The Sub Judice Convention: What to Do When a Matter is 'Before the Courts'

by Graham Steele, MLA

The sub judice convention is a constraint imposed by Parliament on itself to ensure a reasonable balance between free speech for parliamentarians and fair trials for accused persons. In this article the author argues that the sub judice convention is commonly misunderstood. Many believe the rule is "you can't talk about any matter that is before the courts." This article argues that is too broad an interpretation. When used in this way, the sub judice convention has a tendency to suppress parliamentary debate, even when there is not the remotest possibility that the fairness of a trial will be impaired. The author gives a number of examples of the proper and improper use of the convention and calls for a more balanced approach to reconciling free speech and fair trials.

The convention in Commonwealth parliaments that some restriction needs to be placed on the discussion of matters that are "before the courts" is known as "the *sub judice* convention." The purpose of the convention is to balance freedom of speech in parliament and fair trials. Both are important values. Neither can be permitted entirely to trump the other. There are six principal reasons why parliament must not permit the *sub judice* convention to drift into an over-broad, automatic restriction on parliamentary debate.

First, parliamentary sovereignty must be assiduously protected. The rights of Westminster parliaments have been achieved over centuries. They should not lightly be given away. Parliaments must not defer automatically to any process.

Second, the purpose of parliamentary debate is different than the purpose of judicial proceedings. The purpose of a police investigation, for example, is to determine if criminal charges should be laid. If charges are laid, a conviction can be obtained only if there is proof beyond a reasonable doubt. If a conviction is obtained, punishment is imposed for transgressing social norms. Parliamentary processes are very different. They are concerned exclusively with public policy.

Third, there will be many situations where important issues are before parliament and the courts at the same time. Indeed, the passage of legislation by Parliament is often deliberately intended to influence the outcome of court cases.[1]

Fourth, legal processes can sometimes drag on for years, and can be inconclusive. Parliament should be loathe to adopt any rule that may have the effect of stifling debate for an indeterminate period.

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Fifth, there are usually less drastic measures that will permit debate to continue, while ensuring that a trial is not prejudiced.

Finally, it is difficult to find any reported instances where speech in parliament has demonstrably affected a judicial proceeding. We should perhaps be cautious about over-using the *sub judice* convention if the actual threat to judicial proceedings is so rare.

What the *sub judice* convention is not

A useful starting-point is to delineate what the *sub judice* convention is not. I can think of several reasons why a parliamentarian may want to decline comment about a case before the courts. In each case, the reason may be expressed as "The matter is before the courts, so I cannot comment..." Each is legitimate, but none must be permitted to shut down parliamentary debate.

Here are the some reasons, other than the *sub judice* convention, why a person may decline to comment:

There is the strategic limitation that parties to lawsuits impose upon themselves. A public statement may tip the party's hand about litigation strategy, evidence, settlement strategy or negotiations, or witnesses. Sometimes it is wiser to be silent. This is a strategic choice, imposed by parties upon themselves. It has no bearing on whether parliamentary debate should be allowed. It simply means that, if there is a debate, one side (usually the government) chooses not to participate in the debate.

There is the ethical obligation of lawyers to their clients. In Canada, this obligation is typically found in a self-governing law society's *Code of Ethics*. Lawyers are duty-bound not to make public statements without the consent of their client. This is a matter between a lawyer and the client. It has no bearing on whether parliamentary debate should be allowed.

There is the ethical obligation of lawyers to the courts. Again, this obligation is typically found in a law society's *Code of Ethics*. It was not too long ago that most lawyers would routinely decline any comment outside a courtroom. The idea was that lawyers owed it to the court to present their evidence and make their arguments in court. It was thought disrespectful, and beneath the dignity of the judicial process, for a lawyer to say anything to the media outside a courtroom. Over time, these ethical restrictions have been loosened. It is now common to see lawyers speaking to the media. However, they are still operating under an ethical obligation to be fair and accurate and respectful of the court. This restriction is an ethical obligation of lawyers to uphold respect for the administration of justice. It has no bearing on whether parliamentary debate should be allowed.

