Parliamentary Privilege: The Impact of New Brunswick Broadcasting Co. v. Nova Scotia

by Michel Bonsaint

The case before the Court opposed the freedom of expression guaranteed by section 2(b) of the Charter with the parliamentary privileges of the Nova Scotia House of Assembly. It was brought following a decision by the Speaker of the House of Assembly, Arthur Donahoe, to bar the television cameras of from the House. The main constitutional question before the Court was whether the Charter applies to the members of the House of Assembly when exercising their privileges as members. This article looks at the general issue of parliamentary privilege and examines the line of reasoning followed by the Supreme Court.

Parliamentary privilege, in the words of Lucien Lamoureux, a former Speaker of the Canadian House of Commons, "is a somewhat obscure legal concept. Neither its source, its development nor its nature can be easily determined. It nevertheless remains an important, and even an essential element of parliamentary democracy as practised in Canada".[1]

Parliamentary privileges are the privileges held by the members of a legislative assembly as distinguished from the representatives of Crown and Bench. "This state of affairs arose from a history of conflict between Parliament, the Crown and the Judiciary in the United Kingdom."[2] They are needed to enable the members of the legislative assembly to act independently. "The content and extent of parliamentary privileges have evolved with reference to their necessity".[3] For this reason, "categories of privilege did not develop in the same way in the colonial legislature of Canada and elsewhere, and the case law makes clear that the powers deemed necessary in the Houses of Parliament of the United Kingdom were not always deemed necessary in other contexts."[4]

The courts of the United Kingdom recognized that, from its inception, each colonial legislative assembly possessed inherently the powers necessary to discharge its functions, although those powers were of lesser extent than the comparable powers of the Houses of the Imperial Parliament. Only in 1896 did the Judicial Committee of the Privy Council grant the assemblies of Canada full enjoyment of all the British parliamentary privileges, when it ruled that the Parliament of Canada, as well as each provincial legislature, had the power to legislate in the area of parliamentary privilege.[5]

After this ruling, the interest shown in the legal status of parliamentary privileges in Canada diminished, since no great importance attached to whether they were inherent or granted by law. The distinction remained valid only if Parliament, or a provincial legislature, passed no legislation of its own in order to allow the assembly concerned to enjoy all the British parliamentary privileges. In other cases, the courts recognized each assembly's right to the full enjoyment of parliamentary privileges, whatever their source.

Discussion of the source and legal status of parliamentary privileges began again, however, following the coming into force of the *Canadian Charter of Rights and Freedoms*. The *Charter* expressly provides for its own application to Parliament and to each provincial legislature. However:

- to what extent does the *Charter* apply to the Senate and to the House of Commons, which are simply components of the Parliament of Canada, and to the legislative assemblies of

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each province, which are simply components of the provincial legislatures?

- Were the *Charter* to apply to the legislative assemblies, including the Senate and the House of Commons, to what extent would it also apply to the exercise of parliamentary privileges by those bodies?
- What is the legal status of parliamentary privileges in light of the rights and freedoms guaranteed by the *Charter*?

Some Canadian courts had, before the Supreme Court, addressed these issues without any particular jurisprudential direction emerging from their decisions. Indeed, three different positions could be detected. A judgment from the Supreme Court was thus eagerly awaited, but it was only in 1993, eleven years after the passage of the *Charter*, that events finally came to a head in the form of *N.B. Broadcasting Co. v. Nova Scotia*[6] – also referred to as *Donahoe*, from the name of the appellant, the then Speaker of the Nova Scotia House of Assembly. The Supreme Court was faced with a challenging issue: behind the fundamental question of whether or not the *Charter* applied to legislative assemblies lay the no less fundamental question of whether or not it was necessary for legislative assemblies, the *Charter* notwithstanding, to continue to enjoy parliamentary privileges in order to discharge their functions.

Like the lower courts which had previously been required to rule on whether the *Charter* applied to legislative assemblies, the nine judges of the Supreme Court were unable to define a unanimous position. Indeed, the three main positions set out in the ruling are to all intents and purposes irreconcilable, based as they are on highly divergent opinions. It is necessary, if the effects of *Donahoe* on the exercise of parliamentary privilege are to be properly understood, to examine the impact of parliamentary privileges - especially freedom of speech and the right to regulate internal affairs free from outside interference - on court intervention in the internal affairs of legislative assemblies.

Intervention in Internal Affairs of Legislatures

The right of an assembly to regulate its internal affairs free from interference represents, in the classification of Joseph Maingot, a broad category of collective privileges. It includes the right to enforce discipline on members; the right to deliberate and examine witnesses behind closed doors; the right to control the publication of its debates and proceedings; the right to administer that part of the statute law relating to its internal procedure; the right to administer its affairs within the precincts and beyond the debating chamber; the right to settle its own code of procedure; and the power to send for persons in custody.[7]

The most obvious effect of this privilege is to allow a legislative assembly to exercise exclusive authority over almost every aspect of the activities carried on within its walls, without any interference from the courts. It can be seen as an extension of the individual privilege of freedom of speech.

