Guest Editorial

Parliament and Democracy in the 21st Century: Parliamentary Privilege

Definitions of parliamentary privilege abound throughout the Commonwealth but drawing largely from Joseph Maingot, a noted Canadian author on the subject, privilege can be described as the necessary immunity the law provides for Members of a House of Parliament or Assembly to perform their work and the authority of those Houses and Assemblies to enforce that immunity and protect their integrity. It also covers the rights enjoyed by each House of Parliament and Assembly required to perform their work. Members, officers and those participating in a proceeding of a House or Assembly are "cloaked" by privilege. Any offence against the authority of a House of Assembly is technically considered a contempt. Parliamentary privilege is often subject to modern and changing circumstances as the categories of privilege were fixed in the very early 18th century.

The attempt to make the definition comprehensive renders it dry. This is unfortunately because, in my view, the historic rationale for parliamentary privilege is as relevant today as it was centuries ago – to allow Houses and their Members to conduct their business according to the rules they set, free from undue interference from those outside the House. The law of parliamentary privilege protects and promotes core values in our democratic system by protecting Houses of Parliament, Assemblies and those who serve in them

This year marks the 10th anniversary of an important milestone in the recognition of parliamentary privilege. On January 21, 1993 the Supreme Court of Canada released its decision in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker, House of Assembly)*. Parliamentarians often refer to this as *Donahoe* after Arthur Donahoe the then Speaker of the Nova Scotia Assembly. In *Donahoe* the majority of the Supreme Court of Canada held that an Assembly's inherent parliamentary privileges enjoy constitutional status and cannot be "trumped" by another part of the Constitution, specifically, the *Canadian Charter of Rights and Freedoms*.

The issue in *Donahoe* was whether television camera operators had the "right" under the *Charter* to film the proceedings of the Assembly or whether the Assembly had the right to exclude them from the galleries. The majority of the Supreme Court held that Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning and that such privileges, although not part of the written Constitution, are part of the fundamental law of the land and are, accordingly, constitutional. Among the privileges recognized by the majority of the Supreme Court were: freedom of speech including immunity from civil proceedings, exclusive control over the House's own proceedings, ejection of strangers from the House and its precincts and control of publication of debates and proceedings in the House. Accordingly, the Assembly was within its rights to exclude the camera operator.

While the *Donahoe* decision confirmed parliamentary privilege as an unwritten part of the Canadian Constitution, it has not ended the inquiry by the courts into what constitutes the proper application of the doctrine of parliamentary privilege. Determining the scope of parliamentary privilege is certainly a challenge in the new century with courts taking a leading role in defining its scope. Is this involvement by the courts justified? Technically the courts are not to assess the particular application of privilege. According to Justice (now Chief Justice) McLachlin in *Donahoe*, when a matter falls within the "necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld" the courts will not inquire as such questions fall within an Assembly's exclusive jurisdiction. So the court's role is jurisdictional in nature.

The vast majority of privilege issues do not come before the courts. Questions of privilege raised by a Member about some action taken by another Member, Minister or department that relate to a proceeding in Parliament are dealt with by the respective House or Assembly and by the Speaker in the first instance. However, when someone who is outside the Assembly, or does not play a role in the proceedings of parliament, is affected by something the Assembly has done then the matter may end up in court. *Donahoe* was such a situation. In recent years privilege has been argued before the courts in cases concerning the jurisdiction of Human Rights Commissions with respect to Assemblies, wrongful dismissal actions, insurance schemes for Members, language of broadcasting and defamation.

Apart from challenges to parliamentary privilege of an institutional nature (e.g. the courts), rapidly changing technologies may force a re-examination of its application. For instance, is it conceivable that some day Members may participate in proceedings in an Assembly by computer? How would privilege apply to a virtual Assembly or committee situation? While some may call this "heresy" it is not beyond the realm of possibility. This raises the question of the extra-territoriality of the application of parliamentary privilege in the sense that a participant in a "proceeding in Parliament" could be someone who is outside the jurisdiction of the province, territory or country. It may be that someone far beyond the borders could be up to electronic mischief which could affect a Member or the proceedings. Admittedly, these situations can occur now to some extent but the adoption of new technologies may bring these issues to the fore. This could lead to some interesting, if not exciting, developments to determine the application of ancient doctrines to the technological revolution. There may be much to be said for old wine in new bottles.

The doctrine of parliamentary privilege is alive and well in Canada today. It has been confirmed by the highest court in the country as part of the Constitution of Canada. The protections provided to Members and Assemblies are perhaps on a firmer footing than even in Britain where the most fundamental of privileges, freedom of speech, is being tested against the European Convention on Human Rights. The fact that the application of parliamentary privilege is being actively raised in the courts reflects its dynamic nature in modern times although this role for the courts may not please parliamentary purists. Privilege is not a relic of an ancient past kept in someone's trunk never to be brought out.

We have now had the opportunity of living with the Supreme Court of Canada's decision in *Donahoe* for 10 years. During that time, one might think that the task of defining the scope of parliamentary privilege has been the preserve of the courts, yet the rights and immunities are ostensibly for Assemblies and their members. Perhaps it is time for the Assemblies to reoccupy the field and comprehensively examine the nature and scope of parliamentary privilege. A review in Australia by a Joint Select Committee on Parliamentary Privilege led to that country's *Parliamentary Privileges Act 1987*. A joint committee of the House of Commons and House of Lords issued a comprehensive report on parliamentary privilege in 1999 which recommended, among other things, a codification of privilege. While I am not suggesting that privileges be legislated, a review could at least examine that possibility.

As with most things Canadian, it would be a challenge to find an appropriate body to conduct such a review. Of course, one or both Houses of Parliament could establish some committee or joint committee. If provinces and territories also established committees, it could result in there being 15 reports (10 provinces, 3 territories, the House of Commons and Senate). Perhaps the CPA Regional body could play a leading role with representatives and staff from different jurisdictions across Canada. Canadians are not without ingenuity when it comes to the challenges presented by our federal nature.

Whatever mechanism legislators choose, it seems time to reoccupy the field so that the courts can be informed by the views of legislators on the modern day applications of parliamentary privilege and that Canadians can come to appreciate the relevance of these ancient rights and immunities as we proceed into the 21st century.

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