There is the parliamentary convention that no government minister can be compelled to answer a question. This parliamentary "right to remain silent" applies at all times and to all topics, regardless of whether a matter is "before the courts." It has no bearing on whether parliamentary debate should be allowed.

There is the practical limitation that other processes may be better suited than parliament to get the facts. It is quite common for a matter of public interest to be subject to a police investigation, a public inquiry, an internal inquiry, or an audit, or any combination of these things. My experience tells me that these processes are usually better at finding the facts than a parliamentary committee, although each has a different purpose, different tools, and different time-lines. Sometimes parliament may believe that its own inquiries and debates will be more effective if it waits for these other processes to finish, or at least to be well underway. But this is a counsel of caution. It has no bearing on whether parliamentary debate should be allowed.

There is the legal right against self-incrimination. Section 11(c) of the *Charter of Rights* says that "a person charged with an offence" has the right "not to be compelled to be a witness in proceedings against that person in respect of the offence." Section 13 says that "a witness" has the right not to have "any incriminating evidence so given used to incriminate that witness in any other proceedings." Neither of these is grounds for a person to refuse to speak in parliament (in the case of a member) or to parliament (in the case of a witness before a committee). Even without *Charter* protection, parliamentary immunity and parliamentary privilege ensure that anything said in parliament cannot be used in any other proceeding. The right against self-incrimination therefore has no bearing on whether parliamentary debate should be allowed.

There is protection of privacy legislation, which (among other things) prevents Cabinet ministers from discussing individual cases in public.

When parliamentarians are motivated by any of these reasons, they may appear to be invoking the *sub judice* convention, or may actually think they are doing so, saying "I cannot speak about a matter that is before the courts." But we must be careful not to let the ideas be confused. What the member may really be saying is "I do not wish to speak about this matter." That is a different thing entirely.

What is the Convention

Any discussion of the *sub judice* convention in Canada has to start with the first report of the House of Commons

Special Committee on the Rights and Immunities of Members in 1977.[2] Thirty years later, it is still the best and most thoughtful Canadian examination of the topic.

Most of the Special Committee report is taken up with a close examination of the precedents. The Special Committee's substantive findings are in paragraphs 21-24. They can be summarized as follows:

- The justification for the convention has not been established beyond all doubt. The House should not be unduly fettered by a convention the basis of which is uncertain. (Paragraph 22)
- The only possible rationale for the *sub judice* convention is prevention of prejudice to a judicial proceeding. (Paragraph 21)
- Judges are highly unlikely to be swayed by what is said in Parliament. The convention is therefore concerned with the protection of juries and witnesses from undue influences. (Paragraph 21)
- Prejudice is most likely to occur in criminal cases and civil cases of defamation where juries are involved. (Paragraph 24)
- The convention is definitely not a rule. (Paragraph 22)
- Parliament should not be any more limited in its debates concerning judicial proceedings than is the press in reporting such proceedings. (Paragraph 22)
- All members should be expected to exercise discretion in cases where there might be prejudice to a judicial proceeding. During Question Period, the Speaker's role should be minimal, and the responsibility to show restraint should principally rest on the member asking the question and the minister answering it. (Paragraph 23)
- It would be unwise to attempt to define precise rules about how the convention should be applied. (Paragraph 24)
- The Speaker should remain the final arbiter, but he should only exercise his discretion in exceptional cases where it is clear to him that to do otherwise could be harmful to specific individuals. (Paragraph 24)
- Where there is doubt in the mind of the Chair, a presumption should exist in favour of allowing debate and against the application of the convention. (Paragraph 24)

In my view, the Special Committee's recommendations are, thirty years later, still wise and useful. They should continue to form the basis for any application of the *sub judice* convention in Canada.