The following opinion, quoted in *Auditor General v. Minister, E.M.R.*, provides a succinct definition of the relation existing between courts and legislative assemblies:

> It is well known that in the past there have been dangerous strains between the law courts and Parliament – dangerous because each institution has its own particular role to play in our constitution, and because collision between the two institutions is likely to impair their power to vouchsafe those constitutional rights for which citizens depend on them. So for many years Parliament and the courts have each been astute to respect the sphere of action and the privileges of the other – Parliament, for example, by its sub judice rule, the courts by taking care to exclude evidence which might amount to infringement of parliamentary privilege.[8]

Similarly, in *Donahoe*, Justice McLachlin mentions as follows:

> 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 all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.[9]

Although the extent to which the courts are able to intervene in the internal affairs of a legislative assembly has not, as yet, been clearly established, recognition seems to exist of the fact that "the courts may determine if the privilege claimed is necessary to the capacity of the legislature to function...".[10] However, the courts "... have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege".[11]

The right of an assembly to regulate its internal affairs free from outside interference means that, in general, the courts cannot intervene in its proceedings even where the assembly fails to follow its own code of procedure. The Speaker of the assembly, alone, has jurisdiction in this area. In addition, the Speaker has exclusive power to apply and interpret any statutes containing parliamentary procedure.[12]

Furthermore, the right to regulate internal affairs without outside interference seems to extend beyond proceedings in the House and in committee meetings. These internal proceedings "also include areas of administrative concern".[13] "The privilege of the House cannot be confined to what takes place in the debating chamber itself. All the privileges that can be required for the energetic discharge by the members of the House of their duties must be conceded without a murmur or a doubt ...".[14] This privilege has been extended by the courts to such areas as the right to regulate the sale of alcoholic beverages[15] and the right to appoint and manage staff.[16]

Court intervention in the legislative process

As a result, the courts cannot intervene to ascertain what procedure was followed during passage of a bill by a legislative assembly. "Courts come into the picture when legislation is enacted and not before."[17] In fact:

> all that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.[18]

In *Drewery et al. v. Century City Developments Ltd. et al.*, the Ontario Ministry of the Environment and a member of the province's legislature were summoned, by subpoena, to testify before a court on the procedure followed by the Legislative Assembly during the passage of a bill. *Century City* argued that it had grounds to oppose the passage of the bill, and that the fact that it had not been heard by the Legislative Assembly rendered the bill, once passed, null and void. *Century City*, in effect, argued that the *audi alteram partem* rule applied to legislative assemblies. Justice Cromarty of the Ontario High Court first quoted the passage from *Edinburgh and Dalkeith Ry. Co. v. Wauchope* given above, before stating as follows:

> The Act in question before me has been approved, it has received Royal assent, and my only power, the only power of this Court, is to examine whether or not the Act is constitutionally operative. I have a recollection, but I cannot put my mind on the case which somewhere says that Parliament can do anything except make a man a woman ....
>
> This is important with respect to the litigants themselves, but it is even more important with respect to the members of the Legislature or Ministers of the Crown, that they cannot be hailed before a Court to explain what went on prior to the passing of an Act, so that all that may be examined into, and then have the whole of that evidence disregarded before the Court.[19]

In a similar case the Supreme Court of Canada, in *Reference Re Resolution to Amend the Constitution*, was asked to rule on whether the two Canadian Houses of Parliament had the power to make a resolution to send a joint address to Her Majesty the Queen, together with the bill providing for the repatriation of the British North America Act. The Supreme Court first underlined the fact that the privileges, immunities and powers of the two Houses of the Canadian Parliament were linked to those of the British House of Commons. With respect to the internal procedure of the two Houses, it then stated:

> How Houses of Parliament proceed, how a provincial legislative assembly proceeds is in either case a matter of self-definition, subject to any overriding constitutional or self-imposed statutory or indoor prescription. It is unnecessary here to embark on any historical review of the "court" aspect of Parliament and the immunity of its procedures from judicial review. Courts come into the picture when legislation is enacted and not before (unless references are made to them for their opinion on a bill or a proposed enactment). It would be incompatible with the self-regulating – "inherent" is as apt a word – authority of Houses of Parliament to deny their capacity to pass any kind of resolution. Reference may appropriately be made to art. 9 of the *Bill of Rights* of 1689, undoubtedly in force as part of the law of Canada, which provides that "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament".[20]

***A priori* court intervention in the legislative process**

A further effect of the right of an assembly to regulate its internal affairs without outside interference, besides precluding court intervention in the legislative process at the stage of parliamentary proceedings, is also to exclude court intervention in the legislative process *a priori*, for example to prevent the Government or a Member from presenting a bill before the assembly.

