

SPEAKER'S RULING QUESTION OF PRIVILEGE

Honourable senators,

On September 27, Senator Cowan, the Leader of the Opposition in the Senate, rose on a question of privilege pursuant to rule 43. His complaint focussed on statements made by Senator Brazeau on July 6, during debate at third reading of Bill S-4, the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. In separate statements Senator Brazeau had both commented on several witnesses who had appeared on the bill and made specific reference to the past work of Dr. Pamela Palmater, Chair of the Centre for Study of Indigenous Governance at Ryerson University. Subsequently, on September 11, Dr. Palmater wrote to a number of senators to complain about an attempt to discredit her that was not based on fact. She also expressed concern that Senator Brazeau's comment could harm her professionally. With leave, Senator Cowan tabled a copy of the email from Dr. Palmater, which now forms part of our record.

Senator Cowan's argument was that, having been alerted of the complaint, the Senate must act to defend Dr. Palmater's reputation. Not to act might have a "chilling effect" on the work of committees in the future. Witnesses might be reticent about appearing, fearing they could be adversely affected. Senator Cowan argued that Senator Brazeau's statement, by potentially impeding other senators' ability to perform their duties, had amounted to contempt. The Leader of the Opposition indicated that he was not questioning the outcome of any vote on Bill S-4, although he did note that it is impossible to know whether this incident affected the result. In summary Senator Cowan stated,

The critical point [in this question of privilege] is that if what Dr. Palmater says is true, and it is not dealt with, do any of us believe that, in the words of Erskine May [at page 150 of the 23rd edition], this will not "deter prospective witnesses from giving evidence" to us in the future? If future witnesses are deterred from sharing their knowledge with us, how can we perform our constitutionally prescribed duties as members of this legislative body?

Senator Comeau did not accept Senator Cowan's position. Rather, the Deputy Leader of the Government in the Senate focussed on the right of all senators to express divergent points of view. He even suggested that an acceptance of Senator Cowan's argument could amount to an infringement of "Senator Brazeau's fundamental privilege of free speech".

In their interventions Senators Mitchell, Banks, Tardif and Fraser supported Senator Cowan's position. They spoke about the prospective harm that can be done to witnesses and expressed fears about damaging reputations. When he took the floor, Senator Brazeau noted that he was surprised at the complaint. He referred to Dr. Palmater's website to support his understanding of her past career. Before this intervention, Senator Cools had expressed her dismay about the recent tenor of debate in Parliament. She did not feel that the prohibition contained in rule 51 against "personal, sharp or taxing speeches" is always fully respected.

This said, Senator Cools did not see this matter as being a question of privilege, but rather one of due process and due respect. While some words may have been spoken without sufficient reflection, there was no evidence that they were deliberately harmful or aimed at deterring future witnesses.

In considering this matter I have followed normal practice and taken into account the arguments provided by senators during debate on the question of privilege, in addition to our Rules and the insights from the parliamentary authorities.

The basic privilege in this case is freedom of speech. As noted in the second edition of *House of Commons Procedure and Practice*, at pages 89 and 90, this is

[b]y far, the most important right accorded to Members of the House ...
[...] a fundamental right without which they would be hampered in the performance of their duties. It permits them to speak in the House without inhibition, to refer to any matter or express any opinion as they see fit, to say what they feel needs to be said in the furtherance of the national interest and the aspirations of their [residents].

According to page 96 of the 23rd edition of Erskine May, this means that,

[s]ubject to the rules of order in debate, a Member may state whatever he thinks fit in debate, however offensive it may 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.

This privilege is powerful, and it comes with great responsibility. In the other place, “Speakers have ... stated that although there is a need for Members to express their opinions openly in a direct fashion, it is also important that citizens’ reputations are not unfairly attacked.” This is at page 98 of the second edition of *House of Commons Procedure and Practice*. Later, at page 617, the same work notes that,

Members have a responsibility to protect the innocent [and should] avoid as much as possible mentioning by name people from outside the House who are unable to reply in their own defence.

