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Andrew Heard*

The Expulsion and Disqualification
of Legislators: Parliamentary
Privilege and the Charter of Rights

*This article examines whether the Charter of Rights limits the ability of legislatures to expel sitting members and to disqualify individuals from running for election. The discussions reveal the uncertain breadth of the constitutional status that the Supreme Court of Canada accorded legislative privilege in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*. The author argues that both expulsion and disqualification should be included among the privileges that are beyond the Charter's purview.*

Introduction

A particularly knotty problem for democracies lies in what to do with rotten apples who are, or want to be, members of the legislative barrel. An important part of any robust democracy must be the maintenance of integrity among those holding public office and of the general public's confidence in their government institutions. Thus, there may come a time when legislative assemblies have to face the prospect of expelling a member for behaviour which undermines their fundamental integrity. Another troublesome embarrassment can arise when someone recently found guilty of a corrupt practice or serious crime runs in an election. Canadian legislatures have tried to prevent such candidates from seeking office for a set period of time after their conviction. While the legislatures used to have a free rein in dealing with expulsions and disqualification, the *Charter of Rights* added a new dimension to the problem by proclaiming in section 3 that every Canadian citizen has the right "to be qualified for membership" in both the national and provincial legislatures. As a result, the courts have a larger role to play in scrutinizing expulsions and disqualifications from the legislatures, in order to ensure that individuals are not unjustifiably denied their right to run for office. In hearing challenges under the *Charter* on these issues, however, the courts are faced with one of the oldest constitutional battles between judges and legislators: the nature and extent of parliamentary privilege.

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I. *Charter Cases on Expulsion, Disqualification, and Privilege*

Since the *Charter* came into force, there have been at least five expulsions—all from provincial assemblies—and two of these individuals have sought redress from the courts. Billy Joe MacLean fought his expulsion and successfully overturned his five-year ban from running for office in Nova Scotia, while Fred Harvey continues to fight a disqualification from running in an election to reclaim the seat he was expelled from in the New Brunswick Legislative Assembly.¹ These cases invite a closer examination, for they reveal the web of problems associated with the legislatures' powers to expel and disqualify members from office.

Intricately involved with these cases are the constitutional privileges of legislatures to determine who may sit as members. In the context of the *Charter* claims made by MacLean and Harvey, the courts are put in a position of assessing the nature of these privileges and their limits. With the Supreme Court of Canada's 1993 ruling in *New Brunswick Broadcasting*² that the *Charter* generally does not apply to parliamentary privileges, a legislator would not be granted relief under s. 3 of the *Charter* if the expulsion or disqualification can be properly characterized as an exercise of these privileges. If the legislature's privileges are not involved, however, the courts must undertake a detailed examination of the justifications for expulsion and disqualification in order to resolve the *Charter* claim. Even in the latter event, a discussion of the legislative privilege of an assembly to control its membership provides an insight into the values that need to be balanced in a *Charter* analysis. A review of the MacLean and Harvey cases helpfully illustrates the matters which the courts should account for in weighing the constitutionality of expulsion and disqualification.

Billy Joe MacLean was a cabinet minister in Nova Scotia at the time of being charged under the *Criminal Code* with forging documents to claim \$22,000 from the House of Assembly. He subsequently pleaded guilty and was sentenced to a day in jail (served by his court appearance) and a fine of \$1,500 on each of four counts. Within four weeks of his sentencing, the legislature reconvened in a special session to pass an Act which expelled him from the House and set up a general prohibition

1. *MacLean v. Nova Scotia (A.G.)* (1987), 35 D.L.R. (4th) 306 (N.S.S.C., T.D.) [hereinafter *MacLean*]; *Harvey v. New Brunswick (A.G.)* (1993), 109 D.L.R. (4th) 371 (N.B.C.A.) [hereinafter *Harvey* (C.A.)]; leave to appeal to Supreme Court of Canada granted (June 3, 1994), Bulletin of Proceedings 939 (S.C.C.), LaForest, Sopinka and Major JJ.

2. *Donahoe v. Canadian Broadcasting Corporation (sub nom: New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly))*, [1993] 1 S.C.R. 319 [hereinafter *New Brunswick Broadcasting*].

against individuals convicted of indictable offences punishable with more than five years' imprisonment from standing for election for at least five years.³ MacLean took this to court and won a favourable decision from Chief Justice Glube of the province's Supreme Court Trial Division.⁴

In her decision, Glube C.J. distinguished between the provisions of the Act which provided for the expulsion of sitting members and those which disqualified anyone from running for a seat in the House for five years. She reviewed evidence of a variety of constitutional authorities to conclude, "The power to expel a member has long been a part of the prerogative of Legislatures."⁵ Furthermore, she decided that there was no conflict between the exercise of this power and s. 3 of the *Charter*:

I agree that proper standards for its sitting members may be set by the House. In my opinion, s. 3 deals with the right to vote and the right to be elected and that is different from setting standards for sitting members. In my opinion, no breach of s. 3 occurs by the House expelling one of its members.⁶

3. *An Act respecting Reasonable Limits for Membership in the House of Assembly*, S.N.S. 1986, c. 104. Section 2 of this Act expressly removed MacLean from office "by reason of his conviction on four counts of using forged documents in respect of money received by him in his capacity as a member." The Act also added the following provisions to the *House of Assembly Act*:

25A(1) A person who stands convicted of an indictable offence that is punishable by imprisonment for a maximum of more than five years is not eligible

- (a) to be nominated as a candidate for election as a member of the House; or
- (b) to be elected as a member of the House,

for a period of five years from the date of the conviction and, if the sentence imposed for the offence substituted by a competent authority has not been fully served at the end of that period, for the further time remaining to be served in that sentence.

(2) Where a conviction has been set aside by a competent authority, any disability imposed by this section is removed.

25B Where a person who is a member of the House is convicted of an indictable offence that is punishable by imprisonment for a maximum of more than five years, that member forthwith ceases to be a member, and the seat of that member is deemed to be vacant until an election is held in that electoral district according to law.

24C For greater certainty, Sections 25A and 25B apply in respect of persons convicted before as well as after the coming into force of those sections.

The *House of Assembly Act*, R.S.N.S. 1992 (Supp), c. 1 has re-numbered s. 25A as s. 22 and s. 25B as s. 23; s. 24C has been deleted.

4. For summaries and brief comments on this decision, see A. Donahoe, "The Right to Choose: Candidates' Eligibility Test Questioned in Canadian Court" (1987) 68 *Parliamentarian* 128; J. Holtby, "The Legislature, the Charter, and Billy Joe MacLean" (1987) 10 *Canadian Parliamentary Review* 12.

5. *MacLean*, *supra* note 1 at 314.

6. *Ibid.* at 315.

Thus, the House was within its rights to expel MacLean from office. However, Chief Justice Glube took quite a different view of the disqualification from running for office. She believed that the disqualification went beyond the traditional privileges of a legislature to discipline its members. In her view the Act was punitive and excessive by denying both expelled members and other prospective candidates their right to stand as candidates. She seemed particularly irked by the way the Act denied the electorate the opportunity to decide who they could vote for: "Surely the citizens of this province should be given the credit for having the sense to determine who is a proper member."⁷ As a result she declared to be 'null and void' the disqualifications embodied in the new sections added to the *House of Assembly Act*. MacLean then ran in the by-election held in his riding and was re-elected by a narrow margin.

Fred Harvey won a seat in the New Brunswick Legislative Assembly in the 1991 general election. He was later convicted and fined \$100 under the *Elections Act*⁸ for having induced a minor to vote, knowing her to be under-age. Because of this conviction, however, he was expelled from the Assembly and barred from running as a candidate for five years.

