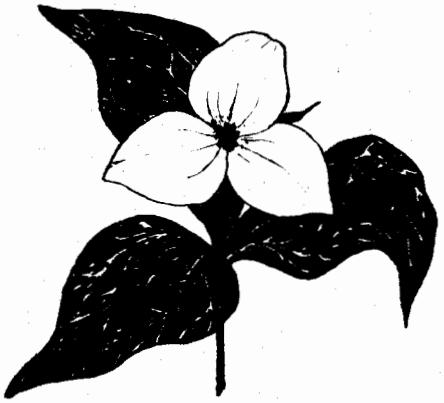
THE IMPRISONMENT OF A MEMBER FOR REFUSING TO DISCLOSE CONFIDENTIAL COMMUNICATIONS

By Graham White

In the summer of 1977, Ed Ziemba, Member of the Ontario Legislature for High Park-Swansea, spent six days in a dank cell in Toronto's 120 year-old Don Jail. Mr. Ziemba had made allegations in the House of criminal wrongdoing and cited documentary evidence supplied him on a confidential basis. His imprisonment resulted from his refusal to identify his informant during the subsequent court case – a refusal which Mr. Ziemba insisted he was duty-bound to make as a Member of the Legislature. Parliamentarians across Canada have expressed concern over the implications of this case. Speaker Amerongen of Alberta raised this issue before the Council of Canadian Speakers recently, and as a result, former Speaker of the Newfoundland Assembly, the Honourable Gerald Ottenheimer, who is now Attorney General, has agreed to draw the Speakers' concern to his fellow Attorneys General. The final act of this drama was played out last year, but the implications of the Ziemba case are still very much with us, for it raises fundamental questions as to the nature of parliamentary privilege, particularly for Members of provincial Parliaments.



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". . . The Assembly whose servant I am, and who, through me, the better to enable them to discharge their duty to their Queen and Country hereby claim all their undoubted rights and privileges. . ." – traditional address of the Ontario Speaker to the Lieutenant-Governor at the opening of a new Parliament.

On March 12, 1976, during consideration of the Ministry of Health estimates, Mr. Ziemba made a speech in the Committee of Supply accusing the principals of Abko Laboratories of defrauding OHIP, the provincial health insurance plan. He also named several doctors, who had allegedly received kickbacks from Abko, and who were in violation of the provisions of the Health Disciplines Act relating to conflict of interest.

Several weeks earlier, Mr. Ziemba had been given by a person who wished to remain anonymous, information and documents which indicated irregularities and possible fraud. He passed the documents along to the police, but kept copies on which he based his speech in the House. As well, he had given copies of some of the documents to the *Toronto Star*, which had published a story from them.

Following a police investigation, Abko and two of its owners were charged with fraud. The preliminary hearing began in January 1977, and Mr. Ziemba was called as a witness by the defence. He was advised of and claimed the protection of the Canada Evidence Act and the Ontario Evidence Act, so that his testimony would not be used

Graham White is Assistant Clerk of the Legislative Assembly of Ontario

against him in any subsequent proceedings.

Mr. Ziemba then refused to answer two questions put to him by the counsel for the defense:

> Who first advised you that Abko Medical Laboratories Limited might be involved in overcharging the Ontario Hospital Insurance Plan?
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> Did you receive any documents from Abko Medical Laboratories Limited relating to an overcharge of the Ontario Hospital Insurance Plan?

By way of response, Mr. Ziemba said: "No, I'm going to refuse to answer that question, Your Honour, because I am a public person and frequently, in fact almost weekly, documents are turned over to me and I do think that I would be jeopardizing my career in the Legislature if I . . . divulged even the fact that I received information that was given to me, with the idea that no one would find out about it. It's privileged information."

The judge, His Honour Robert Dneiper, ruled that Ziemba need not answer the first question as it was not relevant to the case, but that he must answer the second question. Mr. Ziemba persisted in his refusal. Despite this refusal, Judge Dneiper denied the request from Abko's attorney that Ziemba be jailed under the provisions of section 472 of the Criminal Code, which empowers a judge at a preliminary hearing to jail a witness for up to eight days for refusing to answer a question "without offering a reasonable excuse for his failure or refusal." (This section provides for repeated incarceration for up to eight days so long as the witness refuses to answer.)

