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Criminal Charges and Parliamentarians

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Marc-André Roy

Legal and Social Affairs Division
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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 related to their parliamentary functions, outside the narrowly defined application of parliamentary privilege.¹

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

In general, the laying of criminal charges against a member of the Senate or the House of Commons has no immediate legal implications with respect to their right to remain in office, with the exception of a procedure applicable to senators in certain situations. However, in the case of a conviction for a criminal offence, the legal implications with respect to the parliamentarian's right to keep their seat and their future eligibility are more serious. In all cases, both houses of Parliament retain the power to expel members, whether or not they have been convicted of a criminal offence.

This publication discusses measures that may be taken by the Senate and the House of Commons when criminal charges are laid against a parliamentarian, the implications of a conviction for criminal conduct, and the power to expel a parliamentarian under parliamentary privilege.

2 MEASURES THAT MAY BE TAKEN WHEN CRIMINAL CHARGES ARE LAID

Although the legislation does not provide for any automatic consequences following the laying of criminal charges against a senator or a member of Parliament, both houses of Parliament may take preventive disciplinary action to protect the dignity and integrity of the institution.

Both the Senate and the House of Commons have the authority to order a leave of absence or to suspend a member for a period that may extend to the life of a parliamentary session.² Criminal charges need not be laid for a member to be placed on leave or suspended. Since its creation, the Senate has ordered two leaves of absence and four suspensions.³ In the House of Commons, no member has ever been suspended because of criminal charges laid against them.

The Senate has a procedure in place that is automatically followed if a senator is charged with a criminal offence for which he or she may be prosecuted by indictment. Under the *Rules of the Senate*,⁴ a senator in this situation is granted

leave with pay during which he or she may not attend sittings of the Senate or its committees. This leave of absence lasts until one of the following conditions is met:

- the charge is withdrawn;
- the proceedings are stayed;
- the charge is proceeded with in summary conviction proceedings; or
- the senator is acquitted, convicted or discharged.⁵

This procedure was followed in the case of Senator Raymond Lavigne. In June 2006, Senator Lavigne was expelled from the Liberal caucus for allegedly misusing Senate funds for personal use. Upon a referral from the Senate, the Royal Canadian Mounted Police launched an investigation in which Mr. Lavigne was charged with fraud over \$5,000, breach of trust and obstruction of justice. After the charges were laid, Senator Lavigne was granted a leave of absence in accordance with the procedure set out in the *Rules of the Senate*.⁶ He was therefore unable to sit in the Senate or participate in committee proceedings during his trial.

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, he resigned from the Senate. He was sentenced to six months' imprisonment and six months' house arrest.⁸

No procedure for an automatic leave of absence exists in the House of Commons.

3 CONSEQUENCES OF CONVICTION

The *Constitution Act, 1867*,⁹ the *Canada Elections Act*¹⁰ and the *Rules of the Senate* set out rules that automatically apply when a senator or member of Parliament is convicted of certain criminal charges. In general, there are two categories of legal consequences: those affecting a parliamentarian's *right* to hold his or her seat, and those affecting his or her *eligibility* to hold a seat in Parliament.

3.1 CONSEQUENCES AFFECTING A PARLIAMENTARIAN'S RIGHT TO HOLD HIS OR HER SEAT

A few legal provisions specifically address the consequences of a conviction on a parliamentarian's right to hold his or her seat.

Section 750(1) of the *Criminal Code*,¹¹ which applies to members of both the Senate and the House, stipulates the following:

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.

Parliamentarians automatically lose their seat if they fall within the terms of this section. This has happened only once, in 1946: after MP Fred Rose was convicted and sentenced to six years' imprisonment, the House declared his seat vacant and ordered a new election.¹²

It is important to note that section 750 of the *Criminal Code* applies only in cases where a member of the House of Commons or the Senate 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 subject to a maximum term of imprisonment of less than two years, section 750 does not apply. If a parliamentarian is charged with a hybrid offence (where the Crown can choose whether to proceed summarily or by indictment) and the decision is made to proceed by indictment, it is the actual sentence imposed that is relevant, not the potential penalty.

Section 502 of the *Canada Elections Act* sets out other situations in which a conviction automatically results in the loss of the right to sit in the House of Commons. Under section 502(3), any person who is convicted of an illegal practice listed in section 502(1) (e.g., knowingly exceeding the election expenses limit) or a corrupt practice listed in section 502(2) (e.g., making a false statement to have a person deleted from the Register of Electors) becomes ineligible to sit in the House of Commons for five years (in the case of an illegal practice) or seven years (in the case of a corrupt practice).

