
Freedom of Speech and the Office of Speaker

by David Hamilton

One of the most important ways a member represents his or her constituents is by raising issues in the legislature. Presiding Officers face a dilemma in this regard. As elected members they are expected to represent their constituents. Yet by tradition they are precluding from speaking in debate or participating in question period except as an impartial referee. This paper will examine the inter-relationship between freedom of speech as it relates to the role of the Speaker and the political convention that the Speaker raise issues in a forum other than on the floor of the House.

We all know the hallmark of the Speaker's role is neutrality and impartiality. It is critical to the democratic functioning of our parliamentary institutions that debate and law-making be presided over by an impartial Speaker. Yet, it is also an essential democratic principle that every citizen is entitled to representation in the political process. In order to effectively represent constituents, a Speaker must have the ability to raise the concerns of their constituents in an effective manner. "A Speaker is not a political eunuch, he is a Member of Parliament. So it is absolutely essential that he be allowed to fulfil his role as a Member of Parliament because that is what his constituents expect of him"¹.

Obviously, there are many aspects to performing the dual role of Member and Speaker. The Speaker must consider how to balance the need for perceived neutrality with the need to adequately represent the interest of constituents. In most Canadian jurisdictions, the issue of whether the Speaker takes an active role in party politics is relevant. It is important that a Speaker be visible in his

or her constituency. It is equally important that a Speaker's constituents understand the limitations, and strengths, of their Member in the role of Speaker.

Beauchesne states, "The privilege of freedom of speech is both the least questioned and the most fundamental right of the Member of Parliament on the floor of the House and in committee"². Maingot, in his classic text on *Parliamentary Privilege in Canada*, states, in speaking to the essential nature of freedom of speech, "No one in the free world will argue to the contrary"³. Freedom of speech is expressly guaranteed by article 9 of the English *Bill of Rights* of 1689, which states that: "... the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place outside of Parliament"⁴.

While the Bill of Rights does not expressly apply to Canada, the principles enunciated therein form part of our law by virtue of the preamble to the *Constitution Act, 1867* which provides that we shall have a "Constitution similar in Principle to that of the United Kingdom".

Erskine May defines the privilege of freedom of speech as follows: "Subject to the rules of order in debate ..., a Member may state whatever he thinks fit in debate, however, offensive it might be to the feelings, or injurious to the character, of individuals; and he is protected by his privilege from any action for libel, as well as from any other question or molestation."⁵

David Hamilton is Clerk of the Northwest Territories Legislative Assembly. This is a revised version of a paper presented to the 15th Canadian Presiding Officers' Conference in Victoria, British Columbia, January 15-18, 1998.

Implicit in the concept of freedom of speech is the immunity of Members from civil or criminal prosecutions for words spoken within the legislature. There is lengthy judicial precedent supporting this ancient privilege and reinforcing the deference of the Courts to the legislature, at least in regards to matters spoken in the legislature.

There is lengthy judicial precedent for the proposition that the absolute immunity afforded members applies only to statements made within the legislature. As stated by Maingot, "Parliament protects him when he speaks in Parliament, but when he speaks outside, or publishes outside what he says inside Parliament, Parliament offers no protection; only the common law does, if it is offered at all".⁶ In explaining this principle, the Ontario High Court, in a decision affirmed by the Supreme Court of Canada, stated as follows:

The purpose of the privilege is to protect freedom of speech and debate in Parliament but not, surely, to allow individual members to say what they will outside the walls of the House, to persons who are not members or even spectators of the proceedings inside.⁷

The central importance of the requirement that the Speaker not only be impartial but also be seen to be impartial is well documented and indisputable. However, the issue of the Speaker's ability to effectively represent his constituents is not so well documented. Official parliamentary guidebooks are to a large degree silent on the topic. Comments that are published tend to come largely from the writings of those who have served in the capacity of Speaker.

Impartiality of the Speaker

It is evident that our constitutional foundation found in the *Bill of Rights*, 1689 as adopted by the *Constitution Act*, 1867, protects and supports parliamentarians in the furtherance of their responsibilities as Members. Yet, pity the poor Speaker. We have a strongly entrenched principle that the Speaker does not speak or participate in debate in the House. His or her non-participation is deemed to be essential to the very foundation of the parliamentary institution. There are many conventions in place that are designed to ensure the impartiality of the Speaker and to ensure that there is a general recognition of the Speaker's impartiality. For example:

- The Speaker takes no part in debate in the House;

- The Speaker votes only when there is a tie and, even then, there are rules that preclude an expression of opinion on the merits of the question.
- In some jurisdictions, the Speaker relinquishes all affiliation with any parliamentary party.

It has been suggested that the acceptance of the role of Speaker usually involves a radical change in life style. The individual must deliberately isolate themselves from much of the camaraderie of the House.