In *Reference Re Canada Assistance Plan (B.C.)*,[21] the Supreme Court was asked to rule on whether the federal government could table Bill C-69, later to become the *Government Expenditures Restraint Act*, given that passage of the bill would effectively amend the agreement entered into by the Government of Canada and the Government of British Columbia to share the cost of expenditures on social assistance and welfare. According to one of its provisions, the agreement could be amended or terminated by mutual consent, or it could be terminated on one year's notice from either party. After demonstrating that the courts have no interest in parliamentary procedure, Justice Sopinka , speaking for the Supreme Court, stated as follows:

> The formulation and introduction of a bill are part of the legislative process with which the courts will not meddle. So too is the purely procedural requirement in s. 54 of the *Constitution Act, 1867*. That is not to say that this requirement is unnecessary; it must be complied with to create fiscal legislation. But it is not the place of the courts to interpose further procedural requirements in the legislative process.[22]

In reply to the submission that, as regards legislative process, a distinction could be drawn in this particular case between the bill's presentation by the executive and its examination by the Houses of Parliament, Justice Sopinka stated that the "submission ignores the essential role of the executive in the legislative process of which it is an integral part".[23]

In another case the Québec Superior Court, unwilling to interfere in the procedure of the National Assembly, refused to issue an interlocutory injunction to prevent a corporation from presenting and lobbying for the passage of a private bill. As stated in its reasons, "by issuing an interlocutory injunction, the Court would undermine the rights and privileges of the legislative power to pass or reject the bills laid before it".[24]

More recently, in Québec, an individual applied to the Superior Court for the issue of a series of declaratory judgments and injunctions relating to the action undertaken by the Government of Québec for the holding of a referendum on sovereignty in the autumn of 1995.[25]

The applicant wished the court to state, in particular, that "the Prime Minister and the Government of Québec do not have the constitutional power to table, before the National Assembly of Québec, a bill intended, essentially, to separate Québec from Canada";[26] and that "the Government of Québec is acting fraudulently and unlawfully by preparing to use its majority in the National Assembly to force the Assembly to pass a bill designed to destroy Canada".[27]

One of the applicant's requests was that the court order all the members of the Government of Québec to take all necessary steps "not to table a bill respecting Québec sovereignty before the National Assembly;[28] and to ensure that no bill on Québec sovereignty is introduced before the National Assembly for debate and/or passage in accordance with the *Act respecting the National Assembly* and the relevant regulations".[29]

The respondents, for their part, presented the following main argument to the court:

> The applicant, by the very nature of the conclusion sought, is asking the court to interfere in the exercise of the legislative power and in the operation of the National Assembly, which would constitute an unjustifiable attack on the fundamental responsibilities of the National Assembly, as well as on some of its most essential privileges.[30]

In his judgment, Justice Lesage first made the following statement, the meaning of which is not at first glance obvious:

> Parliamentary privilege cannot place the National Assembly above the Constitution of Canada. Members may discuss any subject and pass any measure, be it invalid or illegal, but there is a limit: they may not attack the Constitution from which they hold their powers. The courts must, in their interventions, denounce any unconstitutional measure.[31]

The judge went on to conclude as follows:

> It is clear that the court cannot paralyse the operation of the National Assembly [by issuing a series of injunctions], or prohibit it from debating the matter, as this would amount to an infringement of parliamentary privilege. In addition, it is better that public debate take place with full knowledge of the facts.[32]

The inability of the courts to prevent a person from submitting a matter to the examination of a legislative assembly is supported by parliamentary law. By virtue of the power vested in it to establish its own code of procedure and to have sole authority to ensure compliance with it – subject to a preponderant constitutional provision such as section 133 of the *Constitution Act, 1867* – a legislative assembly has the exclusive power to determine the conditions governing the laying of a matter before it. Where the assembly considers that procedural requirements have been met it must, free from outside interference, have the freedom to decide whether or not it will in fact examine the matter. If a court could intervene in the process leading up to the introduction of a bill before a legislative assembly, for example, on the basis that it was not interfering in the actual proceedings of the assembly, the assembly could be paralysed until the consent of the court to the introduction of the bill had been obtained. It is clear that such a possibility must be excluded without further consideration.

Application of the *Charter* to Legislative Assemblies

We have already seen how the courts adopt a somewhat circumspect attitude towards the legislative assemblies and hesitate to interfere in their internal affairs, leaving them as much latitude as possible to play the specific role assigned to them by the Constitution. Is the mutual respect shown by each branch of the State for the other, born out of fierce tension, still appropriate in the era of the *Charter*? Its adoption has quite clearly modified the nature of the Constitution of Canada, which now assigns preponderant importance to the individual rights and

freedoms that must be respected by certain public institutions. Section 32(1) of the *Charter* provides that the *Charter* applies:

> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Only in 1986, in *RWDSU v. Dolphin Delivery Ltd.*, did the Supreme Court of Canada rule that "the *Charter* does not apply to private litigation."[34] Justice McIntyre, for the Court, considered that "s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government."[35] In 1990, in *McKinney v. University of Guelph*,[36] Justice La Forest, for the majority, adopted the position taken by Justice McIntyre in *Dolphin Delivery*, mentioning that "these words give a strong message that the *Charter* is confined to government action"[37], in other words "the legislative, executive and administrative branches of government".[38]

> ***The Supreme Court has already been called upon several times to rule on the meaning of the word government in section 32 of the Charter. Although it has not yet completely circumscribed this question, the application of the Charter to government has been clarified considerably. To what extent, then, does the Charter apply to the Parliament of Canada and to the legislature of each province?***

Section 17 of the *Constitution Act, 1867* provides that "there shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons." Section 71 specifies that "there shall be a Legislature for Quebec consisting of the Lieutenant Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec."[39] Does section 32 of the *Charter* apply only to an act of the Parliament or of a legislature, in other words a statute, or does it also apply to a non-legislative act emanating from one or other of the Houses of Parliament or from a legislative assembly?