Shortly after this, the preliminary hearing was adjourned pending a ruling from the Supreme Court of Ontario on an application by Abko's lawyers to have Judge Dneiper's decision overturned and Ziemba jailed. On April 12, 1977, Mr. Justice Steele released his decision on this matter. Ziemba, in the opinion of Justice Steele, had no immunity from answering the questions put to him, although it was within the judge's discretion to consider Ziemba's position as an MPP as a "reasonable excuse" for failing to answer and thereby refuse to imprison him. Justice Steele also ordered that Ziemba answer the first question (as to the name of the informant), since it was relevant to the defence's case.

The preliminary hearing resumed in May 1977, and Judge Dneiper again directed that Mr. Ziemba answer the question. Again, Ziemba refused, saying that he would not betray a trust, whereupon the hearing was adjourned until June 23, 1977. Judge Dneiper made it clear that if Ziemba persisted in his refusal, he would be jailed.

In the meantime the province had been plunged into an election campaign; polling day was June 9. Ziemba, a member of the New Democratic Party, stood for re-election, and was victorious. On June 23, Ziemba re-appeared in court, and on refusing Judge Dneiper's order to answer the question, was sent, in handcuffs, to jail.

The new Parliament met on June 27; on that day, the Attorney-General, Roy McMurtry, made a lengthy statement to the House on the Ziemba case. This statement took as its starting point the view that "this is essentially a matter between the member for High Park-Swansea and the court that has jurisdiction over the case." Mr. McMurtry explained the dilemna he faced in finding a way of helping Ziemba without being perceived as interfering in the proper defence of an accused person. He also emphasized that Ziemba had not availed himself of legal avenues to secure his release, by appealing the Supreme Court decision and by applying for a writ of *hebeas corpus* pending a judicial review of the matter.

The Attorney General also indicated that there was little or no experience with similar cases in other Canadian provinces. Thus to clarify the issues involved, and partially to resolve the immediate crisis, the Cabinet was referring three questions to the Court of Appeal under The Constitutional Questions Act:

> 1. Is it open to a court in a criminal proceeding to refrain from compelling a member of the Legislative Assembly to disclose the existence, source or content of a communication made to him by an informant on the same basis as communications by informants to law enforcement officials have been held on occasion to be protected from disclosure in the public interest?
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> 2. If so, what principles and interests should the court consider in determining whether it is in the public interest to compel or to refrain from compelling such disclosure?
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> 3. Does the Legislative Assembly of Ontario have the power to enact legislation protecting its members from being compelled by a court, in a criminal case to disclose the existence, source or content of a communication from an informant?

The Attorney General concluded by stating: "The member for High Park-Swansea can end his jail sentence on Wednesday when he is returned to court, if he chooses to do so. If he chooses not to, counsel for the Crown will at that time invite the presiding provincial judge to consider that any continued incarceration of the member is a matter that ought to be left to be determined by the trial judge, who, of course, will have the advantage of the judgement of the Court of Appeal on the reference." In the event, this is precisely what happened; on July 3, the preliminary hearing was ended and Ziemba released.

The case was argued before the Court of Appeal in November, 1977. Mr. James Breithaupt, Liberal Member from Kitchener and Mr. Patrick Lawlor, N.D.P. Member for Lakeshore made submissions on behalf of their caucuses; submissions which varied markedly in tone and in direction. The highlights of these briefs are set out in the next section.

The decision of the Court of Appeal was released on January 24, 1978. In essence, the ruling was that MPP's have

no immunity from answering questions in criminal proceedings, and further that the Assembly has no jurisdiction to extend such a privilege to its Members. The decision is discussed more fully below.

The actual trial of Abko began in September, 1978. Again, Ed Ziemba was called upon to testify and to reveal his source. The trial judge ruled that Ziemba did not have to reveal his source, *but only* because the question was not relevant. Indeed he pointedly added "this ruling is in no way connected to the fact that you are a Member of the Legislature."

Separate trials were held for the individual defendants, so that during a second trial in late January of 1979, Ziemba was again imprisoned for refusing to answer questions about his source. This time, however, he was only held for a few hours, as the judge decided that the questions were not relevant to the case.

