
The Legislature, The Charter, and Billy Joe MacLean

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The expulsion of Billy Joe MacLean from the Nova Scotia Legislature on October 30, 1986, after his guilty plea to four counts of issuing false receipts for his expenses as a Member of the Legislature was seen by many persons associated with political life in Canada as an appropriate response to a violation of the "code" which regulates life around parliaments. "All members are honourable" is a strict doctrine governing not only debate in the chamber, but all aspects of parliamentary life. Mr. MacLean's admission that he had violated the code was more significant to politicians than to the law courts. His sentence from the Court was one day imprisonment, deemed to be served by his appearance in Court, and a fine of \$6,000. The response of his political peers was the passage of a bill depriving Mr. MacLean of his right to sit in the House.

The Nova Scotia Assembly was reconvened on October 30, 1986, in extraordinary session to deal with the matter. In one day, without a dissenting vote, Mr MacLean was deprived of his seat in the assembly. The Bill, introduced by the government, not only expelled Mr. MacLean, but included a provision to prohibit any person from being a candidate in an election for membership in the House of Assembly for five years if that person had been convicted of an indictable offence punishable by imprisonment for more than five years. The legislation was made retroactive to include Mr. MacLean.

Nova Scotia legislators might have hoped that by expelling him and barring him from running for re-election, they had dealt a fatal blow to the political future of Billy Joe MacLean. And they might have been correct five years ago. Before the Canadian Charter of Rights and Freedoms was passed five years ago. But Mr. MacLean decided to look to the Charter of Rights and the Courts to redress what he felt was an excessive response to his malfeasance. The code of the club was in conflict with the rights of an individual Canadian and the electorate.

On December 22, 1986, J. E. Sexton, Douglas Caldwell, and J. E. Fichaud, counsel for Mr. MacLean, appeared in the Trial Division of the Supreme Court of Nova Scotia, before the Honourable Chief Justice Constance R. Glube. The Attorney General, represented by Reinhold and Alison Scott responded to the action.

Plaintiff MacLean challenged the validity of the *Membership Act*. His counsel pointed out that the *Act* exceeded in harshness any similar legislation in Canada. Several jurisdictions disqualify persons from sitting in parliaments when sentenced to certain terms. In Saskatchewan the *Legislative Assembly Act* permits the House to suspend a member who has been convicted of

an indictable offence and sentenced to imprisonment for two or more years. In Manitoba, the law disqualifies from membership a person who is sentenced to a term of five years or more. In New Brunswick a person who is an inmate of a penal institution is ineligible to vote or be a candidate. The Criminal Code of Canada Section 682 prohibits a person who is sentenced to prison for a term exceeding five years from sitting in Parliament or in the legislatures while undergoing the punishment. All of these laws speak of the sentence actually imposed by the Court. The Nova Scotia bill disqualified Mr. MacLean on the basis of the maximum sentence which was available to the Court, rather than the actual sentence handed down by the Court.

"It is the intent of this legislation to establish standards of eligibility for members of the House of Assembly now and in the future . . . The legislation also deals specifically with the situation regarding the member for Inverness South who has been convicted on four counts of using forged documents, all indictable offences all of which carry a maximum punishment of more than five years imprisonment. The legislation effectively expels the member for Inverness South."

Hon. George Moody, Chairman of the Management Board, Nova Scotia House of Assembly, October 30, 1986.

In his submission, Mr. Sexton pointed out that the *Membership Act* would disqualify from membership anyone convicted of stealing cattle, mischief in relation to property, or the alteration, removal or concealment of a navigation marker or signal. All of these offences carrying sentences of more than five years imprisonment. However, it would not exclude someone convicted of influence peddling, breach of trust, or selling public offices.

The famous British case of John Wilkes was cited. The House of Commons expelled Wilkes in 1764, following his conviction for seditious libel. He was re-elected. The House resolved that he was incapable of being re-elected. The election was declared to be void, but Wilkes was again re-elected, and once again the election was declared void and a new writ issued. *Erskine May's* account continues: "A new expedient was now tried; Mr. Luttrell, then a member, accepted the Chiltern Hundreds, (in effect quit the House) and stood against Mr. Wilkes at the elec-

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tion, and being defeated, petitioned the House against the return of his opponent. The House resolved that, although a majority of the electors had voted for Mr. Wilkes, Mr. Luttrell ought to have been returned, and they amended the return accordingly. Against this proceeding the electors of Middlesex presented a petition, without effect, as the House declared that Mr. Luttrell was duly elected. . . . (But) on 3 May, 1782, the resolution of 17 February, 1769 was ordered to be expunged from the Journals, as "subversive to the rights of the whole of the electors of this Kingdom."