In *RWDSU v. Dolphin Delivery Ltd.*, after mentioning that in light of section 32 of the *Charter* "it may be seen that Parliament and the Legislatures are treated as separate or specific branches of government, distinct from the executive branch of government",[40] Justice McIntyre states that "it would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom."[41] This position is reiterated by Justice La Forest in *McKinney v. University of Guelph*.[42] Given that in both cases the Supreme Court was ruling on the notion of *government* as expressed in section 32, it went no further to clarify the application of the *Charter* to the *Parliament of Canada* and to the *legislature of each province*. Only in 1993, in *Donahoe*, did the Supreme Court finally address this issue, venturing as it did so into practically virgin territory.

The Supreme Court Decision in *Donahoe*

The difficulty experienced by the lower courts in attempting to reconcile the imperative nature of the provisions of the *Charter* with the necessity of full enjoyment, by the legislative assemblies, of the parliamentary privileges prevailing in our system of parliamentary democracy is also reflected in the Supreme Court decision *Donahoe*.[43] The eight Supreme Court judges who took part in the decision produced four different opinions, including one dissenting opinion. Seven judges came to the conclusion that the *Charter* did not apply in the circumstances, but for three different reasons.

a) The opinion of Chief Justice Lamer

After quoting the definition of parliamentary privilege given by Joseph Maingot, Chief Justice Lamer begins by stating that "it is important here to distinguish the Houses of Parliament and the legislative assemblies from the broader legislatures of which they are a part",[44] and that "the legislature cannot hold and exercise parliamentary privileges, as such privileges include the rights of the members of the legislative assembly as against the Crown's representative."[45] It is, in fact, "the members of the Houses of Parliament and the legislative assemblies who hold parliamentary privileges",[46] those that "are judged necessary to the discharge of their legislative function."[47]

With respect to section 32 of the *Charter*, therefore, Chief Justice Lamer states as follows:

> It refers only to the "legislature and government" and, as submitted by the appellant, the House of Assembly is neither legislature nor government properly speaking. The House of Assembly is a component of the legislature but only together with the Lieutenant Governor does it comprise the legislature. As pointed out earlier, this is

more than a semantic difference in the context of the exercise of parliamentary privileges. The legislature as a whole cannot exercise parliamentary privileges as those privileges are held by the members of the Assembly, individually or collectively, against the Lieutenant Governor in his or her capacity as the Crown's representative.[48]

In consequence, "when one examines "the language, structure, and history of the constitutional text", "constitutional tradition" and "the history and traditions of our society", it is clear that s. 32 of the *Charter* does not extend the operation of the *Charter* to the exercise by the members of the House of their inherent privileges."[49]

Chief Justice Lamer bases his argument on certain sections of the Constitution that distinguish between *Parliament* and the *legislature of each province* and their component parts. First, he mentions that section 32 provides that the *Charter* applies to the legislature of each province in all matters within the authority of the legislature. In his opinion, this "is a clear reference to legislative authority under, for example, s. 92 of the *Constitution Act, 1867* which begins with the words" in each Province *the Legislature* may exclusively make Laws".[50]

He also refers to section 33 of the *Charter*, subsections (1) and (4) of which link *Parliament* and *legislature* with the enactment of legislation, and to various sections of the *Constitution Act, 1867*, including section 17 which refers to a Parliament consisting of the Queen, the Senate and the House of Commons, section 18 which deals with the privileges of the Senate and the House of Commons, sections 21 to 36 which concern the Senate, sections 37 to 52 which concern the House of Commons, and section 69 which concerns the composition of the Legislature for Ontario.[51]

Lastly, the Chief Justice refers to Part V of the *Constitution Act, 1982*, which deals with the constitutional amendment procedure and which refers to resolutions of the Senate, the House of Commons and the legislative assemblies of each province, "thereby distinguishing between *resolutions* of the House and *enactments* of the legislature".[52]

He goes on to state that sections 5, 17 and 18 of the *Charter* "at first blush, cast some doubt on this interpretation"[53], since the words *Parliament* and *legislature* seem to be used to designate either the Senate and the House of Commons or a provincial legislative assembly, respectively. Nevertheless, in his opinion, "[w]hile these examples show that usage is not completely consistent, they by no means take away from the general rule that "legislature" in s. 32 means the body that enacts legislation."[54]

