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Are the Alberta Ethics Commissioner's actions subject to parliamentary privilege or judicial review?

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Case Commented On: *McIver v Alberta (Ethics Commissioner)*, [2018 ABQB 240](#)

Ric McIver, a member of the Legislative Assembly of Alberta, made comments during Question Period about power companies. His comments were subject to a complaint that he was in conflict of interest as his wife is a sole shareholder and director of a power company. The Ethics Commissioner investigated and determined that he breached the *Conflict of Interest Act*, [RSA 2000, c C-23 \[CIA\]](#) [Any following references to legislative sections are assumed to be to the *CIA* unless otherwise noted] and eventually sanctioned Mr. McIver. He was ordered to apologize to pay \$500 and to apologize to the Legislative Assembly. In an application for judicial review, Mr. McIver challenged the Ethics Commissioner's decision and argued that she exceeded her jurisdiction in interfering with his free speech (*McIver*, para 2). Justice Janice Ashcroft of the Alberta Court of Queen's Bench addressed the following issues:

1. What is the role of the Ethics Commissioner in this judicial review?
2. Is the decision to sanction Mr. McIver subject to judicial review, or is it protected by the constitutional doctrine of parliamentary privilege?
3. If the decision is subject to judicial review, did the Ethics Commissioner exceed her jurisdiction? (*McIver*, para 9)

The role of the Ethics Commissioner in this Judicial Review

In an earlier preliminary decision, Justice Eamon had granted party status to the Speaker (see *McIver v Alberta (Ethics Commissioner)*, [2017 ABQB 695 \(CanLII\)](#) at para 42). Justice Ashcroft now addressed the scope of the role of the Tribunal/decision-maker (Ethics Commissioner) in the judicial review (*McIver* at para 11). The Counsel for Mr. McIver and the Speaker stated that Ethics Commissioner should be allowed to give full submissions because the issue was jurisdictional (*McIver* at para 12). Moreover, the Ethics Commissioner submitted that she should be allowed to make full submissions as the issue is one about parliamentary privilege with a threshold jurisdictional question (*McIver* at para 14). Justice Ashcroft noted that in *Ontario (Energy Board) v Ontario Power Generation Inc*, [2015 SCC 44 \(CanLII\)](#), the Court reviewed the law regarding tribunal participation and emphasized the relevant expertise and familiarity of the Tribunal with the applicable administrative regime (*McIver*, at para 15). Justice Ashcroft permitted the Ethics Commissioner to give limited submissions on the basis that the threshold issue appeared to be jurisdictional, and further held that the Ethics Commissioner was in the best position to inform the Court as to its general legislative structure and function (*McIver*, at para 16).

Framing the issue

Mr. McIver submitted that this judicial review should be approached using administrative law principles. He argued that the Court should first undertake an analysis of whether the Ethics Commissioner exceeded the scope of her jurisdiction and infringed on the Constitution. He also argued that, as the *CIA* does not expressly abrogate his parliamentary privilege to free expression in Question Period, the Ethics Commissioner exceeded her jurisdiction in infringing that privilege and, therefore, her decision should be subject to judicial review (*McIver*, at para 17). On the other hand, the Speaker and the Ethics Commissioner disagreed with Mr. McIver's approach. They submitted that the Court must evaluate whether the actions of the Ethics Commissioner and the decision of the Legislative Assembly relate to an accepted category of parliamentary privilege. If so, then parliamentary privilege applies to the decision and the Court has no jurisdiction to consider the issue or examine whether the Ethics Commissioner exceeded the scope of her authority (*McIver*, at para 18). The Court agreed with the Speaker and the Ethics Commissioner that the issue must be approached from a parliamentary privilege perspective and not from administrative perspective. Thus, if the actions of the Ethics Commissioner and the Legislative Assembly are found to fall within the scope of parliamentary privilege, then the issue is non-justiciable (not capable of being determined by a court of law) (*McIver*, at para 19).