Harvey went to court seeking relief under the *Charter* to overturn his expulsion and disqualification. He succeeded in obtaining a judgment from the Queen's Bench which declared the disqualification provisions of the *Elections Act* to contravene s. 3 of the *Charter*, although the expulsion was upheld.⁹ He took the case to the Appeal Court, seeking a declaration that the expulsion was invalid as well, but the appeal on that point was dismissed without hearing arguments from the respondent Attorney General. However, the Court did proceed with the cross-appeal by the Attorney General, which dealt with the first part of s. 119(c), disqualifying those convicted of corrupt or illegal practices from election to the Assembly.

7. *Ibid.* at 318.

8. R.S.N.B. 1973, c. E-3. The relevant provisions of the *Elections Act* read:

119. Any person who is convicted of having committed any offence that is corrupt or illegal practice shall, during the five years next after the date of his being convicted, in addition to any other punishment by this or any other Act prescribed, be disqualified from and be incapable of

- (a) being registered as an elector or of voting at any election,
- (b) holding any office in the nomination of the Crown or of the Lieutenant-Governor in Council, or
- (c) being elected to or sitting in the Legislative Assembly and, if at such date he has been elected to the Legislative Assembly, his seat shall be vacated from the time of such conviction.

9. *Harvey v. New Brunswick (A.G.)* (1993), 133 N.B.R. (2d) 181 (Q.B.) [hereinafter *Harvey* (Q.B.)].

Although the majority opinion by Ryan J.A. discussed both expulsion and disqualification together, the judgment of the case had to be restricted just to disqualification, which was the point of contention. The focus was on the long-standing legal rules, both common law and statutory, in Canada and Britain, that have disqualified individuals from standing for election because of convictions for corrupt electoral practices, felonies, or treason. Ryan J.A. then went on to conduct a full examination of the issues under the *Charter*, and he concluded that while disqualification infringed the right to be a candidate in s. 3 it was justified under s. 1 to defend the integrity of the democratic process. The goal of s. 119(c) is, in his view, “to ensure the proper exercise of citizens’ political rights free of corruption, intimidation, and similar illegal activities.”¹⁰ According to the majority, the provisions of the *Elections Act* only infringed s. 3 in a limited manner that was proportional to the objective.

Justice Rice dissented from his colleagues’ judgment, and concluded that disqualification from candidature could not be justified under s. 1 of the *Charter*. He dismissed the argument that disqualification was important to prevent a “revolving door” of those expelled from the Assembly. In a sentiment reminiscent of Glube C.J. in *MacLean*, he said: “I fail to see s. 119(c) as having that societal importance and as being ‘pressing and substantial’ when Harvey’s right to a seat in the Legislative Assembly will be resolved and decided by the electorate in a democratic election in the exercise of their fundamental right to vote under s. 3 of the *Charter*.”¹¹

In these two cases, judges have been faced with laws relating to the three aspects of expulsion and disqualification: the expulsion of a sitting member of a legislative assembly, the disqualification of an expelled member from seeking re-election, and the disqualification of non-members from running for office for a period after conviction for certain offences. While both the New Brunswick and the Nova Scotian courts directly addressed the first two of these circumstances, neither delved deeply into the third in their reported decisions.

These two cases reveal a need to study expulsion and disqualification more closely. In neither set of decisions was equal attention given to the grounding that both expulsion and disqualification have in a privilege asserted for centuries in Westminster-style parliamentary systems: the right of the legislative assembly to decide who may sit as a member.

10. *Harvey* (C.A.), *supra* note 1 at 381.

11. *Ibid.* at 377.

These issues ought to be studied in light of the Supreme Court of Canada's decision in *New Brunswick Broadcasting*¹² on the nature and constitutional status of legislative privileges. A fuller understanding of the context of legislative privilege is required for a proper analysis of the relationship between expulsion and disqualification and s. 3 of the *Charter*, especially since *MacLean* was decided six years before *New Brunswick Broadcasting*; and the *Harvey* decision makes no reference to it. The contextual setting *New Brunswick Broadcasting* provides is vital, since it established that legislative privileges may be exempted from the *Charter*. If disqualification or expulsion are in essence matters of inherent legislative privilege, then they cannot be subordinated to s. 3 of the *Charter*.

In *New Brunswick Broadcasting*, the Supreme Court was faced with a claim by the media to record the proceedings of the Nova Scotian House of Assembly with their own hand-held cameras, as a part of the freedom of the press under s. 2(b) of the *Charter*. The Speaker managed to win the case by claiming that the Assembly had an inherent privilege to control admittance to the chamber and exclude 'strangers'. This argument succeeded because the majority of the Court believed that legislative privileges possessed a constitutional status that made them immune to judicial scrutiny under the *Charter*.

An initial debate revolved around whether the *Charter* could apply to the federal and provincial legislative assemblies, or just to 'the legislature', which is composed of the governor and the deliberative chamber(s). Chief Justice Lamer adopted the position taken in obiter by McIntyre J. in *Dolphin Delivery*: "legislation is the only way in which a legislature may infringe a guaranteed right or freedom."¹³ However, he was alone in this position, and all the other members of the deciding panel agreed that it was possible for the *Charter* to apply to the constituent parts of the legislature. Justice McLachlin was vague about the breadth of the *Charter's* application, although she made it clear that provisions such as the requirement for an annual sitting (s. 5) and the use of English and French in Parliament and the New Brunswick Legislative Assembly (s. 17) only made sense if the *Charter* applied in some way to the deliberative chambers.¹⁴ Justice Cory took a much broader approach in

12. *New Brunswick Broadcasting*, *supra* note 2. For a general discussion of this case see A. Heard, "The Supreme Court Entrenches Parliamentary Privilege out of the Charter's Reach: *Donahoe v. CBC*" (1993) 4 Constitutional Forum 102.

13. *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573 at 599 as cited by Lamer C.J. in *New Brunswick Broadcasting*, *supra* note 2 at 358.

14. McLachlin J. did not need to definitively settle the extent of the *Charter's* application, since she excluded the *Charter* in the case at hand on other grounds.

his dissenting opinion, arguing that legislative assemblies were inherently involved in governance and were the sort of 'public actors' which the Court had deemed the *Charter* applied to in *McKinney*;¹⁵ in his view all actions of legislative bodies should be subject to the *Charter*.

The manner in which the majority applied the *Charter* to legislative chambers, however, was not broad enough to bring all aspects of their work into judicial scrutiny under the *Charter*. McLachlin J.'s decision examined the historical basis of legislative privilege and held that Canadian legislatures had acquired in their colonial origins those aspects of British parliamentary privilege "which were necessary for the maintenance of order and discipline during the performance of their duties."¹⁶

While the colonial assemblies' narrower range of privilege was said to exclude the full punitive powers of British parliamentary privilege, it still encompassed the essential immunity from judicial review. As McLachlin J. described the current powers of the courts over parliamentary privilege:

The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function? . . . The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.¹⁷

The majority adopted the position that the *Charter* did not alter this fundamental right of the legislative assemblies to regulate their own affairs. This was a position taken out of concern for a fundamental separation of powers between the three branches of government:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that these parts play their proper role. It is equally important that each show proper deference for the legitimate sphere of activity of the other.¹⁸

In the British parliamentary tradition, legislatures are absolute arbiters of their internal affairs. However, the *Charter of Rights* has potentially disturbed this independence in Canada. Since the *Charter* is part of the 'Supreme Law' which the courts must enforce, legislative bodies would not apparently be able to infringe the *Charter* without risking losing their immunity from judicial review.

15. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

16. *New Brunswick Broadcasting*, *supra* note 2 at 380.

17. *Ibid.* at 384–85.

18. *Ibid.* at 389.

