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Criminal Charges and Parliamentarians

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(In Brief)

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CRIMINAL CHARGES AND PARLIAMENTARIANS*

1 INTRODUCTION

In Canada, all citizens are subject to the ordinary laws of general application, both criminal and civil. There is no exemption for parliamentarians, nor is there any immunity or special rights that accrue to parliamentarians, outside of the limited application of parliamentary privilege.[1]

Whenever a member of the Senate or the House of Commons is charged or convicted of a criminal offence, questions invariably arise as to the effect of such charges and convictions on the person's right to continue as a member of the Senate or the House.

The laying of a criminal charge against a member of the Senate or the House of Commons has no effect in terms of his or her eligibility to remain in office. Even if convicted, a parliamentarian will automatically lose his or her seat only if sentenced to a term of imprisonment of two years or more, pursuant to section 750 of the *Criminal Code*[2] (until 3 September 1996, a parliamentarian had to be sentenced to a term of imprisonment exceeding five years before automatically losing his or her seat). In other cases, however, relying on parliamentary privilege, the Senate or the House could take action to expel the member.

2 LEGISLATIVE FRAMEWORK

2.1 ELIGIBILITY TO RUN FOR OFFICE

In the case of the House of Commons, the *Parliament of Canada Act*[3] and the *Canada Elections Act*[4] make certain people ineligible for membership. Section 65 of the *Canada Elections Act* lists categories of individuals that are prohibited from being candidates in an election. They include:

- those convicted of a corrupt or illegal practice under the Act within the previous five years;
- those currently imprisoned in correctional institutions;
- those not qualified to vote;
- those who hold certain offices (such as judges, sheriff, Crown Attorney); and
- members of the legislature of a province or territory, since a person is not permitted to be a member of both the House of Commons and a provincial or territorial legislature at the same time.

Section 502 of the *Canada Elections Act* also provides a number of similar restrictions. Section 502(1) sets out illegal practices, while section 502(2) lists a number of corrupt practices. Any person who is convicted of the listed practices is effectively banned for five years (in the case of illegal practices) or seven years

(in the case of corrupt practices) from sitting in the House of Commons or holding any office appointed by the Crown or Cabinet, in accordance with section 502(3).

As for the Senate, the *Constitution Act, 1867* [5] sets out certain requirements of age, citizenship, residency and property that senators must meet in order to be appointed, and continue to meet in order to retain their seats.

Although members can be expelled from Parliament, as will be discussed below, it is not easy to prevent them from running for re-election in any resulting by-election or subsequent election. In 1986, the Nova Scotia House of Assembly enacted a law disqualifying persons convicted of certain criminal offences from being nominated as candidates or standing for election to the legislature for a period of five years. The law had been passed after William ("Billy Joe") MacLean was expelled from the Nova Scotia legislature after pleading guilty to four counts of issuing false receipts for his expenses as a member of the House of Assembly. Mr. MacLean succeeded in having the law struck down by the Nova Scotia Supreme Court as a violation of his Charter rights and the rights of the voters who would have been denied the chance to vote for him.

2.2 Removal from Office

Once a person is elected to the House of Commons, there are no constitutional provisions and few statutory provisions regarding the ousting of the member. Section 23 of the *Parliament of Canada Act* states that a member who is elected to a provincial legislature automatically loses his or her seat in the Commons, and section 35 provides that a member's seat will be vacated and the member's election declared void, in cases where he or she "accepts any office or commission that, by virtue of this Division [of the Act], renders a person incapable of being elected to, or of sitting or voting in, the House of Commons."

For the Senate, section 31 of the *Constitution Act, 1867* prescribes other circumstances in which a senator loses his or her seat, such as bankruptcy, absence from two consecutive sessions of Parliament, or being convicted of treason or "of Felony or of any other infamous Crime."