At least one Canadian parliament has attempted to codify the *sub judice* convention in its Standing Orders. In Ontario, Standing Order 23(g) reads as follows:

In debate, a member shall be called to order by the Speaker if he or she:

> (g) Refers to any matter that is the subject of a proceeding
>
> (i) that is pending in a court or before a judge for judicial determination, or
>
> (ii) that is before any quasi-judicial body constituted by the House or by or under the authority of an Act of the Legislature,
>
> Where it is shown to the satisfaction of the Speaker that further reference would create a real and substantial danger of prejudice to the proceeding.

Regardless of whether *sub judice* is an unwritten convention or codified in the Standing Orders, a parliamentary presiding officer who adopts the Special Committee's principles is still left to ponder when, exactly, there is a clear risk of prejudice to a judicial proceeding. Often, this judgment has to be made without notice and in the heat of debate. In these circumstances, there is a natural tendency to "play it safe" and rule the question or comment out of order. Better safe than sorry, right?

Maybe not. "Playing it safe" means that the balance between free parliamentary speech and fair trials is unfairly tilted in one direction. This is contrary to the advice of the Special Committee, which recommended that doubtful cases be resolved in favour of free speech. It is also unnecessary, because there is good, practical guidance available – the law on contempt of court.

Parliamentary Immunity and Contempt of Court

Surely, the best judges of when a judicial proceeding might be prejudiced are judges themselves. And the principal tool used by judges themselves to prevent prejudice and ensure the fairness of trials is "contempt of court." There is a substantial body of law dealing with contempt of court. It is there that parliamentary presiding officers can look for guidance.

Before getting into the detail of contempt of court, I should deal with the obvious objection: Why should parliamentarians pay any attention to contempt of court? Are not parliamentarians absolutely immune from any criminal or civil proceedings, including contempt of court, arising from their speeches in parliament?

In fact a parliamentarian has no immunity from arrest for a criminal contempt or for any crime; however, this does not mean that there can be contempt, criminal or otherwise, for words spoken in parliament.

Joseph Maingot has the following passages in the chapter "Privilege of Freedom of Speech":

> In 1858, while dealing with a controverted election matter in Lower Canada, Badgley J. observed that the sitting Member, Bellingham (who had in a written document made charges of personal corruption against the judge) "should have restricted his abuse to the floor of Parliament or of the Committee Room."

While dealing with a matter of contempt of court, the Superior Court of Quebec confirmed that whatever is said in debate is protected by parliamentary immunity and cannot be made the subject matter of any proceedings before the courts.[3]

This latter passage is about a case where a federal Cabinet minister harshly criticized a judge, after the minister's department lost a prosecution under the *Combines Investigation Act*. The minister was found in contempt of court for his remarks. The remarks were made to the press in the House of Commons lobby adjacent to the chamber. The judge stated as follows:

> ... it is common ground that anything spoken in the Chamber of the House of Commons itself cannot be made the subject-matter of any proceedings before the Courts. …Bearing in mind that the absolute privilege attaches only to a "proceeding in Parliament", it would seem to me almost self-evident on the authorities that I have quoted above that it would not extend to declarations made to members of the press in answer to questions, in a place used for the purpose and physically removed from the floor of the House.[4]

The decision was confirmed by the Quebec Court of Appeal.[5]

The central argument of this paper is that if the courts cannot reach into parliament to protect the fairness of a trial, then the *sub judice* convention should be applied when comments in parliament would be subject to proceedings for contempt if those comments had been made outside the chamber.

> ***The sub judice convention becomes a principled parliamentary courtesy to the courts. In other words, it is a parliamentary counterpart to contempt of court, but interpreted and applied by parliamentarians.***

Contempt of Court

"Contempt of court" is part of the court's inherent jurisdiction to manage its own proceedings. Anyone whose behaviour, inside or outside a courtroom, threatens the fairness of a trial runs the risk of being punished for contempt. A person found in contempt can be fined or even jailed.