Under the logic of the Constitution, however, the legislature's traditional immunity from judicial scrutiny could be assured in two ways: if the *Charter* did not apply to the legislative assemblies asserting these privileges, or if the privileges were given formal constitutional status. The majority opted for the second approach. Justice McLachlin's majority opinion held that the parliamentary system alluded to in the preamble to the *Constitution Act, 1867* necessarily entailed an independence from the Crown and judiciary for the legislatures in their internal workings. In her view, the subjection of an exercise of these parliamentary privileges to judicial scrutiny under the *Charter* would negate the very essence of this independence and immunity. The grounding of a constitutional status in the 1867 preamble provided the basis for according to legislative privileges an immunity from the *Charter*, under the principle articulated in the *Education Act Reference*:¹⁹ the *Charter* cannot invalidate another part of the Constitution of Canada.

But the question arose whether the immunity of these privileges was changed if they remain to be asserted by resolution in the chambers, or if they become embodied in statutes, which are normally subject to the *Charter*. McLachlin J. settled this issue by saying, "inherent constitutional privileges can enjoy constitutional status regardless of whether there exists power to legislate in respect of privilege in the provincial constitution, and regardless of whether provisions relating to privilege have in fact been enacted."²⁰

The wording of the majority decision in *New Brunswick Broadcasting* is vague about the extent of Canadian legislative privilege, but it certainly protects assertions of privilege from *Charter* scrutiny if they involve 'inherent' necessities for the legislature's 'proper functioning'. In this aspect, the majority relied on the principle developed in leading British cases, such as *Stockdale v. Hansard*.²¹ McLachlin J. summarized the effect of recognizing the necessity of a claimed privilege:

The test of necessity is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary sphere of exclusive or absolute 'parliamentary' or 'legislative' jurisdiction. If a matter falls within the necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not enquire into questions concerning privilege. All such questions will fall to the exclusive jurisdiction of the legislative body.²²

19. *Reference Re Bill 30, an Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 [hereinafter *Education Reference*].

20. *New Brunswick Broadcasting*, *supra* note 2 at 374.

21. (1839), 112 E.R. 1112 (Q.B.).

22. *New Brunswick Broadcasting*, *supra* note 2 at 383.

The net result of *New Brunswick Broadcasting* is that the courts can assess a claim made under the *Charter* in order to determine whether the alleged infringement has arisen from some rule or action necessary to a legislative assembly's proper functioning. If a court decides that such is the case, then the policy or action in question is one of legislative privilege that may be immune from *Charter* review.

Justice McLachlin was at pains to take this position one step further, in order to clarify whether the courts could still review a particular application of a recognized privilege. In order to answer this question she used the illustrations of the *Education Act Reference*²³ and the *Electoral Boundaries Reference*.²⁴ In the first case, the Supreme Court decided that the legislative exercise of Ontario's power to implement religiously organized education could not be subject to the *Charter*. The rationale is that the legislation was necessary to give effect to the power conveyed in the Constitution to the province; to strike down the religious discrimination found in the proposed *Education Act* would negate the legislature's ability to exercise that very power granted by the Constitution. In contrast, the Court ruled that legislation implementing a province's constitutional power to set electoral boundaries could be subject to the *Charter*. In this second instance, the scrutiny of a particular boundaries scheme did not logically negate the power to define constituencies. According to the majority in *New Brunswick Broadcasting*, the analogy from the *Education Act Reference* was the most relevant to the judicial review of exercises of legislative privileges. At the heart of legislative privilege is the protection of a legislative body's independence to determine its internal affairs without judicial interference. The courts cannot review particular applications of a recognized privilege without negating this most essential character of that privilege. All the courts can do is inquire whether the policy or action is part of a privilege that is necessary to the functioning of the legislature; the courts cannot question the wisdom of a particular way that privilege is exercised.

A number of important issues emerge from *New Brunswick Broadcasting* that have direct relevance to the constitutionality of expulsion and disqualification. The most fundamental point is that expulsion or disqualification could be immune from a challenge under s. 3 of the *Charter* if they can be properly described as aspects of legislative privilege.

23. *Education Reference*, *supra* note 19.

24. *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 [hereinafter *Boundaries Reference*].

II. *Expulsion of Sitting Members*

The *Charter* does not seem readily applicable to a legislative assembly's expulsion of a member. The right in s. 3 of the *Charter* to be "qualified for membership" in a legislature is most clearly read in the sense given by Glube C.J. in *MacLean*;²⁵ it refers to the right of a citizen to be a candidate rather than to their rights in the legislature once elected. However, other judges might well give this phrase as expanded a reach as the Supreme Court of Canada gave to the "right to vote" in the same section; while a plain reading of that phrase would seem to refer to the actual casting of a ballot, the Court has declared that it also entails a right to "effective representation" that must be reflected in the relative sizes of constituencies.²⁶ The Supreme Court could also possibly decide that the right to be qualified for membership in a legislature also entails the right to remain a member until resignation or electoral defeat. In such a case, the Court will have to consider the effect on s. 3 of a legislative assembly's constitutional privileges. If expulsion is a matter of the "inherent privileges" required by a legislature for its proper functioning, then it cannot be subject to the *Charter*.

As outlined by McLachlin J. in *New Brunswick Broadcasting*, a court is entitled to question whether a claimed privilege actually exists. The test for such an inquiry is whether the alleged privilege is "necessary" to a legislative body's proper functioning: "If a matter falls within this necessary sphere of matters without which the dignity or efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege."²⁷ Past conflicts between legislatures and the courts reveal that necessity can be very much in the eye of the beholder. As has been said about the British context, "There may be at any given moment two doctrines of privilege, the one held by the courts, and the other by either House, the one to be found in the law reports, the other in *Hansard*."²⁸

A cautionary reminder to judges trying to assess an assertion of privilege is found in the very case that laid down the principle of necessity, *Stockdale v. Hansard*.²⁹ The British House of Commons had declared by resolution that parliamentary privilege protected the publishers of parliamentary debates from libel suits. But in a subsequent libel

25. *MacLean*, supra note 1 at 315. Section 3 of the Charter of Rights states: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

26. *Boundaries Reference*, supra note 24.

27. *New Brunswick Broadcasting*, supra note 2.

28. F.H. Lawson & D.J. Bentley, *Cases in Constitutional Law*, 6th ed. (Oxford: Clarendon, 1979) at 255.

29. *Supra* note 21.

suit, the judges declared that the courts may review this assertion of privilege, and then went on hold that the parliamentary privilege protecting free speech in the House did not extend to the publication of its debates. This clash of what was necessary to the Commons' proper functioning was resolved shortly after, when Parliament passed the *Parliamentary Papers Act, 1840*³⁰ which expressly shielded published versions of parliamentary debates. This statutory protection has become a fundamental aspect of parliamentary privilege and has been instituted in Canadian jurisdictions as well. In this instance, the judges were plainly mistaken in their view of what was necessary.

When judges conduct an independent assessment of the competing arguments, they risk basing their judgment on an incomplete appreciation of political realities. In considering the necessity of a claimed privilege, judges should bear in mind two reasons why accepted parliamentary privileges enjoy an immunity from judicial review: legislators are best situated to judge what is necessary to the legislative process, and legislators are accountable to the electorate for their decisions. When faced with a claim to privilege, judges may have to defer at some point to the legislature's judgment of what is necessary to its own dignity and functioning. It should be sufficient for judges to ask whether the legislators have a sound argument, based on principle and practical concern, that is directed to ensuring the basic integrity or efficient functioning of the assembly. Judges should be leery of substituting their own assessment unless the legislature's position is patently a cover for achieving general social policies, or partisan interests, under the guise of parliamentary privilege. This deference was plainly evident in the majority's application of the test of necessity in *New Brunswick Broadcasting*; as McLachlin J. concluded: "the legislative assembly always faces the ultimate sanction, that of the voters".³¹

A review of constitutional authorities reveals that Westminster parliaments have long exercised the right to expel members. As Erskine May wrote in 1863 of the British House of Commons, "No power exercised by the commons is more undoubted than that of expelling a member from the house as a punishment for a grave offence".³² Bourinot was equally emphatic in his discussion of the subject in 1892:

30. (U.K.), 3 & 4 Victoria, c. 9.

