Canada v Prince Edward Island

The Right of Provincial Legislatures to Summon Federal Officials

by Gary Levy

The United States ban on the importation of Prince Edward Island potatoes following discover of potato wart disease in October 2000 gave rise to an interesting case of parliamentary privilege pitting the federal government against the PEI legislature. The issue arose when a committee of the legislature tried to summon officials from the Canadian Food Inspection Agency. On behalf of the agency the Government of Canada took the view that the Committee had overstepped its power and asked the court to quash the summons. The Committee, supported by an intervener, the Speaker of the Ontario Legislative Assembly, argued that the right of a Committee to require attendance of witnesses and production of documents is included among the inherent privileges of the Assembly and the court had no power to review the rightness, or wrongness, of a decision made pursuant to that privilege. This article looks at the arguments and the judgment by Justice Wayne Cheverie of the Prince Edward Island Supreme Court on January 14, 2003.

On April 3, 2001, the Prince Edward Island Legislative Assembly passed a resolution referring what had become known as the "potato wart crisis" to its Standing Committee on Agriculture, Forestry and Environment". The Committee held hearings on the issue throughout the fall and winter. It made several reports to the Legislative Assembly and in each case Committee reports were received and adopted by the Legislative Assembly.

On September 24, 2001, Norman MacPhee, Chair of the Committee, invited representatives of the Canadian Food Inspection Agency (CFIA) to testify. This invitation was declined, although the Agency indicated its willingness to respond to written inquiries from the Committee. Some 900 pages of documents were provided. However, the Committee continued to indicate its desire to hear and question representatives of the CFIA. On November 9, 2001, the Clerk of the Legislative Assembly wrote to the CFIA that failing their attendance, the Committee would consider all of its options, including the issuance of a warrant as authorized by the *Legislative Assembly Act*.

When the Agency maintained its position Mr. MacPhee again wrote requesting input from CFIA officials to assist his Committee, and in turn the Island's potato industry, in avoiding a future crisis of this nature. In the same letter, the Chairman indicated the Committee did intend to forward a list of questions to the CFIA, but was also considering the option of issuing a subpoena to ensure the attendance of certain officials.

On December 12, 2001, the Committee heard from the provincial Minister and Deputy Minister of Agriculture and Forestry, as well as representatives of the Prince Edward Island Potato Board and the Potato Producers Association of Prince Edward Island. On the same day, the Committee met *in camera* and passed a motion to summon Don Love and David MacSwain of the CFIA to appear before it.

The Agency responded by going to court seeking an order to quash these summonses or at least, to obtain a declaration that Mr. Love and Mr. MacSwain be ex-

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empted from complying. In considering this case Justice Wayne Cheverie said there were four questions that had to be answered.

- Does the Legislative Assembly of Prince Edward Island have the power to summon witnesses and order them to produce documents?
- If the Legislative Assembly of Prince Edward Island does have this power, does it extend to the Committee?
- If the Committee has the power, should the witnesses, nonetheless, be exempt from the summonses?
- Does the *Judicial Review Act* of Prince Edward Island apply to the decision of the Committee?

The Power to Summon Witnesses

In their argument, the Agency recognized that Agriculture is an area of joint jurisdiction under section 95 of the *Constitution Act, 1867*. They also recognized the right of the Legislative Assembly to conduct inquiries. The root of the problem, they said, was that this inquiry constituted an investigation into the operation of a federal agency, and that was beyond the jurisdiction of the committee.

The Court found this premise to be premature because until witnesses are brought before the Committee and questions actually put to them, it cannot be said whether the inquiry crosses that constitutional line. Put another way, just because the witnesses sought to be summoned happen to be employees of a federal agency does not necessarily mean the Committee is conducting an inquiry into that federal agency.

Lawyers for the federal side did not concede that the Legislative Assembly had the inherent right to send for persons, papers and records, and, therefore, argued it was even less clear whether any such power was vested in a committee of the Legislative Assembly. In support of this position they relied primarily on provisions of the PEI *Legislative Assembly Act*. The Act provides (s. 28) that the Assembly (not a committee of the legislative assembly) , is vested with the power to command and compel the attendance of witnesses. Whenever the assembly requires the attendance of a person, either before the assembly or a committee thereof, the Speaker or the Chair of the committee may issue a warrant or a subpoena. (s. 29) Since the assembly did not issue such an order in this case, it was argued that the Committee had no authority to require the attendance of Mr. Love and Mr. MacSwain. Certain other rules of the Legislative Assembly were cited to support the argument that summonses are not authorized without the Committee first bringing the matter back to the legislative assembly.

In response the intervener advanced the proposition that the power of a provincial legislature to legislate its own privileges is now entrenched in s. 45 of the *Constitution Act, 1982*. The attendance of witnesses and the production of documents is a necessary, inherent privilege guaranteed to all Canadian legislatures. The codification of certain privileges in the *Legislative Assembly Act* merely supplements the inherent constitutional privileges already accorded to the assembly.