Section 750 of the *Criminal Code*, which applies to both members of the Senate and the House, provides:

> (1) Where a person is convicted of an indictable offence for which the person is sentenced to imprisonment for two years or more and holds, at the time that person is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.
>
> (2) A person to whom subsection (1) applies is, until undergoing the punishment imposed on the person or the punishment substituted therefor by competent authority or receives a free pardon from Her Majesty, incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of Parliament or of a legislature or of exercising any right of suffrage … .

It is important to note that this section applies only in cases where a member of the Senate or House of Commons is *convicted* of an indictable offence and *sentenced* to a term of imprisonment of *two years or more*. Thus, if a parliamentarian is charged with a summary offence, or an indictable offence with a maximum imprisonment of less than two years, the section has no application. A parliamentarian may be charged with a hybrid offence (where the Crown can elect whether to proceed summarily or by indictment); if the decision is for indictment, it would still be the actual sentence that was relevant, not the potential penalty.

Section 750(2) provides that a person who is convicted of an indictable offence and sentenced to a term of imprisonment of two years or more is barred from being a member of Parliament. He or she is not entitled to be elected, or to sit as a member, or to vote in the Senate or House of Commons. Thus, parliamentarians will lose their seats if they come within the terms of the section. The only example of this occurred in 1946: after MP Fred Rose had been convicted of treason and sentenced to six years' imprisonment, the House declared his seat vacant and ordered a new election. It should also be noted that, to the extent that section 750(2) disqualifies a person from voting, it could possibly be challenged as a violation of section 3 (democratic rights of citizens) of the *Canadian Charter of Rights and Freedoms*, as have been the provisions of the *Canada Elections Act*, which restrict the right to vote of some prison inmates.[6]

As noted above, persons imprisoned in correctional institutions are currently disqualified from being candidates in an election for the House of Commons. Thus, a person imprisoned for less than two years could remain a member of the House of Commons but could not stand for re-election while still in prison.

3 PARLIAMENTARY PRIVILEGE AND EXPULSION

Although the rights and immunities of parliamentarians under parliamentary privilege include freedom from arrest in civil actions, they offer no protection from criminal charges. On the other hand, included in the doctrine of parliamentary privilege are disciplinary powers that give the Senate and the House of Commons the right to expel their members. This power has seldom been exercised, partly because it is so extreme.

On two occasions in the 1870s, Louis Riel was expelled from the House of Commons and in 1891 Thomas McGreevy was expelled after being judged to be guilty of contempt of the House. In the Senate, the procedure for removing a Senator appears to be somewhat different, since Senators are summoned by the Governor General. The Senate has declared seats to be vacant in the past – usually on the basis that the Senator missed two consecutive sessions – but it seems that an address to the Governor General seeking the removal of a Senator might also be required.

In June 2006, Senator Raymond Lavigne was expelled from the Liberal party caucus for allegedly misusing Senate funds for personal use. Upon a referral from the Senate, the Royal Canadian Mounted Police subsequently launched an investigation in which Mr. Lavigne was charged with fraud over $5,000, breach of trust and obstruction of justice. During the criminal proceedings, Mr. Lavigne was barred from

sitting in the Senate or taking part in any Senate committees, but remained officially a senator and maintained his salary.

On 11 March 2011, the Ontario Superior Court convicted Mr. Lavigne of fraud over $5,000 and breach of trust.[7] On 21 March 2011, Mr. Lavigne resigned from the Senate, days before the chamber was scheduled to debate whether to suspend him. Upon sentencing, he received a six-month prison term and six months' house arrest.[8]

In the past, the authority of the House over its members was considered to be absolute; it was said that the House could expel a member "for such reasons as it deems fit." This discretion may have been somewhat circumscribed with the advent of the *Canadian Charter of Rights and Freedoms*. It is now arguable that the House would have to proceed in a reasonable and fair manner, giving the member involved an opportunity to answer any charges.