We must be clear, however, that it is generally true that senators have the right to express themselves freely and to say anything they want in any parliamentary proceeding. Only the Senate itself, through its Rules and practices, can constrain this right. Maingot, at page 26 of the second edition, makes this clear, stating that parliamentarians’ freedom of speech is “subject only to the rules, customs, and practices” of their house.

It goes without saying that just because senators have the freedom to say something does not mean that they should avail themselves of this right in all cases. Honourable senators should be aware of the need to avoid impugning the reputations of those who do not sit in this place and who have no mechanism to defend themselves.

The case before us is somewhat complicated by the fact that it is not only parliamentarians who benefit from the protection of privilege. Witnesses are not to be molested or interfered with because of evidence that they have given or intend to give before a committee. To interfere with witnesses before their appearance or to punish them for evidence given can constitute a breach of the privileges of the Senate. This is recognized at page 150 of the 23rd edition of Erskine May, to which reference was made during debate on the alleged question of privilege.

The retrospective element of this protection is described when it is stated that,

molestation of or threats against those who have previously given evidence before either House or a committee will be treated by the House concerned as a contempt. Such actions have included assaults or a threat of assault on witnesses, insulting or abusive behaviour, misuse (by a gaoler) or censure by an employer.

The prospective element of the protection is recognized in the quote to which Senator Cowan made reference, which states that “[a]ny conduct calculated to deter prospective witnesses from giving evidence before either House or a committee is a contempt”.

The aspect of retrospective protection was not fundamental in this question of privilege. We may observe, however, that Senator Brazeau took note of some factors he felt gave context to statements in committee. While I again emphasize the need for caution when mentioning outside individuals in debate, the remarks were not of the type to which Erskine May refers. The Senate was not provided, in debate on the question of privilege, with evidence of deliberate malice, deliberate misstatements or a deliberate attempt to punish.

In terms of prospective protection, which is central to this question of privilege, the basic allegation was that subsequent criticism of the witness could keep unknown future witnesses from appearing, at some point in time. Nothing specific was offered as an illustration to show that this was anything more than a possibility. Against this vague concern, we must set the undoubted freedom of speech that all senators enjoy, subject always to our Rules, customs and practices. There is nothing concrete in this case to suggest a real conflict between the two privileges of senator’s freedom of speech and the protection of identified future witnesses.

The potential for conflict between unfettered freedom of speech and the need to use it in a responsible manner has been recognized in other countries. In Australia, most parliamentary houses have established a “right of reply”. In the federal Senate, for example, a person who claims to have been adversely affected in a proceeding can submit a request that a response be published. This request goes through a control process before being put into effect. Since 1988 the Australian Senate has also recognized that freedom of speech must be exercised in a responsible manner, to avoid the damaging effects that allegations can have.

In the case at issue, the Speaker’s role is to evaluate whether a prima facie question of

privilege is well-founded, using the four criteria in rule 43(1). There can be little doubt that the first criterion was met, since Senator Cowan only became aware of Dr. Palmater's concern on September 11.

In relation to the third criterion, that the concern be raised to seek a genuine remedy, Senator Cowan has indicated that he is ready to move referral to the Standing Committee on Rules, Procedures and the Rights of Parliament.

Lastly, in terms of the second and fourth criteria, it is not evident how Senator Brazeau's exercise of his undoubted freedom of speech has, in a concrete and direct way, prevented the Senate from discharging its basic functions of examining legislation, investigating public affairs and ensuring accountability. The concerns raised were speculative. Moreover, let us remember that nothing indicates that the remarks in question affected the outcome of any decision by the Senate. These two criteria have, therefore, also not been fulfilled.

The ruling is that the conditions of rule 43(1) have not been met and I am unable to apprehend that there is a prima facie question of privilege. This case does, however, serve to underscore how careful we must all be when we use the privileges we enjoy as parliamentarians. With our freedom of speech comes the responsibility to use it in a careful and considered manner that avoids harm.