The Court found that the weight of authority supports the proposition that the legislative assembly does have the power to summon a witness and require production of documents, and the basis of that power is parliamentary privilege. That being the case, the jurisdiction of a court to delve into such privilege is extremely limited.

The Court relied on the words of Justice McLachlin of the Supreme Court of Canada who said:

> The test of necessity is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary sphere of exclusive or absolute "parliamentary" or "legislative" jurisdiction. If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body.
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> ...the principle of necessity will encompass not only certain claimed privileges, but also the power to determine, adjudicate upon and apply those privileges. Were the courts to examine the content of particular exercises of valid privilege, and hold some of these exercises invalid, they would trump the exclusive jurisdiction of the legislative body, after having admitted that the privilege in issue falls within the exclusive jurisdiction of the legislative body. The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function? A particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory.
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> In summary, it seems clear that, from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.[1]

Thus one has to determine whether the right to require the attendance of witnesses, and for those witnesses to produce documents, falls into a category of matters necessary to the independent functioning of the legislative assembly. The Supreme Court of Canada has said once it has been determined the privilege claimed is necessary to the capacity of the legislature to function, then the court has no power to scrutinize the exercise of that privilege. So the question is twofold: does the right to compel

witnesses and production of documents fall within the recognized category of privilege necessary to the independent functioning of the assembly, and, secondly, whether the exercise of that privilege, i.e. the issuing of a summons to a witness, falls within that category. If it does, it is not subject to review.

The next step in the analysis was to determine whether the right of a Legislative Assembly to summon witnesses and have them produce documents falls into a recognized category of privilege. Historically, the Parliament of the United Kingdom possesses the power to require the attendance of witnesses and the production of documents.[2] In the Canadian context, cases were cited in support of the proposition that legislative assemblies in this country have the right to summon witnesses and have them produce documents; this right is inherent parliamentary privilege; and the power was exercised as far back as the 1800's.

> Responsible Government, which has been recognised in the Local as well as in the constitution of the General Government, would be a delusion if that power of enquiry was denied, and the enquiry would be valueless without the power of summoning witnesses. I consider this to be a necessary incident of the powers of Legislatures, and of controlling the administration of public affairs, and as such I believe that the House of Assembly had a right to exercise it."[3]

Based on the precedents the Court concluded that it is difficult to imagine how the legislative assembly could properly conduct an inquiry within its constitutional jurisdiction without the power to summon witnesses and require the production of records and documents.

Does the Power to Summon Extend to a Committee?

The Rules for Committees provides that:

> When the Committee decides that a certain person should appear as a witness, it may direct the Committee Clerk to invite that person to appear, or if necessary, the Committee may adopt a motion requesting that person to be summoned before the Committee (S. 32).

The Court agreed there was no question that in attempting to carry out its mandate from the Assembly, the Committee did not refer the issue of the summons back to the assembly for its consideration, as provided in s. 29 of the *Legislative Assembly Act*. However, that was not fatal to the process. Sections 28 and 29 of the *Act*, in the Court's view, represent a codification of certain inherent parliamentary privileges. They do not represent a codification of "all" parliamentary privileges. If one examines s. 27 of the *Act*, one sees a general adoption of privileges, immunities and powers, both with reference to the Legislative Assembly and to the committees and members thereof, as were enjoyed and exercised by the House of Commons of Canada. Further support for this proposition can be found in Rule 42 of the *Rules of the Assembly* which states: "Privileges are the rights enjoyed by the House collectively and by the Members of the House individually as conferred by the *Legislative Assembly Act* or other statutes or by practice, precedent, usage, and custom".

Thus, the Committee, in carrying out the mandate given to it by the Assembly might have exercised its authority in a neater and cleaner manner, but that is for the Legislative Assembly to decide. The Legislative Assembly is the master of its own process including the operation of its Committees. Those Committees are natural extensions of the House, and the House naturally functions through them. In the course of its inquiry as mandated by the resolution of the assembly, the Committee did report back on several occasions, and on each occasion their report was received and adopted by the assembly. There is nothing to indicate the assembly was not aware of the fact the Committee had issued the summonses in question. On each occasion the Committee reported back to the House, there is nothing to indicate that any member of the House took any exception to the process employed by the Committee. On the contrary, the Committee's reports were endorsed. The Committee was functioning at the direction of the full assembly and was fully cloaked with the inherent constitutional parliamentary privilege.

> There is no doubt but that the Committee has the power to issue the summons in question; that it derives that power from the legislative assembly; that the power is rooted in parliamentary privilege; and it is not for this Court to inquire into how that power was exercised.[4]

Should These Witnesses be Exempt?

