

Parliamentary Privilege and Freedom of the Press

by Diane Davidson

The absolute authority of the Houses of Parliament and of legislative assemblies to control their proceedings has been upheld by the Supreme Court of Canada in *Donahoe v. Canadian Broadcasting Corporation* [hereinafter *Donahoe*]¹. On January 21, 1993, the Supreme Court reasserted the necessary independence of the different branches of government and chose to avoid any institutional confrontation between the courts and Parliament or legislative assemblies. The Court declined to review, under the *Charter of Rights and Freedoms* [hereinafter *Charter*],² a proper exercise of privilege by the Nova Scotia House of Assembly. It refused to adjudicate whether the House was right or wrong in refusing CBC access to the galleries of the House. As Chief Justice Lamer stated:

... historically, the courts have been careful to respect the independence of the legislative process just as legislators have been careful to protect the independence of the judiciary In Canada, it is through the privileges inherent in all legislative bodies that the provincial Houses of Assembly are able to control their own proceedings and thereby maintain the independence of the legislative process.³

The decision confirmed that the entrenchment of the *Charter* has not changed the manner in which the Houses of Parliament and legislative assemblies exercise their constitutional right to remove visitors, including members of the press, from their chambers. The Court disagreed with CBC that the courts had acquired jurisdiction to review a proper exercise of privilege that infringed upon a *Charter* right or freedom. Interestingly, Chief Justice Lamer commented that even if the *Charter* had applied to this exercise of privilege, the House itself

and not the courts might have constituted the "court of competent jurisdiction" for purposes of hearing such claims and granting remedies.

Factual Background

The case involved a claim by CBC that its reporters had a constitutional right to film the proceedings of the Nova Scotia House of Assembly with their own hand-held cameras. Speaker Donahoe argued that the decision to use portable cameras in the galleries would interfere with the decorum and orderly conduct of the proceedings of the Assembly and refused to grant such permission based on the unfettered right of the Assembly to control the conduct and the publication of its proceedings.

The Speaker was also concerned that to allow this infringement of parliamentary privilege would lead to further *Charter* challenges concerning such things as the imposition of closure, decisions of committees to meet *in camera* or the non-recognition of a member by the Speaker during the course of parliamentary proceedings.

CBC applied to the Nova Scotia Supreme Court for an order allowing it to film the proceedings based on section 2(b) of the *Charter* which guarantees freedom of expression, including freedom of the press. The Trial Division and the Court of Appeal both ruled in favour of CBC. The Supreme Court of Canada allowed the appeal and overturned the decisions of the lower courts. The Court divided 7 to 1.

The Substantive Issues

Among the substantive issues considered in this decision were the following:

- ① A definition of parliamentary privilege based on the doctrine of necessity

Traditionally, the courts have declined jurisdiction to review the appropriateness of a particular exercise of parliamentary privilege. However, the existence and extent of privilege has always been subject to judicial

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review. The Supreme Court decision has not altered the basic doctrine of judicial review of privilege.

It has, however, clarified that in order to determine whether a particular matter properly falls within the realm of privilege, the House or legislative assembly must demonstrate that the matter is necessary for the legislature to function. At page 17 of his reasons Chief Justice Lamer describes the doctrine of necessity as follows:

... the content and extent of parliamentary privileges have evolved with reference to their necessity. In *Precedents of Proceedings in the House of Commons* (3rd ed. 1796) vol. 1, John Hatsell defined at p. 1 the privileges of Parliament as including those rights which are "absolutely necessary for the execution of its power". It is important to note that, in this context, the justification of necessity is applied in a general sense. That is, general categories or privilege are deemed necessary to the discharge of the Assembly's function. Each specific instance of the exercise of a privilege need not be shown to be necessary.⁴

In the *Donahoe* case the Court only considered if the general power of the House of Assembly to exclude strangers from its proceedings was necessary to the efficient conduct of its proceedings, without reviewing the particular decision of the House to exclude CBC cameras. McLachlin J. summarized the Court's view at pages 27-28:

... the issue here is the power of the legislative assembly to restrict what members of the public attending the proceedings may do while in the chamber, and to expel them if they refuse to comply. More specifically, the issue is the right of the media to film proceedings with their own cameras, and to enjoy control over the subsequent production and use of the film taken. The Speaker of the House of Assembly of Nova Scotia is of the view that access of this sort would interfere with the decorum and the efficacious proceedings of the House and has ruled against it. In doing so he acts within the ambit of his constitutional power to control the attendance in the House. There is no more cause for a court to review that decision than there would be for a legislature to review the decision of a court to exclude activities in the courtroom which it deems to interfere with the business of the court.⁵

The Court further referred to its decision in *Payson v. Hubert*⁶, where it stated that there existed no public right of access to the chamber and that any authorization to attend the proceedings could be withdrawn at any time as a matter of decorum.