With respect to the Senate, the *Rules of the Senate* provide that a senator who is convicted of a criminal offence in proceedings by indictment is automatically suspended from the time of the sentence (Rule 15-5(1)) and ceases to receive a sessional allowance (Rule 15-3(1)), unless he or she is discharged.¹³ The suspension continues until one of the following conditions is met:

- the finding of guilt is overturned on appeal;
- the sentence is replaced by a discharge on appeal; or
- the Senate determines whether or not the place of the Senator shall become vacant by reason of that conviction.¹⁴

Section 31 of the *Constitution Act, 1867*, prescribes other circumstances in which a senator's seat becomes vacant: bankruptcy, absence from two consecutive sessions of Parliament, or being convicted of treason or "of Felony or of any infamous Crime." To date, no seat in the Senate has been declared vacant on the grounds that a senator has been convicted of treason, felony or an infamous crime. It is therefore somewhat unclear which criminal offences are contemplated by these terms. Section 33 of the *Constitution Act, 1867*, however, provides that it is for the Senate, not the courts, to make this determination.

3.2 CONSEQUENCES AFFECTING FUTURE ELIGIBILITY TO SIT IN THE SENATE OR THE HOUSE OF COMMONS

Losing a seat in Parliament as a result of a criminal conviction does not, on its own, prohibit a parliamentarian from seeking a new mandate. However, some legislative provisions prescribe circumstances in which a person is considered to be ineligible to hold a seat owing to a criminal conviction.

Section 750(2) of the *Criminal Code*¹⁵ provides that a person referred to in section 750(1) – that is, a public office holder 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, to sit as a member, to vote in the Senate or the House of Commons or to exercise any right of suffrage. 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* (the Charter),¹⁶ as have been the provisions of the *Canada Elections Act* restricting the voting rights of some prison inmates.¹⁷

In addition, the *Canada Elections Act* prohibits certain categories of people from standing for election. Section 65 of the Act lists these categories, two of which relate to criminal offences:

- any person who is convicted of an illegal practice or a corrupt practice under section 502(3)(a) of the *Canada Elections Act*, who then becomes ineligible to sit in the House of Commons for five years (in the case of an illegal practice) or seven years (in the case of a corrupt practice); and
- a person who is imprisoned.

Under this provision, individuals who are imprisoned in correctional institutions are currently disqualified from being candidates in an election for the House of Commons. Thus, a person who is 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.

In fact, however, it may be difficult to prevent a former member of Parliament from standing for election, even if he or she has been convicted of criminal acts. 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 was 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.¹⁸

4 THE POWER OF THE SENATE AND THE HOUSE OF COMMONS TO EXPEL MEMBERS

Although the rights and immunities of parliamentarians under parliamentary privilege include freedom from arrest in civil actions, they offer no protection against the laying of criminal charges. On the other hand, the doctrine of parliamentary privilege includes disciplinary powers that give the Senate and the House of Commons the right to expel their members, whether or not they have been convicted of a criminal offence.¹⁹ To do so, the chamber in question must pass a resolution to this effect.

The power of the Senate and the House of Commons to expel members was described by Chief Justice Beverley McLachlin (then McLachlin J.) of the Supreme Court of Canada, in her concurring reasons in *Harvey v. New Brunswick*,²⁰ a case involving a member of the provincial legislature who was expelled after being found guilty of corruption under the New Brunswick *Elections Act*.

If democracies are to survive, they must insist upon the integrity of those who seek and hold public office. They cannot tolerate corrupt practices within the legislature. Nor can they tolerate electoral fraud. If they do, two consequences are apt to result. First, the functioning of the legislature may be impaired. Second, public confidence in the legislature and the government may be undermined. No democracy can afford either.

When faced with behaviour that undermines their fundamental integrity, legislatures are required to act. That action may range from discipline for minor irregularities to expulsion and disqualification for more serious violations. Expulsion and disqualification assure the public that those who have corruptly taken or abused office are removed. The legislative process is purged and the legislature, now restored, may discharge its duties as it should.

The power to expel members for disciplinary reasons has seldom been exercised, partly because it is so extreme. In the 1870s, Louis Riel was expelled on two occasions from the House of Commons, and in 1891, Thomas McGreevy was expelled after being judged to be guilty of contempt of the House.²¹

In the Senate, no senator has ever been expelled for disciplinary reasons, although the Senate has declared seats to be vacant in the past, usually because the senator missed two consecutive sessions. Questions have arisen about whether the Senate has the right to expel members for disciplinary reasons, mainly because this basis does not appear in section 31 of the *Constitution Act, 1867*, which specifies the circumstances in which the Senate may disqualify a senator and declare the seat vacant. However, it is not clear whether the list contained in section 31 is exhaustive.