Mr. Sexton recalled a number of instances when persons who had been convicted of offences had run for re-election, some successfully.¹ "It is submitted that whatever the justification for expulsion, there is no justification for disqualifying Mr. MacLean from running in a by-election. The expulsion may trigger the "democratic" process. The democratic process should then have its way. The people of Inverness South should decide who is to be their representative."

The Nova Scotia Attorney General's counsel argued that the House had every right to expel one of its members. Further, they had the right to set qualifications for membership. The central argument for both sides was the application of the *Charter of Rights and Freedoms*.

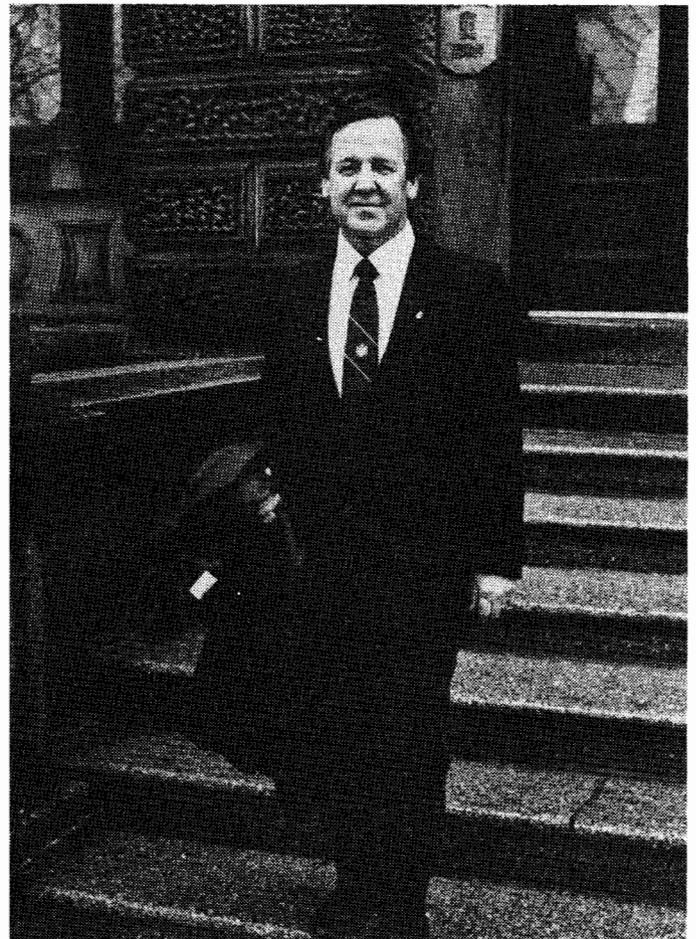
The Court released its decision on January 5, 1987. After dealing with a number of preliminary issues, Chief Justice Glube rejected the Crown's contention that the matter before the Court was part of an amendment to the Constitution and beyond the review of the Court. "I conclude that since the Charter, any provincial law purporting to deal with the eligibility of persons to be elected to individual provincial legislative assemblies must comply with s. 3 of the Charter and the Court has the power to review the legislation and, if necessary, to test the legislation under s. 1.

"If it were otherwise, a province could, for example, amend its constitution by passing a law that only blue-eyed, brown-haired persons could qualify for membership in the legislative assembly, and there would be no way to challenge the law. Amendments to provincial constitutions must be capable of being tested and the challenge must take place in the courts."

Chief Justice Glube then dealt with the right of the Assembly to expel one of its members, and the procedure used by the House. The court cited the traditional parliamentary texts, *Bourinot*, *Beauchesne*, and *May*, each authority supporting the other, that in the words of *Beauchesne*, "There is no question that the House has the right to expel a Member for such reasons as it deems fit." "The purpose of expulsion," say the 20th edition of *Erskine May*, "is not so much disciplinary as remedial, not so much to punish Members as to rid the House of persons who are unfit for membership. . . ."

Mr. MacLean's counsel had argued that while there had been a historic right to expel, this had now been qualified by the Charter. He had been expelled by the use of a bill enacted into law by the House. (In a unicameral system this causes few problems, but in bicameral parliaments, there could be difficulty if one chamber did not proceed in harmony with the other House). Is expulsion by resolution still valid?

"In my opinion, the power to expel a person by resolution of the Assembly remains a valid function of the Assembly, and if by resolution, would not normally be reviewable by the Court." The Chief Justice concluded that the section of the *Membership Act* which expelled Mr. MacLean could stand on its own and was severable from the part of the act which dealt with the prohibition against being a candidate in a subsequent election. There would be no interference with the expulsion, whether it was achieved by resolution or by statute.