THE COURT OF APPEAL DECISION

The Court of Appeal decision is of singular importance in limiting Members' privileges and thus warrants close attention.* In his submission on behalf of the Ontario Liberal Party, Mr. Breithaupt concentrated on the existing scope of parliamentary privilege in current law, rather than on the normative issue of just what privileges members should have. He thus argued that no law in Ontario "protects politicians from revealing sources of information in criminal proceedings at trial." MPP's should not, according to Mr. Breithaupt, be concerned with what are properly police matters, save in the most exceptional cases. More generally, "the position of a member of the Legislative Assembly is not analogous to any of the exceptional situations where communications are privileged. It is a well established rule that a member of the Legislative Assembly is like an ordinary citizen when he is outside the Legislature."

Mr. Lawlor's brief adopted a diametrically opposed view, on the premise that within the Constitution, "the Legislature of Ontario is a sovereign parliament." Hence, MPP's are "absolutely privileged" and may not be compelled in any court proceedings to disclose the source or content of a constituent's communication." "It is not in the public interest so to require" contended Mr. Lawlor, and moreover, this would not be in accordance with the *lex et consuetudo Parliamenti* or with common or statute law. In sum, "the Members of the Legislative Assembly of Ontario, or any parliament, are by the current law and custom of parliaments, and by the exigencies of their office, in the performance of the responsibilities and duties, clothed with an unqualified privilege, while acting in good faith and in their capacity as official representatives of the people of Ontario."

Mr. David Watt argued the case for the Government of Ontario. Essentially his position was that there is no statute or common law basis for Members' refusal to reveal sources of information, and that communications between MPP's and informants do not meet the recognized standards for so-called "common law privilege" to apply. Mr. Edward Greenspan, appearing on behalf of the Canadian Civil Liberties Association put forward the view that, by virtue of their position, MPP's enjoy a qualified privilege before the courts, but that it is "subsumable by the greater interests of justice." The counsel for Abko also made a presentation which, not surprisingly, denied that parliamentary privilege shields MPP's from disclosing information.

Save Mr. Lawlor, all agreed that the Legislative Assembly is not empowered to extend its Members' privilege to refuse to divulge information in a criminal proceedings, since under the British North America Act, the rules of evidence in criminal matters are exclusively the jurisdiction of the Parliament of Canada.

Before dealing with the specifics of the decision, a word on its tenor. Throughout the judgement, there is no hint that Members of Parliament are in any way different in status from the general citizenry. The logic throughout is directed to the privileges which *any* witnesses before a court may properly claim. In the words of Mr. Justice Lacourcière, who wrote the majority decision, "the member function, for which he receives privilege, is to participate in the Legislative Assembly or in committees thereof; and to bring matters by way of petition, bill resolution, motion or otherwise. His major responsibility is in the field of legislation." Few Members, it may be surmised, would agree with this restricted interpretation. Indeed, Mr. Justice Weatherston dissented, observing:

> I do not think that a member of Parliament, or of the Legislative Assembly, is limited to a legislative function. It has long been a major part of his responsibilities to intercede on behalf of his constituents who claim to be oppressed by governmental bureaucracy, and to bring to the notice of the government cases where legislation is thought to be working unfairly. It must also be acknowledged now that members have assumed the responsibility of bringing alleged scandals in public administration to public attention. In all these cases the member may rely on information given to him in confidence. His effectiveness as a member may depend on confidences given and received, and the courts should respect those confidences unless the public interest clearly compels a breach of them.

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* *The full text of the decision may be found in 83 Dominion Law Reports (3rd) at p. 161.*

This passage was cited in the House of Commons, by former Prime Minister John Diefenbaker when, in February 1979, he raised the Court of Appeal judgement as going "a long way to emasculating parliament" and sought action by the federal Government on the issue.

The Court, of course, had been called upon to deliver its opinion on three specific questions of current law; it had not been asked to suggest what *ought* to be the scope of parliamentary privilege. Given on the one hand, the relatively clear provisions of Ontario's Legislative Assembly Act, the British North America Act and the accepted judicial precepts about witnesses, and, on the other hand, the rather abstruse principles of the *lex et conseutudo Parliamenti* and their uncertain application to provincial legislatures, it is perhaps not surprising that the Court found as it did. Nor, for precisely the same reasons, should the Court's failure to attach any special significance to the status of Member of Parliament occasion any great surprise.