❶ The constitutional nature of parliamentary privilege

The Supreme Court recognized that the right of the House of Assembly to control its proceedings and to exclude strangers were inherent privileges which formed an integral part of the Constitution. Freedom of the press as contained in the *Charter* could not encroach or nullify

a proper exercise of these constitutional powers of the House. On the other hand, the majority decision cautioned the House of Assembly that it enjoyed no general immunity from *Charter* review when exercising statutory powers even though the House and its members enjoyed constitutional immunity when exercising their inherent privileges.

The crucial point of the decision resides in the recognition that when exercising their privileges the members are exercising constitutional rather than mere statutory powers. The majority confirmed that the privilege to maintain the dignity and efficiency of the House was necessary and inherent and undoubtedly constitutional in nature. The Supreme Court rejected the view that parliamentary privileges, having been defined in legislation, should be considered only statutory in nature.

The Court determined that the preamble of the *Constitution Act, 1867*⁷ guaranteed the continuance of parliamentary governance by proclaiming an intention to establish "a constitution similar in Principle to that of the United Kingdom". Since Canadian legislative bodies were styled on the United Kingdom parliamentary system they undoubtedly inherited similar powers necessary to their proper functioning. As a result, parliamentary privileges were constitutionalized.

❷ The application of the *Charter* to legislative bodies

The majority of the Supreme Court rejected the conclusion that a legislative assembly could never be subject to the *Charter*. It was argued by the appellant that the term "legislature" contained in section 32 of the *Charter* referred to matters for which the legislative body and the Lieutenant-Governor were jointly responsible. The Court disagreed with this view.

According to the majority, the *Charter* applied not only to the body capable of enacting legislation but also to its operative components taken individually. It was decided that the *Charter* applied to a legislative body except when it was acting in the exercise of its inherent privileges and that the arguments based on section 32 of the *Charter* were inconclusive. The *Charter* could therefore apply when a legislative body impinges on individual freedoms in areas not protected by privilege.

❸ The dissenting opinion concerning the right of the media to film the debates of a legislative body

Mr. Justice Cory, the only dissenting judge, would have allowed the appeal and permitted CBC to film the proceedings of the Nova Scotia House of Assembly with its own cameras. In his view the *Charter* applied to the legislative assembly. While he agreed that television cameras could in certain circumstances be prevented from becoming too intrusive, he considered access by the media to be an essential and necessary means for the

citizens of Nova Scotia to be assured that their elected representatives were conscientiously performing their functions in the best interests of Nova Scotians. He concluded that the House of Assembly had exceeded its jurisdiction over parliamentary privilege when it decided to ban all cameras.

Conclusion

The doctrine of necessity as set out by the Supreme Court should persuade parliamentary institutions not to consider parliamentary privileges as absolute rights and to reassess whether in a modern Canadian democracy they remain indispensable to the efficacious functioning of the institution. The Supreme Court considered as evidence of necessity the fact that the right of legislative assemblies to exclude strangers had been upheld for centuries both abroad and in Canada. The Court also considered the fact that this right remains one of the highest importance, and found that undisturbed debate in the chamber was essential to the proper functioning of the House of Assembly. While the Supreme Court asserted that the courts had jurisdiction to review whether a claim of privilege made by the House was necessary to the conduct of its proceedings, it clearly stated that once a court is convinced of such necessity it has no authority to inquire into the rightness or wrongness of the exercise of privilege in a particular case.

By legislating on matters which may have otherwise been covered by privilege, the Houses of Parliament and legislative assemblies subject themselves to judicial review. The Houses and assemblies should be cautious in diminishing their powers by legislating rules of conduct and of process or by creating bodies which have authority over their internal proceedings. In doing so, legislative bodies could be fundamentally altering their

relationship with the judiciary in matters over which they were initially constitutionally supreme.

The Supreme Court reaffirmed its long-standing tradition of curial deference to the independence of legislative assemblies and to the rights and immunities judged necessary to their functioning. However, the Court ruled that the *Charter* had granted the courts new authority to review actions of public bodies which may violate individual rights and freedoms, including the actions of legislative bodies which are not protected by parliamentary privilege. In particular, legislative assemblies should be mindful of the fact that decisions falling outside the purview of legislative deliberations may now be subject to *Charter* review if the courts determine that they are not rendered in the context of the exercise of a parliamentary privilege.

In the final analysis, the Supreme Court maintained that our parliamentary democracy contains the necessary checks and balances to prevent an improper exercise of parliamentary privilege. While they were not subject to judicial review, members of the Nova Scotia House of Assembly remained accountable to the electorate with respect to the exercise of parliamentary privilege.



Notes

1. Indexed as *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] S.C.J. No. 2, File No.: 22457.
2. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c.11.
3. *Supra*, note 1 at 31.
4. *Supra*, note 1.
5. *Supra*, note 1.
6. (1904), 34 S.C.R. 400.
7. (U.K.), 30 & 31 Vict., c.3 (formerly *British North America Act*, 1867).