Billy Joe MacLean leaving the House of Assembly following the vote to expel him on October 30, 1986. (Canapress)

The next question was the issue of illegibility as a candidate in a subsequent election for a period of five years. The *Membership Act* contains a preamble which the Court felt was an admission by the framers of the Act that its purpose was unconstitutional. "The Act uses the words of S. 1 of the Charter which only needs to occur if there has been a violation of the Charter rights.

"The defendant (the Attorney General) suggests the legislation is both protective and disciplinary. If it is disciplinary, expulsion would accomplish that and anything more would be excessive and not demonstrably justified in a free and democratic society. Expulsion will protect the integrity of the House. The offences in which Mr. MacLean was involved were offences directly related to his role as a member of the House. He was defrauding the House of Assembly by claiming and obtaining funds for alleged expenses as a member by using forged documents. For that, the House chose to expel him. The argument that the House must declare in advance that a person who is a member should not forge documents or he will be expelled is not necessary. The law is found in the *Criminal Code*, namely, that a person shall not forge documents. Until Mr. MacLean pleaded guilty, he was charged, but innocent until proven guilty. In my opinion, expulsion before conviction or before his guilty plea would have been wrong and no doubt could have been challenged. What the House did in expelling him, met their stated purpose of protecting the integrity of the House and was demonstrably justified in a free and democratic society."

"As to the conditions for nomination and election contained in s. 1 of the Act, these have been made retroactive. At the time Mr. MacLean pleaded guilty there were no statutory standards in place. Standards must be prescribed by law and clearly set out so that they can be known to all. Mr. MacLean could not know of the limitations found in s. 1 of the Act on October 3rd, 1986. (When he pleaded guilty to the charges.)

... "the reason for the legislation was protective . . .". It is said that the legislature should be able to set its own standards and determine what people it does not want to have in the House. The content of s. 1 of the Act affects Mr. MacLean and others run and be elected. It also impinges on the rights of voters to elect a member of their choice by a majority vote. Surely the citizens of this province should be given credit for having the sense to determine who is a proper member. The voters now know the facts about Mr. MacLean and should he choose to run, it should be the voters who decide whether he is the person they want to represent them in the House. The legislation is paternalistic and excessive and under the proportionality test is unnecessary to protect society.

"The prohibition has turned from protection to punitive. The defendant (the Attorney General) even suggests the Act has merely set minimum acceptable standards and conduct essential to lend finality to the expulsion. However, the criteria proposed would eliminate people who are not involved in breaching the trust of the House."

The Court found that the prohibition from being a candidate "is penal and not demonstrably justified in a free and democratic society."

This is not to suggest that the legislature cannot pass valid legislation qualifying membership in the legislature. I believe it can. It is not appropriate for the Court to speculate, nor suggest particular legislation but the Court can say that: the legislation must not be retroactive; the legislation must be reasonable for the stated purpose; that for the stated purpose it may only be necessary to include a few specific offences.

"Naturally, any legislation would have to be analysed, after it was drafted, in light of s. 1 of the Charter."

The Court thus made a nullity of the unanimous decision of the Nova Scotia Legislature intended to bar Mr. MacLean from running in the next election. The haste of the members to rid themselves of one who had broken the code resulted in a violation of the rights of not only Billy Joe MacLean, but the electorate and other persons who might wish to be candidates.

"I understand there is a doctrine of parliamentary sovereignty, that the Parliament may pass whatever laws it likes, within the sphere of its legislative authority. But it is also clear that this problem has been limited by our new Constitution Act of 1982, the supreme law of Canada and there are certain things no legislature can do. There is no longer a tyranny of a Legislature where a government, by its control of the legislative majority, can pass any laws it chooses, even those designed solely to rid itself of a politically undesirable colleague."

Billy Joe MacLean, Nova Scotia House of Assembly, October 30, 1986.

The Court has also recognized the right of the Legislature to expel members by resolution which is not subject to question under the provision of the Charter. Likewise, should an assembly use legislation to expel a member, the Court has refused to interfere with that action, continuing to respect the jurisdiction of the assembly in its internal workings, regardless of the Charter.

For politicians who saw the Charter as an intrusion by the Courts into parliamentary life, the case of Billy Joe MacLean has shown that the Courts continue to respect the rights and privileges of the House. For Canadian Citizen William Joseph MacLean, the *Charter of Rights and Freedoms* gave him the ability to be a candidate in the next election and to receive the verdict of the electors.

Postscript: On February 24, 1987, the electors of Inverness South returned Billy Joe MacLean to the Nova Scotia House of Assembly. Mr. MacLean won over his Liberal opponent by 165 votes, with the Progressive Conservative candidate coming third.