The judgement begins with the observation that Ontario MPPs were not extended any "privileges immunities and powers" under the British North America Act. Thus in 1876, the Legislature enacted what has become The Legislative Assembly Act "to secure for its members the freedom to exercise their legislative functions". The Court's implicit presumption is that provincial legislators did not inherit from Westminster any of the traditional rights and privileges of parliament. The arguments are too complex to be rendered here in a succinct way, but suffice it to say that a reasonable constitutional argument can be made for the proposition that provincial parliaments are indeed the direct heirs of established British parliamentary privileges.

The Court then makes the key point that section 37 of the Legislative Assembly Act granted privilege only insofar as to allow Members to express their opinions without fear of an action for slander or libel. A common misconception of the Ziemba case was that it centred on the inside the Chamber/ outside the Chamber distinction and that had Ziemba not repeated his charges outside the House he would not have had any problems. Clearly, however, the issue of whether remarks were made inside or outside the House is of no moment to the Court in this case. In other words the privileges which Members believe apply to their statements in the House do not exist when the matter comes before a criminal court.

The judgement then cites section 52 of the Act, which lays claim to further, unspecified privileges, and turns to legal precedent to determine whether any common law basis exists for a member's refusal to answer questions in a criminal proceeding. This is done in the context of the fundamental judicial premise that all relevant evidence should be heard unless there is a very strong reason why it should not be.

A distinction is then drawn between the *privileges* of elected Members and the *discretion of the Court* not to compel a Member to disclose information. Kielley V. Carson, a leading pre-Confederation Privy Council decision, describing the common law limits to the powers of provincial legislatures, is then cited, and the following conclusion drawn: "members of the Legislative Assembly do not possess any statutory or common-law privilege founded on their status exempting them from the obligation to testify. They receive no special immunity in that respect."

A discussion follows of the bases of "common law" privilege, as it relates, for example, to communications between solicitor and client and between husband and wife. Reference is made in this context to the extension to law enforcement officers of so called crown privilege to refuse to identify informers, yet the point is made that this privilege is not absolute. Similarly, the judgement notes that judges generally use their discretion not to press questions asked of priests relating to confidential communications even though no legal basis for such privilege exists.

Members' private conversations are considered and are found not to satisfy the criteria for common law privilege; nor are any "public interest" reasons for refusing to reveal an informant's communications recognized. Instead the judgement raises, but does not pursue, possible political overtones of an informer going to a Member of Parliament rather than a police officer with evidence of wrongdoing.

In sum, the Court of Appeal finds no basis for a Member to refuse to answer a question in a criminal matter. This conclusion must be tempered with the earlier emphasis on the extreme remoteness of the source or content of an informant's communication with an MPP being adjudged relevant or admissible. Almost invariably,the judgement holds, questions enquiring into such matters would not be permitted as offending against the rule prohibiting heresay evidence. The fact that a Supreme Court Justice ordered Mr. Ziemba to answer the questions put to him at the preliminary hearing, suggest, however, that members cannot rely on the hope that questions they do not feel it proper to answer will be ruled inadmissable. The judgement on the first question concludes with the observation that the severity of the penalty imposed on an MPP for refusing to testify "is a matter of discretion, to be exercised judicially so that justice will be done to the prosecution as well as to the defence case." Given this opinion on question one, no opinion was required on the second question.

A dissenting opinion was registered by Mr. Justice Weatherston, supported by Mr. Justice Houlden. In their view, judges have discretion to refrain from compelling any witness from testifying. However, no clear rules are set forth on this general principle, and nothing said specifically relating to MPP's as witnesses. Since, as indicated above, Members of Parliament are not limited to a legislative role, a judge should consider very seriously an MPP's view that a confidence ought not to be disclosed, but in the end a judge can compell disclosure. Thus the main point on which Justices Weatherston and Houlden dissent is the judge's discretionary power; otherwise, they concur with the majority decision, agreeing

"that members of the Legislative Assembly do not possess any statutory or common law privilege founded on their status exempting them from their obligation to testify".