This issue was addressed by the Standing Senate Committee on Ethics and Conflict of Interest for Senators in a May 2017 report.²² The report dealt with the sanctions to be imposed on Senator Don Meredith based on the findings of the Senate Ethics Officer and the committee that the senator had engaged in an inappropriate sexual relationship with a teenage girl. On the basis of a legal opinion, the committee argued that the Senate had the power to expel members and recommended that “Senator Don Meredith be expelled from the Senate and that his seat be declared

vacant.”²³ However, Senator Meredith resigned from the Senate before the report was adopted. The report therefore became unnecessary and was discharged from the *Order Paper*.²⁴

The power to expel is generally considered to be a discretionary privilege that is absolute, although it may be somewhat restricted by the Charter. In *Harvey*, the Supreme Court of Canada looked closely at the matter of parliamentary privilege in the context of the consequences of 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 these 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, writing for the majority, found that the consequences did not amount to cruel and unusual punishment, Justice McLachlin expressed the 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.”²⁵

5 CONCLUSION

In summary, the laying of criminal charges against a member of the Senate or the House of Commons generally carries no immediate legal implications. However, in the case of the Senate, a procedure for automatically granting a leave of absence is in place when the Crown proceeds by indictment. If a member of the House of Commons is convicted, he or she may continue to sit, unless sentenced to a term of imprisonment of two years or more. In the Senate, there is an automatic procedure for suspension, which can lead to expulsion, when a senator is convicted of a criminal offence in proceedings by indictment.

In all cases, the House of Commons and the Senate have the power to expel members who are facing criminal charges or are convicted, even if they are not sentenced to a term of imprisonment of two years or more. However, this power is rarely used and may be somewhat restricted by the Charter.

NOTES

- * This publication is a revised version of publication 2012-38-E, *Criminal Charges and Parliamentarians*, prepared by Erin Virgint, Parliamentary Information and Research Service, and James Robertson, formerly of the Library of Parliament.
- 1. Parliamentary privilege refers to the rights and immunities that are considered essential for parliamentarians to fulfill their functions. Among other things, 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 M. Jack, *Erskine May’s Treatise on the Law of Privileges, Proceedings and Usage of Parliament*, 24th ed., LexisNexis (U.K.), 2011, p. 243.
- 2. See J. P. Joseph Maingot, *Parliamentary Immunity in Canada*, LexisNexis, 2016, pp. 194–196.

3. Senate, [Senate Procedure in Practice](#), June 2015, p. 21.
4. Senate, [Rules of the Senate](#), September 2017, Rule 15-4.
5. For more information, see Senate (2015), p. 21.
6. Senate, [Journals of the Senate](#), No. 113, 1st Session, 39th Parliament, 22 June 2007, p. 1848. Letter from Senator Lavigne addressed to the Clerk of the Senate notifying him of criminal charges that had been laid against him.
7. [R. v. Lavigne](#), 2011 ONSC 1335.
8. [R. v. Lavigne](#), 2011 ONSC 2938.
9. [Constitution Act, 1867](#) (U.K.), 30 & 31 Victoria, c. 3.
10. [Canada Elections Act](#), S.C. 2000, c. 9.
11. [Criminal Code](#), R.S.C. 1985, c. C-46, s. 750.
12. Audrey O'Brien and Marc Bosc, eds., [House of Commons Procedure and Practice](#), 2nd ed., House of Commons, 2009, p. 246. At the time, this provision was found in section 1034 of the *Criminal Code* and applied to terms of imprisonment of five years or more.
13. Senate (2015), p. 21.
14. For more information, see Senate (2015), p. 21.
15. Section 750(2) of the *Criminal Code* reads as follows:

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.
16. [Canadian Charter of Rights and Freedoms](#), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
17. In [Sauvé v. Canada \(Chief Electoral Officer\)](#), 2002 SCC 68, [2002], 3 SCR 519, the Supreme Court of Canada held that these provisions of the *Canada Elections Act* infringed upon section 3 of the *Canadian Charter of Rights and Freedoms* and could not be saved by section 1 (reasonable limits clause). Currently, the statute still states that individuals who are imprisoned in correctional institutions serving prison sentences of two years or more are not entitled to vote. The Chief Electoral Officer, however, has used the power granted 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 by-election and general election since the decision was rendered. See Elections Canada, [A History of the Vote in Canada](#), 2nd ed., 2007.
18. [MacLean v. Nova Scotia \(Attorney General\)](#) (1987), 35 DLR (4th) 306; 27 CRR 212 (Supreme Court of Nova Scotia).
19. Audrey O'Brien and Marc Bosc (2009), p. 245.
20. [Harvey v. New Brunswick \(Attorney General\)](#), [1996] 2 SCR 876, paras. 61 and 62.
21. Audrey O'Brien and Marc Bosc (2009), p. 246.
22. Senate, Standing Committee on Ethics and Conflict of Interest for Senators, [Second Report](#), 1st Session, 42nd Parliament, 2 May 2017, p. 8.
23. *Ibid.*, p. 14.

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24. Senate, [Journals of the Senate](#), No. 119, 1st Session, 42nd Parliament, 10 May 2017, p. 2061.
25. *Harvey v. New Brunswick (Attorney General)*, para. 55.