31. *New Brunswick Broadcasting*, *supra* note 2 at 389.

32. E. May, *Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 5th ed. (London: Butterworths, 1863) at 58.

The power of Parliament to expel a member is undoubted. This power has been repeatedly exercised by the English and colonial Parliaments, either when members have been guilty of a positive crime, or have offended against the laws and regulations of the House, or have been guilty of fraudulent or other discreditable acts, which proved that they were unfit to exercise the trust which their constituents had reposed in them, and they ought not to continue to associate with the other members of the legislature.³³

Modern authorities are just as firm in their conclusion that expulsion is an accepted power of Westminster parliaments.³⁴ Legislators have been expelled for a wide variety of reasons, in Britain, Canada, and other Westminster systems. Most often, some criminal conviction has sparked the expulsion, but it has also occurred because a member has been “offensive” rather than actually committing a criminal offence; for example, a British MP was expelled in 1947 after he had published unfounded accusations about drunken corruption in Parliament.³⁵ The right to decide who is fit to sit as a member is an ancient and broad right. As a former Law Clerk and Parliamentary Counsel to the Canadian House of Commons once said about the unlimited power of expulsion, “If the House does not like the colour of a member’s hair, they can expel a member.”³⁶ In 1884 a court refused to allow an appeal by an MP who was excluded from the UK House of Commons; Coleridge C.J. said in the case, “the jurisdiction of the Houses over their own Members, their right to impose discipline within their walls, is absolute and exclusive”.³⁷ Alberta has set down in its *Legislative Assembly Act* a provision that encompasses the full power of expulsion; s. 36 states, “The Assembly may, after a hearing conducted in accordance with its standing orders, expel a Member for any cause that is sufficient in the opinion of the Assembly.”³⁸

33. J.G. Bourinot, *Parliamentary Procedure and Practice*, 2d ed. (Montreal: Dawson Bros., 1892) at 193–94.

34. C.J. Bolton, ed., *Erskine May’s Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 21st ed. (London: Butterworths, 1989) at 113; E. Campbell, “Expulsion of Members of Parliament” (1971) 21 U.T.L.J. 15; W.F. Dawson, “Parliamentary Privilege in the Canadian House of Commons” (1959) 25 Can. J. Eco. & Pol. Sci. 402; J. Maignot, *Parliamentary Privilege in Canada*, (Toronto: Butterworths, 1982) at 161; M. Pelletier, “Privilege in the Canadian Parliament” (1973) 54 *Parliamentarian* 143 at 148; O.H. Phillips & P. Jackson, *O. Hood Phillips’ Constitutional and Administrative Law*, 7th ed. (London: Sweet and Maxwell, 1987) at 242–43; E.C.S. Wade & A.W. Bradley, *Constitutional and Administrative Law*, 10th ed. (London: Longman, 1985) at 217.

35. Wade & Bradley, *ibid.* at 218.

36. House of Commons, *Minutes of Proceedings and Evidence of the Special Committee on the Review of the Parliament of Canada Act* (Ottawa: Queen’s Printer, 20 December 1989) at 29.

37. *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271 at 275.

38. R.S.A. 1983, c. L-10.1.

Expulsion can be justified on two grounds: in order to enforce discipline within the House, and in order to remove those whose behaviour has made them “unfit” to remain as members. With respect to discipline, any assembly must have some ultimate sanction to ensure compliance with its rules. Continued, wilful refusal to follow the rules and orders of the House, or Speaker’s rulings, and failing to attend any sittings of the assembly are grounds for which members can ultimately be expelled. Also, expulsion is reserved for those who have received outside payments for their activities in the legislature.³⁹ Removal of members in these circumstances is needed as a disciplinary measure to ensure that the business of the legislature is conducted efficiently and honestly.

Expulsion has also been exercised in order to remove members for actions outside the legislature which render them “unfit” to continue sitting. This is a significant concern with the many instances of legislators committing bribery, corruption, fraud, and other serious misdeeds. Just within the past decade, at least eighteen Canadian legislators were convicted of criminal offences, including sexual assault, assault (on a wife), and murder; while most resigned, a few hung doggedly on until they were expelled by their assembly or defeated at the polls.⁴⁰ No legislature can be venerated as an institution of governance if it is populated with such unsavoury characters. Indeed, some would add that the civic virtue of a society requires the removal from public office of the corrupt, criminal, and profoundly immoral. The Saskatchewan Legislative Assembly was faced with the embarrassment of Colin Thatcher’s determination to remain a member after his conviction for the murder of his wife. In order to protect its fundamental dignity, the Assembly expelled him immediately after Royal Assent was granted to a law explicitly empowering the removal of those convicted to more than two years’ imprisonment.⁴¹ In addition to the symbolic dimension, there is the more practical consideration that some malefactors should be excluded or expelled in order to prevent them from continuing their wicked ways *in office*. Without some means to remove or exclude corrupt members, a legislature runs the risk, at least, of losing public confidence in the political process or, at worst, of becoming an institutional cover for

39. See e.g.: *Parliament of Canada Act*, R.S.C. 1985, c. P-1, s. 35.

40. Not every criminal conviction leads to pressures to resign. For example, Bernard Valcourt retained his seat without much protest after his conviction for drunk driving, and Svend Robinson has not been seriously challenged after being sentenced to a brief jail term for criminal contempt of court. These instances are consistent with the general pattern that sees expulsion or disqualification for criminal convictions that involved indictable offences only.

41. *Legislative Assembly and Executive Council Amendment Act, 1984*, S.S. 1983-84, c. 65. See also the debate on the resolution to expel Thatcher: Saskatchewan, Legislative Assembly, *Debates and Proceedings* (28 November 1984) at 3616.

organized criminal activity aimed at exploiting the public purse. A legislature must have the power to remove corrupt individuals in order to maintain its fundamental integrity.

While there are broad powers to expel by resolution, expulsion can have an explicit statutory basis as well. In every Canadian jurisdiction, members who are found to have gained their seat through electoral corruption are expelled. Various statutes also vacate the seat of a legislator convicted of indictable offences. Those convicted to five years in jail cannot continue to sit in any Canadian legislature under the *Criminal Code*;⁴² Manitoba has a similar provision.⁴³ As mentioned earlier, Nova Scotia has a law which expels MLAs convicted of a crime that could have been subject to a five-year term in prison.⁴⁴ Quebec and Saskatchewan have similar provisions which expel those sentenced to at least two years' imprisonment for indictable criminal offences.⁴⁵ British Columbia legislation expels MLAs for a variety of reasons, including conviction for "an infamous crime".⁴⁶ The thresholds for expelling those imprisoned for a criminal offence seem quite lenient, since a member cannot act effectively during any significant period of incarceration.

A legislative assembly is the sole judge of the broad grounds for expelling a member. As Joseph Maignot concludes, the precedents establish that an exercise of this power is not subject to judicial review:

What is clear is that the ordinary civil and criminal jurisdiction of the courts does not extend to determining the rights of members to sit in the House and the courts equally have nothing to do with questions affecting membership except in so far as they have been specially designated by law to act in such matters as, for example, under the *Dominion Controverted Elections Act*.⁴⁷

One can firmly conclude that the privileges of Canadian legislative assemblies include the power to expel their members. It is necessary to both the discipline and integrity of any legislature that members may be removed from office. Expulsion was not reviewable by the courts prior to the *Charter* and is not now subject to the *Charter*, according to the ratio of *New Brunswick Broadcasting*. In this light, the expulsion provisions in New Brunswick's *Election Act* and in Nova Scotia's *House of Assembly Act* have been properly upheld.