Although "the language, structure and history of the constitutional text are strongly suggestive of the conclusion that the word "legislature" in s. 32 in general means the body capable of enacting legislation and not its component parts taken individually"[55] – and that, as a result, those component parts do not come under the application of the *Charter* – the Chief Justice holds that:

> The legislation that the provinces have enacted with respect to privileges will be reviewable under the *Charter* as is all other legislation. However, it does not follow that the exercise by members of the House of Assembly of their inherent privileges, which are not dependent on statute for their existence, is subject to *Charter* review.[56]

In response to the suggestion made in the dissenting opinion of Justice Cory – which the Chief Justice had been able to consult beforehand – that the House would, in theory, be able to punish for contempt by sentencing a member to life imprisonment without eligibility for parole, he replies that "to the extent that any such authority claimed by the members of the House to punish by life imprisonment rested on statutory authority, the statute would, of course, be subject to *Charter* scrutiny."[57]

Since the case under discussion did not, however, involve a privilege granted by law, Chief Justice Lamer concluded that the Members of the Nova Scotia House of Assembly were not subject to the application of section 2 of the *Charter*.[58]

It is clear from the above that, in the opinion of the Chief Justice, section 32 of the *Charter* applies to the *Parliament of Canada* and to the *legislature of each province* and that, as a result, it applies only to a legislative action and not to any other action performed by one or other of the Houses of the Canadian Parliament or of a provincial legislature, including the exercise of a parliamentary privilege. However, as we have seen, the Chief Justice considers that "the legislation that the provinces have enacted with respect to privileges will be reviewable under the *Charter* as is all other legislation",[59] seeming to draw a distinction between the inherent privileges of a legislative assembly and a broader class of privileges enacted by law.

Canadian legislation in the area of parliamentary privilege is restricted to three basic approaches: a list of parliamentary privileges, such as that enacted by the Parliament of Québec in the *Act respecting the National Assembly*[60], a reference to the privileges of the British House of Commons, the approach taken by the Parliament of Canada, or a reference to the privileges of the Canadian House of Commons, as adopted by some provincial legislatures.[61] Since all the statutes concerned mention parliamentary privileges in general, it is unlikely that a violation of the *Charter* could arise from

the actual wording of the legislation, but rather from the way in which the privileges are exercised by the legislative assembly concerned. If, as Chief Justice Lamer contends, section 32 of the *Charter* does not apply to the component parts of the Parliament of Canada and the provincial legislatures, do they come under the scope of the *Charter* simply because their actions have a legislative origin? For this to be true, would their actions not have to be "taken under statutory compulsion"[62] and thus similar in nature to "acts of the legislative branch of government"?[63]

b) The Majority Opinion – The *Charter* does not apply to the exercise of inherent constitutional privileges

For the majority,[64] McLachlin first mentions that "the *Charter* does not apply here, not because a legislative body is never subject to the *Charter*, but because the action here in issue is an action taken pursuant to a right which enjoys constitutional status. Having constitutional status, this right is not one that can be abrogated by the *Charter*."[65]

"Even conceding that our notions of what is permitted to government actors have been significantly altered by the enactment and entrenchment of the *Charter*",[66] the majority holds that "absent specific *Charter* language to the contrary, the long history of curial deference to the independence of the legislative body cannot be lightly set aside".[67] For this reason, the *Charter* cannot "apply to *all of* the actions of the legislative assembly."[68]

The main constitutional question facing the Supreme Court, that of deciding whether the *Charter* applied to the members of the Nova Scotia House of Assembly in the exercise of their inherent privileges as members, was addressed as follows by the majority:

> The *Charter* does not apply to the members of the Nova Scotia House of Assembly when they exercise their inherent privileges, since the inherent privileges of a legislative body such as the Nova Scotia House of Assembly enjoy constitutional status.[69]

The majority, then, unlike the Chief Justice, was unswayed by the *textual argument* "that a textual and a purposive approach to s. 32(1) supports the conclusion that the *Charter* was not intended to reach the actions of a legislative body proper."[70] Rather, the majority considers that the *Charter* applies to legislative assemblies, and that the tradition of curial deference should be applied only to the exercise of inherent privileges, on the grounds that those privileges have constitutional status and that to do otherwise would go against the basic rule "that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution".[71]

c) The opinion of Justices Sopinka and Cory

In the opinion of Justice Sopinka, "the exercise of privileges, whether by legislation or by rules or practices of the legislative assembly, are matters "within the authority of the legislature" and therefore subject to s. 32 unless the rights and privileges are part of the Constitution of Canada and therefore not subject to provincial legislation."[72] He "would find it unusual that the framers of the *Constitution Act, 1867* intended to entrench certain privileges by a general reference in the preamble".[73]