"Contempt of court" is the only common-law crime in Canada. That means it is not codified in the *Criminal Code*, and its scope is determined solely by reference to past usage and present needs. It is administered directly by the court, rather than through the police and prosecutors. The common-law character of contempt adds a layer of uncertainty to the question of what, exactly, constitutes contempt.

An added difficulty for parliamentarians is that there are very few precedents dealing with contempt proceedings against parliamentarians, or even of cases where a judge has expressed concern about parliamentary comments. For guidance, we need to look elsewhere.

Fortunately, the 1977 Special Committee has offered a useful and interesting analogy for us to follow:

> ...On no account should the convention, which has been applied infrequently in years past, come to be regarded as a fixed and binding rule. It is not reasonable, for example, that Parliament should be any more limited in its debates concerning judicial proceedings than is the press in reporting such proceedings.

Like the Special Committee, I believe we have much to learn from journalists on the question of *sub judice*. Journalists face the same *sub judice* questions as parliamentarians, but much more often, since they are writing and broadcasting daily about court proceedings. The sheer volume means that there are many more examples of contempt proceedings against journalists and media outlets. The more precedents we have, the more guidance we have.

The question of the constraints under which journalists are working has been dealt with thoroughly and articulately in a recent book by Professor Dean Jobb.[6]

Although it is impossible to lay down a complete list of rules about contempt of court, because of its unique common-law nature, some general principles can be taken from the precedents:

- The courts' power to punish for contempt is designed "to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."
- Contempt can take a number of forms, including creating prejudice to one of the parties (usually the defendant in a criminal proceeding), causing undue delay or expense, or creating an appearance of substantial unfairness.
- To be contemptuous, a publication must "present a real risk, as opposed to a mere possibility of interference with the administration of justice." In the words of Britain's House of Lords, "the prejudice must be more than trifling or trivial but less than a certainty." In the same vein, a publication ban may be imposed only when the information poses a "real and substantial risk" to a fair trial, and judges must limit the scope of the ban to ensure that the public receives as much information about the case as possible.
- Because contempt is a common-law crime, each jurisdiction will have its own standards. Thus certain actions might be found contemptuous in Alberta, but not in Ontario; and in Ontario, but not in Nova Scotia.

- When considering whether there has been a contempt, all of the surrounding circumstances must be considered.
- One of the very important factors is timing: the closer a trial, or selection of a jury, the more likely there is to be prejudice. If a trial is years or even months away, there is no realistic chance of prejudice. If the trial is underway, prejudice is more likely.
- Other factors relevant to contempt are whether there will be a jury, how the information is presented (is it "sensationalized" or "balanced"), and what the issues are at trial.
- Some "grey areas" for reporters include imputing guilt to an accused person, attacking an accused person's character, reporting on previous convictions, reporting that there has been a confession, and showing pictures of an accused if identification is an issue. The common thread is that jurors, or potential jurors, may be exposed to information that is inadmissible in court. And this kind of information is inadmissible in court precisely because it is unfairly prejudicial.
- Violating a publication ban, or identifying a witness or accused whose identity is protected, is contemptuous.

These, then, are the restrictions under which journalists operate. They are, in fact, the very same restrictions under which parliamentarians operate when speaking outside the parliamentary chamber. But what about inside the chamber?

Some "Red Flags" for Presiding Officers

The law of contempt that applies to journalists is broadly applicable to the parliamentary chamber, with a couple of cautions.

No-one expects presiding officers to apply the law of contempt with precision. The parliamentary chamber is not a courtroom, and presiding officers and table officers do not have to be lawyers. The law of contempt, like any other common-law concept, is always evolving. Nevertheless, the broad outlines of the law on contempt are reasonably clear, and is no more difficult to apply than the parliamentary law that presiding officers and table officers apply every sitting day.