Standard of Review

Mr. McIver argued that the standard of review is correctness as the issue is constitutional. The Speaker and the Ethics Commissioner submitted that a standard of review analysis is not appropriate as the issue is not subject to judicial review. The Court agreed with the position of the Speaker and the Ethics Commissioner (*McIver*, at para 20). Justice Ashcroft then proceeded to explain her reasons for coming to this decision.

What is the decision under review? Who is the decision maker?

Mr. McIver asked for judicial review of the Ethics Commissioner's decision and argued that the Ethics Commissioner is the decision maker. He relied on sections 25(10) and (15) to support his argument. Section 25(10) states that the Ethics Commissioner may refuse to investigate or cease an investigation if she is of the opinion that the request is frivolous, vexatious or not made in good faith or there are no or insufficient grounds to warrant an investigation or the continuance of an investigation (*McIver*, at para 21).

The Speaker and the Ethics Commissioner disagreed and submitted that the *CIA* gives the Legislative Assembly full discretion to accept or not to accept the Ethics Commissioner's decisions as per subsections 25(1), (4), (12), 24(1), (3), (4), 28(1), (3), and 29(1) (*McIver*, at paras 22-23).

Justice Ashcroft held that a complete reading of the legislation is vital in determining who the actual decision maker is. The "laying of the report" before the Speaker is mandatory under section 28(1). As per section 25(16) the Speaker must show the report before the Legislative Assembly (*McIver*, at para 24). Under section 29(1) the Legislative Assembly may accept or

reject the findings, and may, if it finds there has been a breach, impose the recommended sanction, its own sanction, or no sanction at all (*McIver*, at para 25). The complaint was made under section 24(1). The Ethics Commissioner reported her findings to the Speaker. The Legislative Assembly accepted the Ethics Commissioner's findings and imposed a sanction on Mr. McIver. In effect, what happened was that the Ethics Commissioner investigated and made recommendations regarding the complaint, while the Legislative Assembly was the ultimate decision maker (*McIver*, at para 26). Thus, according to Justice Ashcroft, it was the Legislative Assembly that infringed on McIver's freedom of speech during Question Period (*McIver*, at para 27).

What is parliamentary privilege and who may claim it?

Parliamentary privilege means immunity from judicial oversight. The Legislative Assembly may claim parliamentary privilege and avoid review by the courts, supposing its actions fall within an acceptable category of parliamentary privilege (*McIver*, at para 33).

Justice Ashcroft noted that the case law indicates that the Ethics Commissioner is an extension of the Legislative Assembly and may also claim parliamentary privilege (*McIver*, at para 37). In *Tafler v British Columbia (Commissioner of Conflict of Interest)*, [1995 CanLII 1367 \(BC SC\)](#), [5 BCLR \(3d\) 285](#) at para 53, aff'd [1998 CanLII 6216 \(BC CA\)](#), [49 BCLR \(3d\) 328 \(BCCA\)](#) it was decided that the British Columbia "Commissioner's" counterpart in Alberta is the Ethics Commissioner and that the Commissioner's actions and decisions were protected by parliamentary privilege. Also, in *Rose v HMTQ*, [2015 NBCA 26 \(CanLII\)](#), at para 22, the New Brunswick Court of Appeal found that the Commissioner had immunity from review based on parliamentary privilege.

The specific category of privilege is recognized and meets proof of necessity

Justice Ashcroft reiterated that the Legislative Assembly, and by extension the Ethics Commissioner, may claim parliamentary privilege provided that their actions fall within an accepted category of that privilege. She noted that the Ethics Commissioner and the Speaker claimed that an inherent category of parliamentary privilege is the regulation of the legislature's internal affairs, which includes regulating the standards and conduct of its member (*McIver*, at para 38). Mr. McIver agreed that setting standards and regulating the conduct of its members is a recognized category of parliamentary privilege, but he did not agree that the Legislative Assembly and the Ethics Commissioner can claim the privilege in circumstances where she has exceeded her jurisdiction (*McIver*, at para 39).

Justice Ashcroft relied on *Singh v Attorney General of Quebec*, [2018 QCCA 257 \(CanLII\)](#) at para 14, to hold that the Court's first task when faced with a defence of parliamentary privilege is to determine whether the impugned conduct falls within an inherent category of parliamentary privilege. If it does not, a second analysis as to "proof of necessity" should be performed by demonstrating it is necessary for effective administration of the legislature (*McIver*, at para 40).