42. Section 748(2).

43. *Legislative Assembly Act*, R.S.M. 1990, c. L-110, s. 18(1).

44. *Supra* note 3.

45. *National Assembly Act*, S.Q. 1982, c. 62, s. 17; *Legislative Assembly and Executive Council Act*, R.S.S. 1979, c. L-11.1, s. 40.1(1).

46. *Constitution Act*, R.S.B.C. 1979, c. 62, s. 54; members are also expelled on a number of other grounds, including bankruptcy and swearing allegiance to another state.

47. Maignot, *supra* note 34 at 161–2.

III. *Disqualification*

While expulsion from a legislature may be clearly immune from *Charter* scrutiny, disqualification from membership in a legislature raises a number of conundra that reveal a certain vulnerability to *Charter* challenges. The complication with disqualification lies initially in deciding whether it can be characterized as part of parliamentary privilege. This analysis is troublesome because of a couple of problems: the ambiguity of the ‘test of necessity’ for identifying a bona fide privilege; and the uncertainty whether the full range of legislative privileges possessed are “inherent” and, therefore, beyond the *Charter*’s reach.

A further complication pervading these issues lies in translating British jurisprudence on parliamentary privilege to the Canadian constitutional stage. While the Supreme Court in *New Brunswick Broadcasting* drew lessons from the treatment of privileges in British courts, the majority paid no attention to the vital distinction in Britain between privileges asserted by resolution and those effected by statute. British courts developed the test of necessity to review privileges asserted by resolution, but statutory embodiments of privilege remain completely beyond judicial scrutiny.

If disqualification is a matter of legislative privilege, then it could be saved from *Charter* scrutiny. Disqualification would qualify as a matter of privilege if it were either a necessary means to realize full expulsion, which is a privilege, or it could be a privilege in its own right. The New Brunswick Attorney General argued in *Harvey* that disqualification from membership was necessary to prevent a “revolving door”.⁴⁸ In one sense, he is correct, since there are a number of examples in both Britain and Canada of legislators being expelled, winning the ensuing by-election, only to be expelled once again as still “unfit” for the legislature; in some cases the expulsion and re-election cycle was repeated several times.⁴⁹ A legislature does not have conclusive authority to discipline its members if it expels someone simply to have that person returned to carry on where he or she left off. Disqualification would give finality to a disciplinary decision to expel a member.

As a privilege in its own right, the justification for disqualification is similar to that for expelling a sitting member for actions committed outside the legislature. In both instances, the criminal or other illegal activities impugn the individual’s integrity and undermine the public’s faith in the legislature. Expulsion has mainly been used as a last resort to

48. *Harvey* (C.A.), *supra* note 1 at 375.

49. See Bourinot, *supra* note 33; May, *supra* note 32 at 60.

remove members following serious convictions. But a murderer, rapist, or fraud artist is no more suitable for public office because they are convicted just before an election rather than afterwards. Thus, disqualification prevents certain malefactors from standing as candidates for a limited period following their conviction. Disqualification has been exercised for a more limited range of activities than expulsion. Disqualification has a statutory basis and automatically results from a conviction for a specified range of offences.

In assessing the necessity of disqualification, a court would have to decide whether “the dignity or efficiency” of a legislative assembly could be maintained if it was not able to disqualify candidates from being elected to the assembly. The justification for disqualification is the same as that for some aspects of expulsion: the dignity and integrity of an assembly would be seriously undermined if the corrupt could sit as members.

A general head of privilege encompasses control over the internal composition of the legislature, and this general area of privilege could include disqualification as a specific privilege. Maignot has argued that the control over composition is far reaching: “In the final analysis, the House of Commons may exclude, suspend, or expel any member for any reason.”⁵⁰ This power of the Commons even extends to being able to exclude from the House someone who has just received a popular mandate in an election.⁵¹ As Pelletier has written of the Canadian context:

Acceptance by the Commons is a test of which all Members must meet and the Canadian House has on occasion rejected a Member notwithstanding any legal qualification and regularity of his election. . . . The fact that the House rarely questions the qualifications and right of its Members is no indication that an elected candidate does not have to meet the test of acceptability to his colleagues. The authority of the House of Commons to reject a fully qualified and properly elected Member has not been weakened by time or disuse.⁵²

The authorities are clear that under parliamentary privilege, a legislative body is in general control of its membership.

Discussions of disqualification and privilege are complicated because British authorities have consistently held that expulsion does not create any disabilities from running again in an election.⁵³ When British authorities talk about expulsion creating no disqualification, however, they are only dealing with the traditional exercise of expulsion *by resolution*.

50. Maignot, *supra* note 34.

51. See *Bradlaugh v. Gossett*, *supra* note 37.

52. Pelletier, *supra* note 34 at 149.

53. See e.g. Bolton, *supra* note 34; Wade & Bradley, *supra* note 34.

They are correct that members expelled by a resolution of the House are generally not disqualified from running in their own by-elections, since the qualifications for candidature are set by statute. No single House of Parliament can change the legal qualifications for candidature by a resolution expelling one of its members. But that statement is quite different from saying that disqualification cannot be a matter of parliamentary privilege. While legislators may not be disqualified by the resolution that expels them, they can be and have been disqualified by statute; these statutory disqualifications may be an expression of privilege.⁵⁴ It is instructive to return to the edition of *Erskine May* written shortly before Confederation. Writing in 1863, May says,

Another important power peculiar to the Commons, is that of determining all matters touching on the election of their own members. This right has been regularly claimed and exercised since the reign of Queen Elizabeth, and probably in earlier times. . . .⁵⁵

This historical context is essential, since the privileges of most Canadian legislatures are now based on those of the British House of Commons in 1867.⁵⁶

There have been for centuries disqualifications to candidature, both in Britain and Canada. For the last two centuries, disqualifications have been based on statutory rules that prohibit one's candidacy for a limited period after a conviction for a set range of criminal offences or corrupt practices.⁵⁷ Canada's *Criminal Code*⁵⁸ includes a provision that disqualifies anyone sentenced to five or more years' imprisonment from being elected until the punishment is served; Manitoba has a similar disqualification.⁵⁹ Nova Scotia adopted a five-year period of disqualification for anyone convicted of a criminal offence that could have carried a prison sentence of more than five years, regardless of the actual sentence; as noted earlier, however, this provision was struck down in *MacLean*.⁶⁰

Convictions for corrupt and illegal electoral practices have long been automatic disqualifications in Britain and at both the national and

54. Bourinot recounts an instance where a member was expelled and disqualified by statute in *Lower Canada*: Bourinot, *supra* note 33 at 195.

55. May, *supra* note 32 at 54.

56. 1871 in the case of British Columbia. See also *infra* note 82.

57. The British House of Commons had previously tried to bar certain candidates by resolution, but that practice was abandoned after 1782 and disqualifications have since been based on statute alone. In that year, the British House of Commons resolved to retract and expunge the disqualifications it had placed on John Wilkes in 1769. See May, *supra* note 32. Some jurisdictions add bankruptcy to the list of grounds for statutory disqualification.

58. Section 748(2).

59. *Legislative Assembly Act*, R.S.M. 1987, c. L-110, s. 18(1).