On question three, the decision, written by Mr. Justice Houlden, was unanimous. The reasoning is as follows: the British North America Act conferred upon the provinces the power to amend their own constitutions (save with respect to the Lieutenant-Governor), and an 1891 Privy Council decision affirmed that Members' privileges were an integral part of such constitutions. Therefore, the Assembly has the power to enact legislation protecting its Members from being compelled to disclose information but only in proceedings over which it has jurisdiction. By virtue of section 91 (27) of the British North America Act, procedure in criminal matters is the exclusive jurisdiction of the Parliament of Canada, so that provincial assemblies are not competent to legislate the extension of their Members' privileges to the rules of evidence in criminal proceedings.

IMPLICATIONS

To say the very least, the implications of the Ziemba case, and the issues it raises are very far-reaching. First and foremost, should parliamentarians have privilege to withold the content and source of confidential communications? Opinion is sharply divided on this question, even among Members. The Court's decision sets out lucidly the reasons why a Member should not enjoy such privilege; the counter argument was put forth eloquently by the *Globe and Mail,* which on February 20, 1979 saw the decision as:

> a finding which removes from the public a protection it has thought for many years that it had. Citizens have believed that they could confide in their members with safety for both of them; and it is essential that they have this safety. They would be greatly at risk without it. Much information which has disclosed wrongdoing has, for example, been given to members by civil servants, whose jobs would be jeopardized if members could be forced to disclose their identity. It is incredible that the communications between members and their constituents should be less protected, as the court says they are, than communications between police informants and policemen. The job of protecting this vital channel of communication moves to the Government and Parliament of Canada. They should act with all speed.

A subsidiary question, raised in the *Globe* editorial, is whether their position as elected representatives of the people does not entitle Members of Parliament to at least equal treatment with policeman, social workers and others who enjoy privilege not to reveal private communications in court. If Parliament is the supreme yet representative institution we like to think it is, then do not the responsibilities enjoined upon its Members carry with them certain concomitant privileges? The outcome of the Ziemba case should encourage Members and ordinary citizens to think very seriously about the duties a Member of Parliament performs, and what rights and privileges are required in the execution of those duties.

The dilemma is clear: no Member is above the law, or would wish to be, yet neither is any member of the public in the same position of trust and responsibility as a Member of Parliament. An equally important set of questions relates to the relative privileges enjoyed by Members of the Parliament of Canada and of Provincial Parliaments. Although their workloads may (or may not) differ, the essential nature of their positions would seem identical. On this point, Mr. Justice Steele commented that in his view, the privilege of a Member of the Ontario Legislature "is analogous to the privilege of a Member of Parliament". Now it is true that members of the House of Commons enjoy no special protection from being compelled to disclose confidential communications, but, unlike their provincial counterparts, they are in a position to extend such privileges to themselves. The constitutional division of powers creates substantially greater scope for MPs' privileges than for MPPs or MLAs. It must be wondered whether this was intended to be so, and further, whether subsequent developments in the status of provincial parliaments are consistent with the inferior privileges of provincial members. The question also arises as to what *other* privileges which provincial members have presumed that they enjoy, may rest on shaky constitutional grounds?

Along the same lines, what of the "undoubted rights and privileges" of Parliament? Are they not derived from Britain in unwritten form, in a fashion similar to our inheritance of the principles of responsible government, cabinet solidarity and the like? If so, how can Members lay claim to them so that they will be recognized in the Courts? The judgement suggested that if a provincial legislature were to enact "valid legislation" protecting its members from being compelled to disclose confidential information, the courts might construe this as a "reasonable excuse" for refusing to answer questions at a preliminary inquiry. This would seem, however, a rather tenuous basis for any reliable extension of parliamentary privilege.

In the wake of the Court of Appeal decision, it seems evident that only action by the federal Government can effectively remedy the lack of privilege which cost Ed Ziemba his freedom. Solicitor General Robert Kaplan introduced, as a backbencher, a bill to protect the confidentiality of elected representatives' communications with constituents but the bill never went past first reading. No government legislation has yet appeared as a follow-up to this initiative.

By way of conclusion, it is clear that the privileges enjoyed by Members of Parliament are unclear and that this is particularly so for Members of Provincial Parliaments. Unfortunately, it is likely also true that few Members are fully aware of the jeopardy they may face in situations which they believed they were covered by parliamentary privilege. Let us hope that no more Members have to spend a week in jail before the problem is appreciated and acted upon.