At Westminster he leads a somewhat cut-off life; for example, he does not use the dining rooms or the Members smoking room, or other bars or the library. However, he has his own accommodation where he does most of his work away from the Chamber. Here he is able to meet any Members individually to discuss problems they wish to raise with him...⁸

How, then does the Speaker represent his constituents? Over the years, a principle of priority access to Cabinet is normally extended to Speakers in all jurisdictions. This provides an important forum to air constituency concerns with the loss of any politician's most important and effective tool, his voice, his ability to speak out freely, his ability to take sides and to express his opinions and his right to participate in Question Period and to take part in debates in the House.

Former Speaker John A. Fraser suggests that traditions have developed which alleviate the difficulties faced by Speakers in attempting to satisfactorily fulfil all aspects of their unique role.

Although a Speaker must be non-partisan and cannot debate, there is a long-standing tradition that is very much alive. It is simply this: the Speaker accepts limitations in the interests of all Members. In view of this, Cabinet Ministers, Private Members and, to a remarkable degree, senior civil servants, go out of their way to assist the Speaker in resolving his constituents' problems. It is an unusual, but very effective, relationship which affords the Speaker full access to those in positions of influence and power.⁹

This leads to a further consideration, and that is, the role of the Speaker at election time. Speaker Fraser says, "notwithstanding all the duties of the office, a Speaker must still serve his constituents, his community and be re-elected."¹⁰ He indicated, as well, that the lack of any involvement in political life for an extended period of time may put the Speaker at a disadvantage with respect to other candidates when it comes election time.

The British Select Committee of 1938 did not feel that the Speaker's constituents were inadequately represented. On the contrary, the Committee felt that the Speaker's constituents may, in fact, have an advantage over others. The Committee made the following comments:

...In matters of individual interest or grievance the Speaker's constituents are in fact in a peculiarly favoured position. Though the Speaker himself can put down no questions, any matter affecting them which he feels justified in raising privately with a Department of State will, in the nature of human reactions, coming from such a source receive the most careful consideration. Again, if the circumstances of a particular case require that a question should receive public expression it would be, and in fact is, willingly sponsored by other members. Apart from these considerations, it cannot be disputed that a great honour is conferred on the constituency whose member is chosen from among all others for those rare qualities which will enable him to fill the high office of presiding over the deliberations of the House of Commons and representing it as the first commoner in the land.¹¹

So much for altering convention to address the problem. The Select Committee suggested that the only remedy may lie in the fuller education of the electorate. Such education would be aimed at increasing the public recognition and understanding of the vital democratic safeguards that it is the duty of the Speaker to defend. But how do you go about educating the electorate and increasing their understanding of the role of the Speaker? Has this been attempted in other jurisdictions? How and with what degree of success?

As a final note on the issue of Speakers representing their constituents effectively, some people believe that the Speaker has an advantage over Cabinet Ministers when it comes to the interests of constituents. Speaker Selwyn Lloyd of Britain believed that: "...the Speaker could represent a constituency more effectively than a Minister since the former is not bound by collective responsibility. He is therefore not inhibited in raising constituency problems even though he is obliged to raise them privately."¹²

Extending Freedom of Speech to Speaker's Communications?

The parliamentary principle that the Speaker be afforded access to Government Ministers by raising issues informally outside of the legislature, when viewed in relation to the absolute freedom of ordinary members to raise issues within the confines of the legislature, has recently raised an interesting issue in the Northwest Territories and for anyone interested in defining the extent of parliamentary privilege.

On May 13, 1997, the Speaker, acting in his capacity as Member for Deh Cho, sent a letter to the Premier outlining his concerns with respect to the practices of a collection agency in the NWT, expressing particular concern over their conduct in relation to dealing with aboriginal people. The letter asked the Premier to investigate this

matter as the collection agency had a contract with the Government of the Northwest Territories. The raising of these issues in this manner was completely in accordance with protocol and parliamentary tradition. The letter was copied to the Fair Practices Officer (our equivalent of provincial human rights commissions), the local Dene (Indian) Band and the collection agency. The Speaker, in his capacity as a Member, was subsequently sued for defamation. Additionally, the Speaker as the chief representative of the Legislative Assembly and the Commissioner of the Northwest Territories as the CEO of the Government, were also sued alleging they are vicariously liable for the comments of individual members, in this case of the Member for Deh Cho.

Some confusion was caused in the media by the fact that an individual was sued both in his capacity as a Member and as the Speaker of the Assembly. The media did not appear, at first blush, to understand that he was being sued for comments made in performing his constituency duties, not for comments made in his role as Speaker.¹³

The Speaker Sam Gargan, as Member for Deh Cho, (with independent – outside – legal counsel) in his Statement of Defence, has responded by asserting an extension of the parliamentary privilege that members are immune from lawsuit for statements made in the House, regardless of how offensive or defamatory. There is ample case authority that ordinary Members are not immune from lawsuits for statements made outside of the legislature. In this case, the Speaker argues that this case law should not apply to him. He has asserted that he was exercising his parliamentary privilege - his responsibility to represent his constituents - in the only way possible given the existence of the parliamentary protocol that he not raise issues in the house. Hence, he argues that as Speaker, the immunity that the House affords to Member's communications should be extended to include any communication directed to the Government in furtherance of constituency interests. To argue otherwise is to give the Speaker lesser protection for statements made in furtherance of constituency issues than for ordinary Members. We believe that this is the first time that such an argument has been made in Canadian courts. Indeed, we are not aware of any precedent in any Commonwealth jurisdiction. Of course, the Speaker (as Member) has also defended the comments with other "standard" defences of qualified privilege and other forms of absolute privilege. For parliamentarians, however, the defence of an extended parliamentary privilege is the most intriguing.

