive motion, should be equally serious.

Disobedience

Closely linked to the three previous possibilities, outright disobedience of the Chair is a fourth eventuality that must be considered. For the most part, a ruling of the Presiding Officer is initiated by a point of order or a question of privilege having been raised in the House or Committee. Conversely, a Presiding Officer may, on occasion, feel the need to intervene on his or her own initiative to address an individual Member or the House collectively. Examples include repetitious debate, arguments not relevant to the subject matter at hand or the use of unparliamentary language. In such cases the Presiding Officer may call the offending Member to order and, after requesting that they discontinue the conduct in question, return the floor to them. In the case of unparliamentary language, the Presiding Officer may request an unequivocal withdrawal of the offensive word or phrase. In each of these cases, the Member called to order could, at his or her peril, choose to ignore the direction of the Chair or refuse to withdraw the offending remark, as the case may be.

A number of responses to such disobedience are available to the Presiding Officer. The Chair may choose not to recognize the Member called to order for a period of time. If the disobedience is not a deliberate attempt to create disorder in the House, but rather the result of inexperience, exuberance or a lack of familiarity with the Rules, this technique may prove an effective way to set matters to right. The Chair may also elect to warn the Member, either in private or in the House, that continuation of the behavior may result in a further and more serious intervention.

The most serious disciplinary measure available to the Speaker is to "name" a Member who disregards the authority of the Chair or abuses the Rules by persistently and willfully obstructing the business of the Assembly. Prior to naming, the Speaker may, at his or her discretion, request the Member to retract the offensive words and/or apologize to the House. Any attempt to debate the Speaker on such an intervention, or an outright refusal to comply, may elicit a warning that the Member will be named should he or she refrain from immediately correcting the matter.

The authority to name a Member rests only with the Speaker or a Deputy Speaker acting in his or her stead. In Committee of the Whole, disobedience of the Chair is reported to the Speaker who will consider the matter as if it had occurred in the Assembly. In the event that the Speaker is absent from the House on a particular day, the Deputy Speaker would refrain from serving as Chair of Committee of the Whole so as to avoid the spectacle of ruling on a matter that she brought to her own attention.

Once a Member has been named, the Speaker has the authority to order his or her withdrawal from the Chamber for the remainder of the sitting day and may order the Sergeant-at-Arms to take the necessary steps to remove a Member who refuses to comply. A motion without notice may be moved by any Member to increase the length of the suspension and shall be decided without amendment or debate.

In the Northwest Territories, standing and special committees have the authority to expel Members for up to three days for improper conduct. Such a decision must be taken by a majority of the committee as opposed to the Chair. Committees also retain the ability to report incidences of disobedience to the Speaker or House for consideration by way of report.

Finally, disobedience of the Chair that results in the disruption of the proceedings of the Assembly or one of its committees may be considered a breach of privilege and dealt with accordingly.

Threat or Intimidation

Challenges to the authority of the Speaker or other Presiding Officers have, on occasion, crossed the boundary between criticism and entered the far more serious realm of threat or intimidation. As discussed, any challenge or criticism of the Chair, other than by way of substantive motion, is a serious matter. Attempts to influence the conduct of the Chair, or any Member for that matter, by way of threat or intimidation constitute perhaps the most serious attack on the independence of the Chair and the integrity of the House.

Thankfully, incidences of threat or intimidation of the Chair are becoming increasingly rare in Canada. Unfortunately, this trend is not universal. In November of 2004, the Speaker and other Members of the Anambra Legislative Assembly in Nigeria were held at gunpoint in their Assembly, which was subsequently destroyed, for refusing to cede to threats and bribes from an armed group of thugs to impeach the state Governor unconstitutionally. The fundamental tenet of the impartiality and independence of the Chair in our system of parliamentary democracy should never be taken for granted.

Conclusion

As the following excerpt from François Côté's earlier paper on "The Impartiality of the Chair" demonstrates, my earlier analogy of parliamentary tradition and law of the doctrine of papal infallibility is mortally limited.

> It is nonetheless true, however, that the Chair is not infallible. Whatever errors may occasionally be committed, it is of the utmost importance for the integrity of the institution that the Chair continue to be treated with deference and that its impartiality not be called into question at every turn. As our Speaker said in his ruling of June 12, 2001, "such are the rules of the parliamentary game that we must all acknowledge that it is the Speaker who is to have the final word; otherwise nothing is possible."[5]

Although I have focused on ways to challenge a Speaker I think it is important to end by emphasizing that such challenges have been rare and will likely continue to be rare in the future. There is, I believe, a sacred contract between Presiding Officers and the Assemblies they serve. In return for the Speakers' impartiality and silence on important matters of public policy, Members, individually and collectively, must offer their respect and deference, if not to the incumbent, then to the Office he or she holds. A breach of the terms of this contract by either party threatens the integrity of the institutions they have each sworn to serve.

Notes

1. See *Rules of the Legislative Assembly of the NWT* section 12(2).
2. François Côté, "The Impartiality of the Chair", paper presented at the 19th Canadian Presiding Officers Conference, St. John's, Newfoundland and Labrador, January 25, 2002, p. 9.
3. Robert Marleau and Camille Montpetit , *House of Commons Procedure and Practice,* p. 450.
4. *House of Commons Debates*, June 8, 196, p. 2140.
5. See François Côté, "The Impartiality of the Chair", paper presented at the 19th Canadian Presiding Officers Conference, St. John's, Newfoundland and Labrador, January 25, 2002, p. 12.