Even if the Committee had the authority to compel the attendance of witnesses, it could still be argued that it did not have authority to inquire into the administration or the operation of a federal agency.[5] The Court found there was nothing to support that conclusion other than speculation. The Committee was attempting to carry out a resolution of the legislative assembly requiring it to conduct a "full and complete examination" of the potato wart crisis. It is only when the witnesses appear before the Committee that it will become apparent whether it intends to act within its constitutional sphere of authority or whether it wants to conduct a "fishing expedition" as suggested by the applicants. If the Committee strayed beyond its constitutional authority at that time, then the Agency could seek the appropriate remedy. Justice Cheverie agreed with the argument presented by the Intervenor who said it would not be *ultra vires* for the Committee to ask CFIA witnesses about decisions made and actions taken or not taken by the CFIA in responding to the potato wart crisis so long as the purpose of the questioning, in pith and substance, relates to a matter within the provincial legislative sphere. Any incidental

reflection on the administration and management of CFIA is permissible.[6]

Justice Cheverie said he considered the *Keable* decision carefully but found it did not support the position of the Agency. There is a distinction between a provincial commission of inquiry as in *Keable* and the proceedings of the Committee in this case, mandated within the jurisdiction of the Legislative Assembly. The origin of the authority is constitutional in nature and falls within the inherent authority of the legislative assembly. The *Keable* inquiry was initiated pursuant to a provincial statute. It was rightly restricted by the constitutional authority of such a provincial statute. In the present case, the Committee is not limited by a provincial statute in the conduct of its inquiry. Its power is not dependent upon a provincial statute, and this distinguishes it from the *Keable* case.

The argument that the committee was acting pursuant to provincial legislation and it is not binding on the federal Crown was also dismissed because the Committee does not derive its power to summon witnesses from provincial legislation. Rather, it is exercising its constitutionally protected privilege.

Again relying on the *Keable* case the Agency argued that Mr. Love and Mr. MacSwain should be exempt from the summonses because of Crown immunity from discovery. They contended that the broad sweeping powers contained in the resolution from the legislative assembly, when coupled with the broad wording contained in the summonses constitute a "discovery". Justice Cheverie concluded that the Solicitor General was not compellable as a witness before that commission because the commission derived its power from a provincial statute. The Committee in the present case is exercising its inherent power to compel the attendance of witnesses which flows from the constitutional authority of the legislative assembly itself.

> I am not so sure the work of the Committee is so much in the nature of a discovery, as it is a response to the resolution of the legislative assembly itself to make full inquiry into a crisis in the Prince Edward Island potato industry so as to seek ways in which such a crisis may be averted in future. For these reasons, I conclude the witnesses should not be exempt from the summonses.[7]

Judicial Review of a Committee Decisions?

The final question related to whether the court could over-rule a decision of a legislative committee. The federal side argued that in issuing the summonses the Committee was acting pursuant to provisions of the *Judicial Review Act* since the Committee was a tribunal as defined by the Act. Justice Cheverie found that since the Committee was exercising a parliamentary privilege it was not covered by the Act. In response to the argument that the privileges of the Assembly were limited to those defined in the *Legislative Assembly Act* he repeated his earlier observation that attempts to codify part of privilege in a statute does not include "all" of the inherent parliamentary privileges of the assembly and its committees.

He also reaffirmed the traditional understanding that committee meetings are "proceedings in parliament" and are therefore not subject to judicial review.

Notes

1. *New Brunswick Broadcasting Co. v Nova Scotia* (Speaker of the House of Assembly) (1993) 1 S.C.R. 319 at pp. 383-385.
2. See *Stockdale v. Hansard* (1839), 112 E.R. 1112 at 1176 (Q.B.)
3. See the case of *Ex parte Dansereau (1875)*, 19 L.C.J. 210 (Q.B. - Appeal Side), reprinted in J.R. Cartwright, Cases Decided on the *British North America Act, 1867*, vol. II (Toronto: Warwick & Sons, 1887) at 165.
4. *AG Canada v MacPhee et ors* 2003 PESCTD 06, p.13
5. In support of their argument for inter-jurisdictional immunity they relied on the Supreme Court of Canada in *A.G. Quebec & Keable v. A.G. Canada*, [1979] 1 S.C.R. 218.
6. Factum of the Intervenor, Speaker of the Ontario Legislative Assembly, p. 82.
7. *AG Canada v MacPhee et ors* 2003 PESCTD 06, p.15.

Editor's Note

Following the decision of the Supreme Court of Prince Edward Island the Standing Committee, once again, invited the two CFIA representatives to attend a meeting scheduled for April 24, 2003. The officials did not appear, but instead sent legal counsel from New Brunswick who assured the Standing Committee the officials intended to be present at another, mutually convenient date. Written confirmation of their intention to appear was requested. Senior Counsel from the Department of Justice Canada, in Halifax, responded, assuring the Committee that the two officials intended to be present as requested. Finally, nineteen months after the original requests, the two representatives of the Canadian Food Inspection Agency, along with their legal counsel, appeared before the Standing Committee on May 15, 2003, to answer questions related to the potato wart crisis. The Standing Committee will table its final report in the current session.