This case raises a number of interesting issues. What is the role of the courts in defining the privileges of legislatures? Inherent in the concept of parliamentary privilege

is the right of the legislatures to regulate its internal affairs without outside interference. In the leading Canadian case on parliamentary privilege, *N.B. Broadcasting Company v. Nova Scotia* (more commonly known as the Donohoe decision), the Supreme Court of Canada held that the tradition of judicial deference should be applied to the privileges exercised by a legislature [and presumably Members] on the grounds that these privileges have constitutional status and that to do otherwise would go against the basic rule "...that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution..."¹⁴

"The privileges of Parliament are the privileges of the People, and the rights of Parliament are the rights of the People."

Edward Blake, MP August 28, 1879

Should the Courts have a role in defining the expansion of the privilege of freedom of speech? If so, Donohoe suggests that the courts will apply a criterion of necessity. Can it be said that it is absolutely necessary to the functioning of a legislature that the absolute privilege afforded Members in their debates on the floor of the House be extended to cover written communications by Speakers who do not have the ability to speak in the legislature?

Other, more practical, issues are raised. Most people would agree with the proposition that we are becoming an increasingly litigious society. Certainly, the experience of our American neighbours would tend to support this proposition. It also appears that we as Canadians are focused more on legal issues than ever before. The practical effect of libel lawsuits on politicians is to potentially inhibit their ability to *fearlessly* advocate the views and concerns of their constituents. Certainly, this is the potential impact on Speakers who have no "immune" forum in which to raise this issues. Do lawsuits of this nature make it more difficult to attract, recruit and keep qualified Speakers who are already attempting to keep a balance between their dual and sometimes conflicting roles? In the Northwest Territories, we have had a long history of Speakers resigning in order to speak freely in the House on issues that they feel strongly about. The effect of this lawsuit may well be to reinforce that history.

Perhaps the dilemma concerning the role of the Speaker to be impartial and effectively represent his or her constituents is best expressed by a former Canadian Speaker, Mr. James Jerome in his book, *Mr. Speaker*.

I remember a conversation with Speaker Larnoureux during the summer of 1974, after my nomination was widely rumoured in Ottawa. The first thing he said to me was that if I became Speaker, I would begin explaining the role the day I was elected and I would never stop. No truer words were ever spoken! Like so many unwritten Parliamentary or constitutional conventions, there is every theoretical reason why our concept of the Speakership cannot work. How can a Speaker serve his constituents when he can't speak on their behalf? How can a Speaker reconcile needed constituency assistance, which of course must come from Cabinet, with the essential principle of objectivity and impartiality and the solemn responsibility to preserve the Opposition's rights to attack the Government? How can a Speaker seek a party nomination and go through an election campaign without criticizing any of the parties in Parliament? How can there be any genuine impartiality when every Speaker since Confederation (until 1979) was the nominee of the party in power? The fact is, again like so many unwritten conventions, that it shouldn't work – but it does.¹⁵

Notes

1. Pierre Duchesne, *Debates* 13th Annual Canadian Presiding Officers' Conference.
2. Arthur Beauchesne, *Parliamentary Rules & Forms*, 6th edition, p. 22.
3. Joseph Maingot, *Parliamentary Privileges in Canada*, McGill-Queen's University Press, 1997.
4. *Bill of Rights*, 1689.
5. Erskine May, *Parliamentary Practice*, 21st ed., p. 84.
6. Maingot *op.cit.*, p. 38.
7. *Roman Corp. Ltd. v. Hudson's Bay Oil & Gas Co. Ltd.*, 18 D.L.R. (3d) 134 (Ont. H.C.) at 139.
8. J.A. Griffith & Michael Ryle, *Parliament; Function, Practice & Procedure*, London: Sweet & Maxwell, 1989, pp. 144-145.
9. John A. Fraser, *The House of Commons at Work*, Montreal: Édition de la Chenelière, 1993, pp. 56, 57.
10. *Ibid.*, p. 56, 57.
11. Philip Laundry, *The Office of Speaker in the Parliaments of the Commonwealth*, p. 71-72.
12. *Ibid.*, p. 72.
13. *Yellowknifer*, October 29, 1997.
14. *N.B. Broadcasting Company v. Nova Scotia*, [1993] 1 S.C.R. 319 at 373.
15. James Jerome, *Mr. Speaker*, Toronto: McLellan and Stewart, 1985.