A parliamentarian who is convicted of a summary criminal offence or an indictable offence carrying a sentence of less than two years could, therefore, still be expelled from the Senate or the House of Commons, but expulsion would require a resolution of the chamber, rather than being automatic.

A justification for such a resolution could be that someone who is in jail for an extended period of time is unlikely to be able to carry out his or her parliamentary functions or serve constituents properly. Also, a senator who was sentenced to a lengthy prison term would risk having his or her seat declared vacant on the basis of missing two consecutive sessions. Before taking action, however, the Senate or the House might want to await the outcome of any appeals. Whether or not the crime pertained to the parliamentarian's parliamentary functions might also be relevant, although making such a distinction is not always easy or appropriate.

In a 1996 case involving a member of the New Brunswick Legislative Assembly who had been expelled from the legislature after being convicted of corrupt practices under the New Brunswick *Elections Act*, the Supreme Court of Canada looked closely at the matter of parliamentary privilege in the context of consequences flowing from criminal convictions. It was argued that the member's expulsion and disqualification from holding office in the future violated his section 12 Charter rights, because the consequences constituted cruel and unusual treatment or punishment (section 12 guarantees individuals protection from cruel and unusual punishment in Canada). The Court rejected this argument. While Justice Gérard La Forest, in his reasons, found that the consequences did not amount to cruel and unusual punishment, Justice Beverley McLachlin, in her reasons, expressed her view that "the disqualification for office raised in this case falls within the historical privilege of the legislature and is hence immune from judicial review."[9]

4 CONCLUSION

In summary, the laying of criminal charges against a member of the Senate or House of Commons carries no immediate legal implication. Even if a member is convicted, he or she can continue to sit, unless sentenced to a term of imprisonment of two years or more. Nonetheless, the House and the Senate retain the power to expel

their members who are facing criminal charges or are convicted but not sentenced to a term of imprisonment of two years or more. However, this power is rarely used and certain provisions of the *Canadian Charter of Rights and Freedoms* might protect parliamentarians in such circumstances.

NOTES

* This is a revised version of a document to which Karine Richer, formerly of the Library of Parliament, contributed.

1. Parliamentary privilege would generally protect a member from prosecution or civil liability arising from anything said in the course of parliamentary proceedings. Dealing with matters of privilege falls under the jurisdiction of Parliament. It would be highly doubtful, however, that a criminal act committed in Parliament could be protected from the ordinary operation of the criminal law. See W. McKay, *Erskine May's Treatise on the Law of Privileges, Proceedings and Usage of Parliament*, 23rd ed., Lexis-Nexis UK, 2004, p. 117.
2. *Criminal Code*, R.S.C., 1985, c. 46, s. 750.
3. *Parliament of Canada Act*, R.S.C., 1985, c. P-1.
4. *Canada Elections Act*, S.C. 2000, c. 9.
5. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).
6. In the 2002 decision *Sauvé* v. *Canada (Chief Electoral Officer)* [2002], 3 S.C.R. 519, the Supreme Court of Canada held that this legislation infringed upon section 3 of the Charter and could not be saved by section 1 (reasonable limits clause). Currently, the statute continues to be worded as though inmates serving prison sentences of two years or more are not entitled to vote. The Chief Electoral Officer, however, has used the power granted to him by section 17 of the *Canada Elections Act*, which enables him to "adapt" the Act to meet unusual or unforeseen situations, to extend voting rights to inmates in federal prisons. As a result, inmates in federal penitentiaries have been able to vote in every federal by-election and general election since the decision. See: *Sauvé* v. *Canada (Chief Electoral Officer),* 2002 SCC 68, [2002] 3 S.C.R. 519; and Elections Canada, *A History of the Vote in Canada*.
7. *R.* v. *Lavigne*, 2011 ONSC 1335.
8. *R.* v. *Lavigne*, 2011 ONSC 2938.
9. *Harvey* v. *New Brunswick (Attorney General),* [1996] 2 S.C.R. 876, para.55.