

Article

The Judicialisation of Parliamentary Privilege in Canada: A Cautionary Tale

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Abstract: Over the past few decades, Canadian courts have exerted strong influence over the meaning and operation of parliamentary privileges. Starting with a television producer's Charter rights claim to access a provincial legislature's public gallery and followed by an employment law claim made by the chauffeur to the Speaker of the House of Commons, the Supreme Court of Canada has articulated an approach under which judges closely scrutinise privileges invoked by legislatures when defending themselves against litigated claims. By applying the doctrine of necessity, Canadian courts make authoritative rulings on what counts as a valid legislative function and the processes and activities needed to fulfil those functions. Canadian courts also require the scope of parliamentary privileges to be pleaded in narrow terms that correspond to the details of a plaintiff's claim, which has resulted in a hollowed-out conception of privilege over time. In scrutinising the necessity and scope of privilege, Canadian courts have chipped away at the separation of powers. Further, the Canadian approach unjustifiably prioritises the judicial vindication of private rights over the institutional needs of the legislature. Courts in other jurisdictions should reject the Canadian approach and avoid scrutinising the propriety of the exercise of privilege through a necessity test. Instead, courts should engage in a more limited jurisdictional test to confirm the availability of a relevant category of parliamentary privilege in law or historical practice. Judicialising parliamentary privileges weakens the autonomy and vitality of legislative institutions, with the Canadian approach serving as a cautionary tale. Ultimately, the legislature is accountable to the electorate for the exercise of its privileges. To promote fairness and reduce the risk of court interference, parliaments should strengthen the accountability and transparency associated with the exercise of their privileges, including by developing guidelines for their appropriate use.

Keywords: parliamentary privilege; legislative privilege; institutional relationships; parliaments and courts; legal institutions; judicial review; separation of powers; constitutional architecture; legislative autonomy; doctrine of necessity; Canadian jurisprudence; comparative law



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1. Introduction

In the Westminster tradition, ‘parliamentary privilege’ refers to the rights, powers and protections that belong to each House of Parliament to ensure its effective functioning as a legislative assembly.¹ The most well-known privilege is free speech, which facilitates robust debate by shielding legislators from lawsuits for statements made during the course of parliamentary proceedings.² Parliamentary privilege forms part of the general law.³ In

¹ See, e.g., Nitzler and Hutton (2019), paragraph 12.1 (United Kingdom); Maingot (1997) (Canada); Bosc and Gagnon (2017) (Canada); Campbell (2003) (Australia); Evans (2014) (Australia). ‘Privilege’ is a somewhat problematic term to the extent that it suggests total immunity from the law. Privilege is instead part of the general law with recognised categories of privilege forming part of the law and customs of parliament (or parliament(s)).

² While legislators and committee witnesses cannot be sued in a court of law for defamation in relation to statements made during parliamentary proceedings, they are subject to House rules and orders, including those relating to decorum and speech.

³ *H.M. Government* (2012), page 11. See also *Canada (House of Commons) v. Vois*, page 685.

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