The Court of Appeal in *Carter v Alberta*, [2002 ABCA 303 \(CanLII\)](#) established that in determining “necessity” the focus must be on the sphere, rather than the particular privilege (*McIver*, at para 42).

Justice Ashcroft agreed that the particular category of privilege claimed by the Ethics Commissioner and the Speaker is the right to govern its internal affairs and set standards for the conduct of its own members; this has historical roots and is affirmed by the caselaw (*McIver*, at para 43). Further, she notes that “discipline of its members, which includes discipline relating to breaches of conflicts of interest, has been held to be within the sphere of parliamentary privilege relating to controlling its own proceedings and settings standards: *Harvey v New Brunswick (Attorney General)*, [1996 CanLII 163 \(SCC\)](#), [1996] 2 SCR 876 at paras 61-62.

The Court also accepted as per *Morin v Northwest Territories (Conflict of Interest Commissioner)*, [1999 CanLII 6802 \(NWT SC\)](#) that “the sphere of privilege, the ability to regulate its internal affairs including the conduct of its members, ‘continues to be necessary for the functioning’ of the Legislative Assembly” (*McIver*, at para 45).

Parliamentary privilege applies even though the sanctioned conduct may interfere with another privilege including freedom of speech

Mr. McIver emphasized that when he spoke in the Legislative Assembly he was representing the interests of his constituents. As per the *English Bill of Rights 1689*, Art. 9, Mr. McIver argued that he had a parliamentary privilege to free speech (*McIver*, at para 46). He also argued that as per *House of Commons v Canada Labour Relations Board*, [1986 CanLII 4052 \(FCA\)](#), [27 DLR \(4th\) 481](#) the *CIA* cannot abrogate this privilege without express language (*McIver*, at para 47). On the other hand, the Ethics Commissioner and Speaker claimed that the Legislature may regulate free speech as a function of its parliamentary privilege. Therefore, they argued that no abrogating language is required in the *CIA* (*McIver*, at para 49).

Justice Ashcroft noted that two parliamentary privileges had collided here. One was Mr. McIver’s privilege of free speech and another was the Legislative Assembly’s privilege to regulate and discipline its members. The Respondents argued that when these two privileges conflict, the Legislative Assembly should adjudicate the matter—not the court. Mr. McIver argued that historically it has been clear that the parliamentary privilege over internal regulation should not be used as a “sword to police Question Period” in this manner (*McIver*, at para 50).

Justice Ashcroft reiterated that the Legislative Assembly has a parliamentary privilege to regulate the conduct of its members and discipline them. Further, the Ethics Commissioner exercises this privilege as an extension of the Legislative Assembly in her function under the *CIA*. The Court concluded that the Legislative Assembly may limit its members’ exercise of free speech as part of its own parliamentary privilege (*McIver*, at para 51). Moreover, the Court ruled that Article 9 of the *Bill of Rights 1689* confirms that “it is Parliament and not the courts that should question limitations on freedom of speech, which is consistent with the Legislative Assembly’s position that it should deal with regulating the conduct of its members, including their speech” (*McIver*, at para 52).

Mr. McIver also argued that the Court may still conduct a judicial review of the *CIA* and its effect on his privileged free speech, as there is no privative clause in the *CIA*. The Court rejected this approach and stated that the courts have no jurisdiction over the exercise of parliamentary privilege to begin with, and thus no privative clause is required (*McIver*, at para 62).

Mr. McIver also argued that policing his speech in Question Period could constitute a breach of his own and his constituents' *Charter* rights. Justice Ashcroft noted that parliamentary privilege applies even if a *Charter* right to free speech is infringed. She relies on the decision in *Canada (House of Commons) v Vaid*, [2005 SCC 30 \(CanLII\)](#), to hold that parliamentary privilege is not displaced by the wording of *Charter*, s 32 (*McIver*, at par 63). She also relies upon *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [\[1993\] 1 SCR 319, 1993 CanLII 153 \(SCC\)](#) to affirm that the *Charter* has no application to legislation invoking parliamentary privilege (*McIver*, at para 64). Finally, Justice Ashcroft notes that *Singh v Attorney General of Quebec*, [2018 QCCA 257 \(CanLII\)](#) also confirms that *Charter* rights cannot diminish the protection of parliamentary privilege (*McIver*, at para 65).