Justice Sopinka therefore agrees with the reasons put forward by Justice Cory to the effect "that s. 2(*b*) of the *Charter* may be engaged".[74] In contrast to Justice Cory, however, he considers that in the case under consideration "any restriction on s. 2(*b*) is justified under s. 1 of the *Charter*"[75] since, in fact, "the original prohibition on filming and broadcasting the work of the House of Assembly was relaxed in favour of the installation of the "electronic Hansard"."[76] Given that the media already had the possibility of broadcasting and recording debates using this source, the prohibition on filming the proceedings directly – "assuming that the restriction is a violation of s. 2(*b*)",[77] a matter that he declined to rule on – Justice Sopinka is "satisfied that it is justified under s. 1 of the *Charter*."[78]

Justice Cory first states that he cannot concur with the conclusion reached by the Chief Justice to the effect that section 32 can only apply to the legislature as a whole, and not to one of its component parts such as the legislative assembly.[79] In his view,

> there can be no doubt that the underlying purpose of s. 32(1) is to restrict the application of the *Charter* to public actors. The legislative assembly is an institution that is not only essential to the operation of democracy but is also an integral part of democratic government. It would seem that it is a public actor. It follows that the *Charter* should apply to the actions of the legislative assembly.[80]

In support of this contention, he poses the following hypothetical question:

> would there be any question that the Charter would apply if, in exercising its jurisdiction with regard to punishment of a member for contempt, the legislative assembly were to sentence that member to life imprisonment without eligibility for parole?[81]

He goes on to state that "such an action would fall outside the constitutional scope of parliamentary privilege and the provisions of s. 12 of the *Charter* applying to cruel and unusual punishment would come into play."[82] Finally, he concludes that "the Assembly cannot exclude television entirely by means of regulation without infringing s. 2(*b*) of the *Charter*"[83] and that "the

number of cameras could be limited and their location and their manner of operation regulated"[84] which, in the judge's opinion, would be "eminently fair and suitable and would be justifiable under s. 1 of the *Charter*."[85]

Conclusion

The recognition, by the majority, of the constitutional status of inherent parliamentary privileges represents an incomplete victory for Canada's legislative assemblies. In our opinion, *Donahoe* represents a clear setback for them with respect to the judicial review of their internal affairs. First, not insignificantly, the majority decision confirms what was, until recently, merely suspected: that the *Charter* applies to legislative assemblies. Next, the majority decision *reintroduces* the concept of inherent privileges, for no other reason than to reduce the impact of its decision to bring legislative assemblies under the application of the *Charter*. This, in our opinion, constitutes a further setback, since the Supreme Court fails to recognize the necessity for full enjoyment, by the legislative assemblies, of the *lex parliamenti* long recognized by the courts. Under the pretext of respecting a long-standing tradition of curial deference towards legislative assemblies, the majority decision paradoxically relies on a form of reasoning that could, in the long run, increase judicial control over legislative assemblies.

By linking the application of the *Charter* to the notion of inherent privileges, the majority decision returns us to the colonial era not only with regard to the content of the privileges themselves, but also with regard to court intervention. Any person will now be able to invoke the *Charter* against any decision made by a legislative assembly, which will obviously increase the opportunities for judicial review. To decide whether judicial review is possible under the *Charter*, the courts will no longer have to determine whether the decision made by an assembly or by one of its committees stems from a recognized parliamentary privilege, but rather whether or not it is based on an inherent parliamentary privilege.

Donahoe has undoubtedly resulted in a reduction in the scope of the actions of legislative assemblies not subject to the *Charter*, since that scope will henceforth be determined on the basis of inherent parliamentary privileges. As we have seen, the majority decision simply proposes a general test of necessity and provides a non-exhaustive list of inherent privileges. We can safely assume that the individual privileges generally attributed to the members of a legislative assembly in the British tradition will be admitted to be inherent and will thus fall outside the application of the *Charter*.

However, if the *Charter* applies to legislative assemblies, will it also apply to an action taken by a member that oversteps the bounds of freedom of speech? For example, will it be possible to invoke section 7 of the *Charter* in connection with a statement made by a member outside the scope of parliamentary proceedings?[87] Will it be possible to invoke the right to equality under section 15 of the *Charter* against the acts and decisions that are inherent in the performance of a member's functions, such as the activities carried out in a riding office?

Turning now to certain collective privileges held by a legislative assembly, such as the power to punish for contempt, the right to regulate internal affairs free from outside interference, and the right to institute inquiries, call for witnesses, and gather evidence, will the witnesses summoned to appear before a parliamentary committee now be able to invoke certain rights under the *Charter*? It is not at all certain that the power to punish for contempt could, on the ground that it constitutes an inherent privilege, prevail over the application of the *Charter*. Both the Judicial Committee of the Privy Council and the Supreme Court of Canada have ruled that the power to punish for contempt is not an inherent privilege necessary to the exercise of legislative functions.[88]

Although we must applaud the intention of the Supreme Court majority to respect the independence of Canada's legislative assemblies as far as possible by limiting the opportunities for judicial review under the *Charter*, the hazardous nature of the line of reasoning followed to achieve this result which, we might add, provides no guarantees, can only be deplored. By making recognition of the constitutional status of a privilege the sole means of exempting it from the application of the *Charter*, on the ground "that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution",[89] the majority decision almost inevitably returns us to the colonial era. It would have been difficult to provide legal grounds to justify the constitutional status of all the parliamentary privileges of British tradition – the *lex parliamenti* – enjoyed by Canada's legislative assemblies for many years, on the ground that those that were not inherent were granted by law, which is why the *re-introduction* of the notion of inherent privileges was practically the only avenue open to the majority to limit the unwanted side-effects of an unrestricted application of the *Charter* to the legislative assemblies.