There is also the frank reality that parliamentary comments do not, in themselves, receive wide publicity. Few people attend parliamentary sessions; Hansard does not have the readership of the local daily newspaper; and even a live parliamentary TV broadcast does not have the viewership of the supper-hour newscast or *Canadian Idol*. To have an impact on a jury pool, parliamentary comments would have to be reported through the mass media. But media outlets are already filtering parliamentary comments through the law of contempt. They will not report anything a politician says that might be contemptuous, because then they would themselves be liable to a citation for contempt. So the situations where a speech in parliament might pose a real and substantial risk of prejudice dwindles to those rare cases where the parliamentarian might say something that is prejudicial if anyone knows it, such as the identity of an accused or victim whose identity is subject to a publication ban.

With these cautions, we are now ready to list the "red flags" for which a parliamentary presiding officer might look. In none of these cases should it be automatic that the member is ruled out of order. These "red flags" are merely signs that the risk is increasing. Nor should the list be considered exhaustive. In any given case, all of the circumstances must be considered.

The "red flags" include:

- A trial is imminent, or underway, and it involves a jury. Timing is perhaps the most critical factor when considering prejudice.
- The member remarks on the personal characteristics of a judge who is hearing a case, or on the judge's handling of a specific case that is not concluded.
- The member attributes guilt to a named criminal defendant whose trial has not concluded, or comments on the character (including citing previous convictions) of a person who is being tried.
- The member advocates a particular result in a specific case, which has not yet been concluded.
- The member starts to reveal information that is not in the public domain, such as information subject to a public ban, or information about a closed hearing, or the identity of a suspect who has not been charged.
- The member starts to make remarks that could be construed as intimidating to witnesses or potential witnesses.
- The member refers to a judicial proceeding in which that member, or some other member, is personally involved.

"Green flags" for presiding officers

There are other situations where there is, realistically, little or no risk of prejudice to a judicial proceeding. I will call these "green flags," because members should normally be permitted to proceed. But, as with "red flags," in none of these cases should it be assumed that the *sub judice* convention cannot apply. These "green flags" are merely signs that the risk of prejudice is minimal. Nor should the list be considered exhaustive. In any given case, all of the circumstances must be considered.

The Investigation Stage: It is sometimes suggested that parliament should not deal with matters that are the subject of a police investigation. (This must, of course, be carefully distinguished from the common procedure of the police not to comment on their investigations, on the

grounds that the investigation may be compromised by premature public disclosures. This police procedure is not itself a reason to curtail debate in parliament).

While that may be a wise counsel of caution, applying the *sub judice* convention at the investigatory stage will almost always be unwarranted. (This must, of course, be carefully distinguished from the right of Ministers of the Crown to refuse, in parliament, to confirm or deny whether an investigation is underway, or to confirm or deny that a particular person is being investigated. A government policy of non-comment is sound public policy, but it is not in itself a reason to curtail debate in parliament).

The fundamental reason is that there is, by definition, no judicial proceeding, and there may never be. The only judicial involvement is peripheral, such as approving an application for a search warrant. There cannot be a "real and substantial risk" of prejudice to a judicial proceeding if there is not, in fact, a judicial proceeding.

Police investigations, in themselves, may be an important public-policy issue. The fact that an investigation is being undertaken (or not), or that a particular person is being investigated (or not), can surely be a subject of legitimate comment in parliament. No person involved in judicial proceedings, whether it is the judge, prosecutor, sheriff, police, or otherwise, can be held to be above comment or criticism.

There are a number of other reasons why parliamentarians should be loathe to cede their right to free expression because of a police investigation:

- We should probably have more faith in our police than to suggest that they could be diverted from their task by comments in Parliament. Like judges and prosecutors, Canadian police forces can justifiably be thought to be made of "sterner stuff."
- Investigations can take years. Parliament should be loathe to curtail debate for an indefinite period.
- An investigation will not necessarily result in charges.
- The police will not always confirm that an investigation is underway. Parliament should be loathe to curtail debate based on mere speculation about whether an investigation might be underway.