Parliamentary Privilege applies even though the conduct was in Question Period

Mr. McIver argued that Question Period is unique, and it is different from a debate or voting on legislation, therefore the parliamentary privilege to regulate conduct does not apply in Question Period. He also stated that for the above reasons it is not referenced in the *CIA* (*McIver*, at para 66). The Speaker and the Ethics Commissioner disagreed and argued that the parliamentary privilege to regulate conduct applies to Question Period. The Speaker argued that the primary duty of members is to serve in the Legislative Assembly. This duty is carried out almost exclusively through speech, and, as such, participation in Question Period is simply an aspect of those duties; there is no reason to distinguish Question Period from other forms of legislative debate (*McIver*, paras 67-68).

Justice Ashcroft concluded that members of the Legislative Assembly exercise their power and influence during Question Period in the same manner as they do in other forms of legislative debate. She noted that: "Question Period is part of the legislative process and participation in it is an exercise of a member's duty" and therefore parliamentary privilege continues to apply (*McIver*, at para 69).

An administrative law approach is not appropriate in assessing the conduct of the Ethics Commissioner

Justice Ashcroft noted that there may be cases where a statutory delegate engages in activities that do not fall within a recognized category of parliamentary privilege (*McIver*, at para 70). However, she found that this case was not such a case:

In the case before me, the Ethics Commissioner was exercising her function as a statutory delegate of the Legislative Assembly. In investigating an alleged conflict of interest of a member for statements made in Question Period, finding a breach and recommending sanctions, she was acting within the parliamentary privilege over the regulation of members and her actions are not subject to judicial review.

Resolving issues where that privilege clashes with other parliamentary privileges, such as freedom of speech, is clearly a matter for the legislature. It is inappropriate for this Court to proceed with a judicial review under the auspices of an examination as to whether the Ethics Commissioner exceeded her jurisdiction, as it would result in an unacceptable infringement of parliamentary privilege. (at para 71)

Mr. McIver also argued that the Ethics Commissioner exceeded her jurisdiction by misinterpreting the words “Crown”, “influence”, and “intent”. The Court found that it would be improper to engage in any analysis of the Ethics Commissioner’s actions, as these actions fall within a recognized category of parliamentary privilege. As per the submission of counsel for the Ethics Commissioner these are not, in any event, issues of true jurisdiction (*Dunsmuir v New Brunswick*, [2008 SCC 9 \(CanLII\)](#) at para 59 in *McIver*, at para 77).

In conclusion, Justice Ashcroft held that regulating the conduct of members of the Legislative Assembly includes regulating their speech. Thus, the actions of the Ethics Commissioner and the Legislative Assembly in investigating an alleged conflict of interest, making recommendations, and imposing sanctions, fell within an inherent category of parliamentary privilege. She held that: “[t]he Ethics Commissioner was acting pursuant to that privilege. As such the outcome of her investigation is subject to parliamentary, and not judicial, review” (*McIver*, at para 78).

Conclusion

On the surface, legislative privilege and freedom of expression collided in this case. The Ethics Commissioner was investigating an alleged conflict of interest of a member for statements made in Question Period. She found a breach and recommended sanctions. Her actions fell under the inherent and acceptable category of parliamentary privilege as per the caselaw. However, freedom of expression in Question period is not a unique matter and it is a part of legislative process. Moreover, the caselaw established that *Charter* rights and freedoms did not diminish the long-standing principle of parliamentary privilege. The Ethics Commissioner was acting within parliamentary privilege and the court could not examine whether she exceeded her jurisdiction, as this would result in an unacceptable infringement of parliamentary privilege. It is a well-established doctrine of constitutional law in these circumstances that the Ethic’s Commissioner’s actions are not reviewable by the Court.

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