60. *MacLean*, *supra* note 1.

provincial levels in Canada.⁶¹ New Brunswick's disqualification for corrupt electoral practices, at issue in *Harvey*, originally dates from 1791.⁶² And it is important to note that until the late 19th or early 20th centuries, the House of Commons, and other Canadian legislative assemblies, acted as courts to hear and resolve allegations of electoral irregularities and subsequent disqualifications.⁶³ While the trial of these matters has since been delegated to the judiciary, the Canadian legislatures' original domain in these matters stemmed directly from the British Commons' privilege to determine the grounds for membership in the House. The setting of disqualifications by statute would seem logically to belong to this ancient privilege to determine matters relating to the election of members.

Disqualifications for criminal offences, conflict of interest, and electoral corruption involve the same justification: high public office should be held only by individuals of integrity. Conviction for serious criminal offences indicates a deep character flaw; time is needed to demonstrate the rehabilitation necessary for confidence in that person's honesty. Electoral corruption adds another dimension, in that it involves a subversion of the very process which candidates seek to carry them to the legislature. If candidates cannot even conduct their elections honestly, there is no assurance that they will be any more trustworthy in office.

A strong argument emerges that Canadian legislatures may legislate disqualifications from candidature as a matter of parliamentary privilege. Certain disqualifications are necessary to the integrity and proper functioning of Canadian legislatures. Public confidence in the legislature can require the exclusion of individuals who have been proven to lack the basic integrity needed to ensure trustworthy behaviour in office.

A counter argument flows from the positions taken by Glube C.J. and Rice J.A. in *MacLean* and *Harvey* respectively, in which greater virtue is seen in the electorate's judgment than in that of the legislative assembly. In this perspective, the legislature is accorded the power to remove one of its sitting members, but the voters are best suited to decide whether an expelled member should be returned to office. It may be necessary for a legislative body to expel a corrupt member, but it is not necessary to either

61. See J.P. Boyer, *Election Law in Canada: the Law, Practice, and Procedure of Federal, Provincial, and Territorial Elections*, vol. 1 (Toronto: Butterworths, 1986) at 526–574; Lord Hailsham of Marylebone, ed., *Halsbury's Laws of England*, vol. 5, 4th ed. (London: Butterworths, 1990) at 543–46.

62. *An Act for Regulating Elections, of Representatives in the General Assembly, and for Limiting the Duration of Assemblies, in this Province* (N.B.), 31 Geo. III, c. 17, s. 8.

63. See N. Ward, "Electoral Corruption and Controverted Elections" (1949) 15 Can. J. Eco. & Pol. Sci. 74.

its dignity or functioning that an expelled member be denied the opportunity to face the electorate. The judgment of the electorate is even more valued for those who have not been members of the legislature, but who have committed some indiscretion prior to running for office. It is better to rely on the voters in a riding to weigh the particular offence and its circumstances in deciding whether that individual should hold public office, rather than rely on automatic statutory disqualifications.

Unfortunately, a reliance on the democratic judgment of someone's fitness for office is not without its own problems, which stem from electoral realities. The reliance upon the electorate's judgment of a candidate's suitability for office is at once appealing and troublesome. It has the attraction of the democratic value that underlies the whole edifice of representative democracy. It also runs headlong into the practical problems of our electoral system. In *MacLean*, Glube C.J. struck down the disqualifications involved by relying on a faulty assumption about the way the electoral system works:

The content of s. 1 of the Act affects the rights of Mr. MacLean and others to run and be elected. It also impinges on the rights of voters to elect a member of their choice by *majority vote*.⁶⁴

Our electoral system does not require a winning candidate to have majority support, only one vote more than the others. More frequently than not, Canadian legislators win office with less than a majority of the votes in their particular election. This situation was clearly illustrated in the case of Billy Joe MacLean. With his partial victory before Glube C.J., Maclean ran in the by-election created by his expulsion from the House and won. However, MacLean won with only 40 percent of the votes and just 165 votes more than his nearest rival; almost 60 percent of the electorate voted *against* MacLean. His victory can be accounted for by the overwhelming support he won in just two polling districts, one of which was the subject of disquieting allegations of impropriety.⁶⁵ MacLean had been expelled and disqualified by a statute passed without a single dissenting vote on third reading, but he was re-elected by a minority in his own riding. MacLean's minority election is far from unusual. A candidate can win with about 30 percent of the vote in a hotly contested seat. For example, Kim Campbell was defeated in the 1993 federal election by Hedy Fry, who won with 31% of the vote in Vancouver Centre; Paul Forseth won the New Westminster-Burnaby riding in the same election

64. *MacLean*, *supra* note 1 at 318 (emphasis added).

65. "Inverness opponents fogot high-tone compaign [sic] as Billy Joe moved ahead" *Daily News* (28 February 1987) 14–15.

with just 29% of the vote.⁶⁶ While the first-past-the-post electoral system is Canada's traditional electoral system and should not be simply discounted by judges for its vagaries, the electoral system's inherent weaknesses should be understood by judges who would otherwise rest their conclusions on imaginary virtues.

One must also realize that a corrupt, conniving, or indulgent minority can be the group that carries a candidate to power. This should be a particular concern when a candidate has been, or intends to be, actively involved in exploiting public office for corrupt purposes. Many in the constituency may well benefit from this corruption, others may turn a blind eye. Especially in the small constituencies found in some provinces, such people can have a significant impact on the final result of a close race. While political corruption has drastically changed since Confederation in most communities, it would be the height of naïveté to believe that significant corruption can now be discounted as a practical concern.

The democratic counter-argument to disqualification is limited in its emphasis on the judgment of a plurality of voters in one constituency. This local focus fails to account for the discredit brought upon the whole legislature by the presence of certain convicted offenders. This collective harm poses problems to the democratic argument even in its most benign manifestation, when a forgiving majority decides that they want as a representative an individual recently convicted of some crime. However benevolent the motivations which led to an offender's election, there still remains the issue of the greater harm to the integrity of the whole legislature caused by the presence of a recently proven criminal. These concerns are all the more troubling when a criminal is elected by a small minority. It is also important to remember that popularity is no substitute for integrity and honesty. The election of a candidate does not simply affect one riding, but the whole political community as well. Because of all the potential risks, there is much to be said for the judgment of the majority of a legislative assembly prevailing over that of a minority in one constituency when it comes to questions of the basic integrity of the legislature.

I would argue, therefore, that disqualification is a matter of legislative privilege that is necessary to the basic integrity of the legislative process. Indeed, an inability to disqualify those guilty of corrupt practices and serious crimes would bring the legislature into disrepute.

66. Chief Electoral Officer of Canada, *Thirty-fifth General Election 1993: Official Voting Results*, (Ottawa: CEO, 1993) at 1521 and 1446.

IV. Statutory and "Inherent" Privileges

Even if disqualification is accepted to be a matter of privilege, a court has to consider whether disqualification belongs to the group of privileges that were granted constitutional status in *New Brunswick Broadcasting*. There was an underlying implication in the majority decision that only "inherent" privileges enjoyed constitutional status. This inherency is referred to a number of times in the decisions and raises some particular problems. Colonial legislative bodies were only recognized in the common law to have the "inherent" privileges necessary to their most basic discipline and functioning. Thus, they lacked many of the privileges legislatures currently possess, such as the right to require testimony under oath by witnesses, the full powers to punish those they judge to be in contempt of the assemblies, and the ability to deal with many transgressions outside the precincts of the assembly.⁶⁷ They could only enjoy the complete roster of privileges enjoyed by the British Parliament by express statutory authority.