We believe that the best way of preserving the independence of Canada's legislative assemblies and of continuing the long tradition of curial deference, despite the adoption of the *Charter*, lies in the approach adopted by Chief Justice Lamer. Although considered, by the

Supreme Court majority, to be a merely textual argument, the Chief Justice's view that "the language, structure and history of the constitutional text are strongly suggestive of the conclusion that the word "legislature" in s. 32 in general means the body capable of enacting legislation and not its component parts taken individually" is, in our opinion, justified.[90]

Admittedly, the Chief Justice Lamer used certain specific sections of the Constitution to support his argument but, far from basing his approach on them, used them merely to illustrate the fact that, despite its inclusion of the words *Parliament* and *legislature*, section 32 is not intended to subject the legislative assemblies to the authority of the *Charter* or to set aside a highly desirable equilibrium between the courts and the legislative assemblies. A legislative assembly can hardly be expected to exercise its profoundly constitutional role without enjoying all the necessary latitude. Have the changes wrought in the Canadian constitutional landscape by the *Charter*, however, called into question this fundamental aspect of parliamentary democracy?

We do not share the Chief Justice's view that, as regards *Charter* applicability, a distinction must be made between inherent privileges and legislatively-created privileges. If the *Charter* does not apply to the legislative assemblies, there is no reason to believe that it becomes applicable solely because the action taken by a legislative assembly is founded on a privilege having its source in a statute unless, as discussed above, the action was "taken under statutory compulsion".[91] For example, the *Charter* could become applicable if the exercise of a privilege stems directly from a statute, as in *MacLean v. Nova Scotia*.[92] In the latter case Mr. MacLean, a member of the Nova Scotia House of Assembly, was expelled not by a decision of the assembly itself but rather pursuant to a statute providing expressly for his expulsion, adopted by the legislature by virtue of its power to legislate in the area of parliamentary privilege in conformity with section 45 of the *Constitution Act, 1982*.[93]

Even if the *Charter* did not apply to legislative assemblies, we would not share the apprehensions of Justice Cory with regard to potential violations of rights and freedoms by a legislative assembly. Our democratic system guarantees that the membership of each legislative assembly is decided by popular vote, and since the public is informed on a daily basis of the work of the legislative assemblies, all the actions of their members are constantly scrutinized and commented on.

The choice between, on the one hand, a possible reduction in the effectiveness of legislative assembly proceedings if made subject to the *Charter* and, on the other hand, the apprehended negative effects of non-application should, in our opinion, have been settled by a ruling leading to the second possibility. This is not to say that fundamental rights should not be respected within Canada's legislative assemblies; rather, we believe that this goal should be achieved by the application of internal rules, for instance by the adoption of rules to protect witnesses called by committees. The main advantage of such an approach would be to remove the internal proceedings of each assembly from undue supervision by the courts which is, in fact, the principal negative effect of *Donahoe*, whatever the actual degree of *Charter* applicability.

Notes

1. The comment by Lamoureux is found on page ix of the preface to the French edition of Joseph Maingot's work *Parliamentary Privilege in Canada*, published by Les Éditions Yvon Blais in 1987 under the title *Le Privilège parlementaire au Canada*.
2. See note 6, p. 342.
3. *Ibid.* p. 343.
4. *Ibid.*
5. *Fielding v. Thomas*, 1986, A.C. 600.
6. [1993] 1 R.C.S. 319.
7. Maingot, Joseph. *Parliamentary Privilege in Canada, Butterworths*, 1982, p. 15.
8. [1989] 2 R.C.S. 49, p. 88, *Dickson,C.J.*. See also *Pickin v. British Railways Board (H.L.(E.))*, [1974] 2 W.L.R. 208 (H.L.), pp. 228 et 229.
9. See note 6, p. 389.
10. *Ibid.* p. 384.
11. *Ibid.* p. 385.
12. See *Bradlaugh v. Gossett*, (1884), 12 Q.B.D. 271, pp. 280 et 281.
13. See note 1, p. 303.
14. *R. v. Graham-Campbell, Ex parte Herbert*, [1935] 1 K.B. 594, p. 598.
15. *Ibid.*
16. *House of Commons c. C.L.R.B.*, [1986] 2 C.F. 372, pp. 384 et 385 - Arthur Beauchesne, *Parliamentary Rules and Forms*,, 4th edition, Toronto, Carswell, 1964, p. 329, s. 446.
17. *Reference Re Resolution to Amend the Constitution*, [1981] 1 R.C.S. 753, p. 785.
18. *Edinburgh and Dalkeith Ry. Co. v. Wauchope*, (1842), 8 Cl. & F. 710, p. 725.
19. [1974] 52 D.L.R. (3d) 512 (Ont. H.C.), p. 514.
20. See note 14, pp. 784 et 785.
21. [1991] 2 S.C.R. 525.
22. *Ibid.*, p. 559.
23. *Ibid.*
24. *Rail & Water Terminal of Montreal Ltd v. Compagnie de Gestion de Matane Inc.*, [1976] C.S. 102 (Qué. S.C.), p. 104. See also *Bilston Corp. v. Wolverhampton Corp.*, [1942] 1 Ch. 391 and *Berthiaume c. DuTremblay*, [1955] Qué. R.P. 328. In the latter case, an interim injunction was issued to prevent the introduction of a private bill before the Quebec legislature. The decision was strongly criticized by the Honourable Bora Laskin in an article published in the *Canadian Bar Review*, 1955, vol. 33. In *Rediffusion (Hong Kong) Ltd. v.*