Thus, a question emerges about whether only the "inherent" privileges of the pre-Confederation colonial assemblies enjoy a constitutional status, or whether the full range of parliamentary privilege is a part of the Constitution. The situation is clouded because of a lack of clarity in the opinions written in *New Brunswick Broadcasting*. In his concurring opinion Chief Justice Lamer clearly made the distinction between inherent privileges and broader ones founded on statute: "The position which I have advanced in these reasons holds that the members of the Nova Scotia House of Assembly, in exercising their *inherent* privileges (which are not dependent on statute for their existence), are not subject to Charter review;" other privileges that have to be founded on statute would be subject to *Charter* scrutiny.⁶⁸ The majority opinion unfortunately does not explicitly deal with the distinction, but it is evident by implication throughout much of the discussion. A number of references are made to the limited nature of the "inherent" privileges of colonial legislatures, identified in judicial decisions and academic writings; only one passing reference is made to the situation which has prevailed for over a century—most Canadian legislatures have the full privileges of the British House of Commons.

67. Maignot, *supra* note 34 at 4–7 and 152–84. Some leading cases on the privileges of colonial assemblies are: *Kielley v. Carson* (1842), 4 Moo. P.C.C 63; *Doyle v. Falconer* (1866), 16 E.R. 293 (P.C.); *Landers v. Woodworth*, [1878] 2 S.C.R. 158; *Barton v. Taylor* (1886), 11 App. Cas. 197.

68. *New Brunswick Broadcasting*, *supra* note 2 at 365 [emphasis in original].

I would argue that disqualifications aimed at protecting the basic integrity of the legislative process can meet the test of inherent privileges, which were “protective, defensive powers.”⁶⁹ This conclusion might be mistaken, however, as the Supreme Court of Canada has previously held that, in one context at least, the protection must be directed towards “an immediate obstruction”.⁷⁰ One must consider the reach of the constitutional protection given to other privileges adopted by statute, because of the importance of the statutory privileges all Canadian legislatures have added since Confederation. The Supreme Court has left some fundamental puzzles in this issue, because there is no proper recognition in *New Brunswick Broadcasting* that Canadian legislatures can legislate for themselves whatever privileges they wish; most of the Court’s analysis dealt with British and colonial examinations of inherent privileges asserted by resolution.

With the passage of the *Colonial Laws Validity Act*⁷¹ in 1865, colonial assemblies were generally able to legislate for themselves what privileges they wished, unless limited by other statutes. While the Canadian Parliament came into being with the powers of the British House of Commons in 1867, it was limited to those powers. As a result its 1873 *Oaths Act*⁷² was disallowed, since the British Commons only acquired this power to compel testimony under oath in 1871. Consequently, the limiting provision of the *Constitution Act, 1867* was amended in 1875 to provide express statutory authority to the Canadian Parliament to grant itself additional privileges.⁷³ The Canadian House of Commons enjoys the privileges of the British House of Commons, but this link to Britain is now entirely discretionary. It is based on s. 18 of the *Constitution Act, 1867*⁷⁴ and s. 4 of the *Parliament of Canada Act*,⁷⁵ but this British

69. This is the phrase used by the court in *Barton v. Taylor*, *supra* note 67 at 203.

70. *Landers v. Woodworth*, *supra* note 67 at 201–2.

71. (U.K.), 28 & 29 Vict., c. 63.

72. S.C. 1872, c. 1. For a review of the events involved, see: Pelletier, *supra* note 34 at 145.

73. *Parliament of Canada Act* (U.K.), 38–39 Vict., c. 38.

74. Section 18 states: “The privileges, immunities, and powers held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, and powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof.”

75. R.S.C. 1985, c. P-1. Section 4 states:

“The Senate and the House of Commons respectively, and the members thereof respectively, hold, enjoy, and exercise,

(a) such and the like privileges, immunities, and powers as, at the time of the passing of the *British North America Act, 1867*, were held, enjoyed, and exercised

foundation is plainly within the competence of the Canadian Parliament to amend or sever under s. 44 of the *Constitution Act, 1982*.⁷⁶ The general authority under the *Colonial Laws Validity Act* was used after Confederation by provincial legislatures, which also found the former powers of colonial assemblies to be inadequate but were not expressly limited to the British powers of 1867. This authority to expand the base of privileges was explicitly upheld in a Privy Council case dealing with Nova Scotia's statutory adoption of broader privileges.⁷⁷ Nova Scotia claimed in 1876 the privileges of the Canadian House of Commons following a court decision denying the Assembly the power to punish for contempt under its original, inherent privileges.⁷⁸ For their own part, the provincial legislatures may change their legislative privileges through the authority they have under s. 45 to amend their own "provincial constitutions";⁷⁹ the Privy Council ruled in 1896 that legislative privileges were squarely within the jurisdiction of a provincial legislature to amend the "provincial constitution" found at the time in s. 92(1) of the *Constitution Act, 1867*.⁸⁰ While McLachlin J. freely quoted Dawson's comments that colonial legislatures only had inherent privileges, she failed to continue her references into the post-Confederation period. Dawson had gone on to say that legislatures have an "ability to define privileges and to assume powers *by statute*, which ability is limited only by the general jurisdictions

by the Commons House of Parliament of the United Kingdom, and by the members thereof, so far as the same are consistent with and not repugnant to that Act; and

(b) such privileges, immunities, and powers as are from time to time defined by Act of the Parliament of Canada, not exceeding those at the time of the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof respectively."

76. Section 44 states: "Subject to sections 41 and 42, Parliament may make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons."

77. *Fielding v. Thomas*, [1896] A.C. 600.

78. The 1874 incident involved an MLA who refused to apologise for a libel against a minister. The provincial Supreme Court emphasized the limited range of inherent privileges in awarding damages to the MLA for the Assembly's attempt to remove him. In response, the Nova Scotian legislature passed *An Act Respecting the Legislature of Nova Scotia*, S.N.S. 1876, c. 22; the Act provided in s.2 that the Assembly would enjoy the privileges of the Canadian House of Commons. The suit was appealed to the Supreme Court of Canada, and it upheld the original outcome; the new privileges, adopted after the incident, could not be relevant to that decision: *Landers v. Woodworth*, *supra* note 67. The general provision relating to the House's privileges is now found in the *House of Assembly Act*, R.S.N.S. 1992 (Supp), c. 1, s. 26(1).

79. Section 45 states: "Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province."

80. *Fielding v. Thomas*, *supra* note 77.

of the legislative body.”⁸¹ Since Confederation, Canadian legislatures have been able to assign themselves by statute what privileges they wish.⁸²

The broader range of privilege has become as important to Canadian legislatures as the earlier inherent privileges of the colonial era. Parliament and every provincial legislature have adopted by statute privileges and powers beyond those originally held. Modern legislatures require such basic powers as compelling testimony under oath, punishing for contempt, and protection for publications of their debates, but these privileges are legislated additions to the original privileges of colonial assemblies. A full and flexible range of privileges is necessary for legislators to rise to the challenges of governing in changing and unforeseen circumstances. All exercises of privileges, whether founded on statute or common law, require protection from judicial scrutiny in order to ensure that legislative assemblies are in command of all the affairs necessary to their integrity and functioning. Circumstances have changed dramatically since colonial times, and Canadian legislatures must not be hamstrung by having their privileges locked into that era.

When the Supreme Court returns to parliamentary privilege, it will have to deal more openly with the implications of its decision in *New Brunswick Broadcasting*. The majority decision may have given constitutional status only to the limited “inherent” privileges that Canadian legislatures had as colonial assemblies. It examined the claim to privilege by the Nova Scotia House of Assembly under the test of necessity, which it properly did in that case where the privilege was asserted by resolution. However, the language of the decision also implied that *any* assertion of privilege will be subject to the necessity test. This is a fundamental revolution in jurisprudence on parliamentary privilege, because legislated privileges were not generally subject to judicial scrutiny. With the doctrine of parliamentary supremacy, the British courts did not have to

81. R.M. Dawson, *The Government of Canada*, 4d ed. (Toronto: University of Toronto Press, 1963) at 369 [emphasis in original]. The limitations referred to here can mean that provincial legislatures might not be able to legislate directly on criminal matters as part of their privileges, since jurisdiction over criminal law belongs to the federal Parliament; see Maignot, *supra* note 34 at 6–7.

82. New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island have adopted the powers and privileges of the Canadian House of Commons, which are based on the those of the British House of Commons in 1867. Alberta has tied its privileges directly to those of the British House of Commons in 1867, while British Columbia has adopted the British privileges of 1871. Any of the provincial legislatures that have based their privileges on those of another body may also add other privileges or powers by statute. Manitoba, Ontario, Quebec, and Saskatchewan have defined a list of individual privileges by statute, but with no statutory embrace of another chamber’s privileges.

consider whether this immunity could also be based on the nature of privilege. One may no longer wish to embrace the complete judicial immunity of legislated privileges in Canada, because that would mean any matter clothed as privilege would escape *Charter* scrutiny. However, it is important for the courts to recognize that the full range of privileges should enjoy the same constitutional status. While the Supreme Court must make clear at some point that statutory extensions of privilege can also enjoy constitutional status, not just the limited privileges of pre-Confederation assemblies, the Court should explicitly endorse the implication in *New Brunswick Broadcasting* that statutes embodying additional parliamentary privileges will be subject to the test of necessity before being granted immunity from the *Charter*. This may be a change in the status of legislated privileges that marks an acceptable compromise to ensure the independence and powers of legislatures without permitting a *carte blanche* exemption from the *Charter of Rights*. As a result, statutory disqualifications would enjoy the same constitutional status as other parliamentary privileges.

V. *Disqualifications and s. 3 of the Charter*

There is one final impediment to granting immunity from the *Charter* to statutory disqualifications. While I have argued that disqualification meets the test of necessity, and should be protected from *Charter* scrutiny as a legislative privilege, it runs squarely against the wording of s. 3 of the *Charter*. One can object loudly that judicial immunity for disqualifications would fundamentally negate that part of s. 3 which guarantees every citizen the right "to be qualified for membership" in federal and provincial legislatures; this right might have no force and effect. Even if disqualification is accepted as a parliamentary privilege, s. 3 might be exempted from the general rule that the *Charter* does not apply to these privileges. In her judgment in *New Brunswick Broadcasting*, McLachlin J. said, "Absent specific *Charter* language to the contrary, the long history of curial deference to the independence of the legislative body, and to the rights necessary to the functioning of that body, cannot be lightly set aside. . . ."⁸³ The language of s. 3 of the *Charter* may be so specific that it was clearly intended to apply to disqualifications. This line of argument might be conclusive if all disqualifications were matters of privilege and the right of candidature in s. 3 really would be left without meaning. However, not all disqualifications may be matters of privilege. There are a number of disqualifications based on age, residency, or

83. *New Brunswick Broadcasting*, *supra* note 2 at 372.

occupation that cannot be justified as falling within those matters which necessarily affect the integrity of the legislature. Section 3 can still have effect if the privilege relating to disqualification is not defined too broadly. Rather than concluding that control over all aspects of disqualification is necessary to contemporary legislatures, one should establish that the privilege permits legislatures to control just those aspects of candidacy that go to the heart of their integrity and proper functioning. Legislative privilege involves disqualification for criminal, electoral, or conflict of interest offences, but not necessarily age, residency, and occupation. With that narrower definition of disqualification as privilege, s. 3 can still protect the rights of Canadians from a range of other disqualifications while safeguarding parliamentary privileges.

This discussion would not be complete, however, if it did not also consider the sort of analysis that would be necessary were a court to find that disqualification is not part of the legislative privileges immune from *Charter* scrutiny. In that case, specific disqualifications would be subject to s. 1 testing to decide whether they are “demonstrably justified in a free and democratic society”. The disqualifications resulting from serious criminal or electoral offences are aimed at the important social objective of ensuring integrity and public confidence in the legislative process. The reasons for pursuing this objective have already been discussed in this paper. The means chosen are also rationally connected to the objective, by barring from the legislature those whose guilt has been proven by conviction for corrupt or criminal offences.

There may be a question about the proportionality of the specific disqualifications. The disqualifications in Canadian law range from a low of the life of the current legislature (in Newfoundland); through the most frequent ban of five years, to eight years for those guilty of corrupt practices in Ontario or Alberta.⁸⁴ In most cases, the periods of disqualification have only limited consequences. In the case of a five-year disqualification, the person will usually be banned for one general election and occasionally two—depending on when the conviction occurred in the legislative life-cycle. While the eight-year ban will most often involve two elections, it may potentially involve three. A disqualification from one election is the minimum necessary to give proper effect to the objective, and one more election beyond the minimum does not seem onerous. But the potential ban of three elections found with an eight-year disqualification may be out of proportion to the good sought to be achieved, particularly since this extensive ban applies regardless of the

84. Boyer, *supra* note 61.

seriousness of the offence. The disqualification which Billy Joe MacLean challenged in Nova Scotia is also problematic. While the five-year ban is a reasonable period, it applied to anyone convicted of an offence with a maximum sentence of five years, regardless of their actual sentence. This general reach appears rather broad in failing to account for the seriousness of the particular behaviour involved, but the disqualification is only applicable to those convicted of indictable offences; by definition, these are the most serious criminal charges. Therefore, most instances of disqualification are in proportion to the objective, but a few might impose unnecessarily harsh penalties.

One needs also to consider whether there are other reasonable alternatives which could achieve the same objective with less impairment of the right. The most frequently discussed alternative, allowing the electorate to decide on a person's fitness for office, has a number of limitations which have already been discussed. Essentially, this approach falls well short of realizing the objective by failing to ensure that corrupt individuals do not hold office. Another option to a fixed period of disqualification can be easily instituted for those convicted for criminal offences, as the ban could extend until the person obtained a pardon. The granting of a pardon is attractively linked to the objective of ensuring the integrity of a legislature, since a pardon is official recognition that an individual has regained their "good character". However, a number of potential candidates would have to wait much longer than the usual disqualifying period of five years' in order to obtain their pardon, as the pardon process is dependent on, and in addition to, the length of one's sentence. The fixed periods found in current statutes will often impose less onerous penalties than the alternative method and are to be preferred.

Under a s. 1 analysis, therefore, most statutory disqualifications should be upheld. It is quite justifiable to protect the integrity of the legislature by excluding those individuals who have been recently found guilty of corrupt or serious criminal behaviour.

Conclusion

Expulsion and disqualification provide important protection for the integrity of Canadian legislatures. Confidence in the honesty with which public affairs are conducted requires some means to remove or exclude those recently convicted of corrupt or serious criminal behaviour. While the *Charter of Rights* has altered many of the dynamics between the courts and the legislatures, it does not appear to undermine fundamentally a legislature's ability to throw out rotten apples or to keep them out. Expulsion is safe from *Charter* scrutiny in being so firmly rooted in

parliamentary privilege. Disqualification poses more of a complex set of issues, but it also appears to be a matter of privilege. However, the Supreme Court will have to clarify whether it is a matter of “inherent” privilege that enjoys constitutional status. Given the opportunity, the judiciary should decide that all matters of privilege be treated similarly. Additional privileges provided by statute need to be saved from judicial review if they are necessary to the basic integrity or functioning of the legislative assembly; in such a case, statutory disqualifications aimed at excluding the corrupt should possess the full immunity of other privileges. In any event, disqualification is so essential to safeguarding the integrity of the legislative process that most provisions excluding those recently convicted of corrupt or serious criminal offences would survive a challenge under the *Charter*.