A.-G. Hong Kong, [1970] A.C. 1136, the Judicial Committee of the Privy Council refused to allow an injunction to be issued to prevent the legislative Council of Hong Kong from passing a statute *ultra vires*.

25. *Guy Bertrand v. L'Honorable Paul Bégin et l'Honorable Jacques Parizeau et Me Pierre-F. Côté*, Quebec, September 8, 1995, No. 200-05-002117-955, Judge Lesage (Quebec Supreme Court).
26. *Ibid.* p. 7.
27. *Ibid.*, p. 8.
28. *Ibid.* p. 11.
29. *Ibid.* p. 12.
30. *Ibid.*, p. 18.
31. *Ibid.*, p. 40.
32. *Ibid.*, pp. 41 - 42.
33. [1986] 2 S. C.R. 573.
34. *Ibid.* p. 597.
35. *Ibid.* p. 598.
36. [1990] 3 S.C.R. 229.
37. *Ibid.* p. 261.
38. *Ibid.* p. 265.
39. The Legislative Council of Quebec was abolished by the *Act respecting the Legislative Council*, S.Q., 1968, c. 9, art. 1.
40. See note 33, p. 598.
41. *Ibid.* p. 599.
42. See note 36, p. 263.
43. See note 6.
44. *Ibid.* p. 341.
45. *Ibid.* p. 342.
46. *Ibid.*
47. *Ibid.* p. 343.
48. *Ibid.* p. 356.
49. *Ibid.* p. 359.
50. *Ibid.* p. 360.
51. *Ibid.*
52. *Ibid.* p. 361.
53. *Ibid.*
54. *Ibid.* p. 362.
55. *Ibid.* p. 363.
56. *Ibid.* p. 364.
57. *Ibid.* p. 365.
58. *Ibid.* p. 367.
59. *Ibid.* p. 364.
60. R.S.Q. c. A-23.1, preamble and ss. 9, 42-46, 51.
61. See, for example, the *House of Assembly Act*, R.S.N.S. 1989, c. 210.
62. See note 36, p. 269, *Judge La Forest*.
63. *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, p. 511, *Judge La Forest*.
64. The majority includes Justices L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci and La Forest.
65. See note 6, p. 368.
66. *Ibid.* p. 372.
67. *Ibid.*
68. *Ibid.*
69. *Ibid.* pp. 393 et 394.
70. *Ibid.* p. 369.
71. *Ibid.* p. 373. See also Reference re Bill, 30, *An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148.
72. *Ibid.* pp. 395 - 396.
73. *Ibid.* p. 396.
74. *Ibid.* p. 397.
75. *Ibid.*
76. *Ibid.*
77. *Ibid.* p. 398.
78. *Ibid.*
79. *Ibid.* p. 399.
80. *Ibid.* p. 401.
81. *Ibid.* As the Chief Judge mentions in response to this question raised by Justice Cory, "the existence and extent of these privileges are subject to judicial review quite apart from the *Charter*." (p. 365).
82. *Ibid.*
83. *Ibid.* p. 409.
84. *Ibid.* p. 409.
85. *Ibid.* pp. 413 - 414.
86. Namely freedom of speech, freedom from arrest in civil process, exemption from jury service and the privilege relating to members summoned as witnesses.
87. "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
88. See *Kielley v. Carson*, (1842) 4 Moore P.C.C. 63, 13 E.R. 225 (P.C.) – *Doyle v. Falconer*, (1866) L.R. 1 P.C. 328 – *Landers v. Woodworth*, (1878) 2 S.C.R. 158.
89. See note 71.
90. See note 55.
91. See notes 62 and 63.
92. *MacLean v. Nova Scotia*, 76 N.S.R. (2d) 296.
93. S.N.S. 1986, c. 104.

Editor's Note: For another perspective on this case see Diane Davidson "Parliamentary Privilege and Freedom of the Press, *Canadian Parliamentary Review*, vol. 16 (summer, 1993), pp. 10-12.