Nevertheless, it is possible to imagine cases where parliamentary comment can be shown to pose a real risk of prejudice to an investigation. In an extreme case, perhaps a parliamentarian would want to take advantage of parliamentary immunity to reveal something that would be criminal or contemptuous if revealed outside parliament, such as the contents of a sealed application for a search warrant, or the existence or identity of an undercover investigator or confidential informant. It is scarcely imaginable why a parliamentarian would want to do such a thing, or how it could be relevant to a public-policy debate. No media outlet would print or broadcast such a revelation, because publication would leave the media outlet open to sanctions. But it could happen, and it would be the right time to invoke the *sub judice* convention, or something analogous to it.

The Civil Justice System: A "civil" court is essentially any non-criminal court. Typically a civil court adjudicates disputes between private parties.

For purposes of the *sub judice* convention, there are three major differences between criminal cases and civil cases. All of these differences will tend to diminish any possible need to invoke the *sub judice* convention in civil cases.

First, in Canada the vast majority of civil trials are non-jury. We can therefore leave aside any question of tainting jury pools or juries.

In some provinces a trial for libel or slander will be in front of a jury, unless the parties agree otherwise. This makes sense, because the essence of a defamation suit is the effect on the public of the allegedly defamatory statements. The problem lies in the fact that defamation suits may be used precisely to stifle public discussion of certain projects. This is the phenomenon widely known as a "SLAPP-suit" (strategic lawsuit against public participation).

> ***Parliamentarians ought to be careful not to stifle their own debate, where part of the plaintiff's purpose in filing the suit is to do precisely that.***

The second major difference between criminal and civil cases is that the vast majority of civil cases never go to trial. Whereas only a tiny fraction of criminal cases result in withdrawn charges, any civil litigator will confirm that at least 90% of lawsuits, and probably more like 95%-98%, are settled or abandoned before trial.

Third, there is often a passage of years between the filing of a suit and a trial, or between the filing of a suit and its withdrawal or dismissal. Unlike criminal cases, there is no constitutional guarantee of a right to a speedy civil trial. Parliament should be loathe to curtail debate on an issue that may not come to trial for years, if it ever comes to trial at all.

For these reasons, one should expect the *sub judice* convention to be invoked much more rarely in civil cases than criminal cases. Even in the exceptionally rare cases where there will be a civil jury, prejudice need not be seriously considered (just like in criminal trials) until the trial is imminent or underway. A typical "trigger" is when the case is "set down for trial." This is the point at

which the plaintiff formally signals readiness for trial. Setting a matter down for trial makes it more likely, though still far from certain, that a trial will actually be held.

Royal Commissions and Public Inquiries There has been some discussion among the authorities about whether the *sub judice* convention applies to Royal Commissions and other forms of public inquiries.

Although older authorities appear divided, the modern consensus appears to be that the *sub judice* convention does, in principle, apply to commissions and inquiries. The key question is whether the parliamentary speech poses a real and substantial risk of prejudice to the commission or inquiry. That is the same test applied to proceedings in the regular courts.

We should nevertheless expect that the *sub judice* convention would be applied only rarely to commissions and inquiries. The main reason is that public inquiries are just that – inquiries. They are not judicial proceedings in which criminal guilt or civil liability is in issue. Their objectives are different than the courts. Furthermore, public inquiries, by their very nature, have a public-interest element. One would not wish to exclude from parliamentary debate, perhaps for years, a public-policy issue that is important enough to warrant a public inquiry in the first place. Moreover, the principal concern of the criminal and civil justice systems, which is the protection of juries from undue influence, is entirely absent from public inquiries.

There may be situations where there is reason to fear the intimidation of witnesses, or the revealing of information that the inquiry commissioner has heard in camera or banned from publication. As always, the most principled approach is to reason by analogy to contempt of court, with due regard being had to the differences between a regular court and a public inquiry, such as the absence of a jury.

The Speaker of the U.K. House of Commons has attempted to distinguish between royal commissions which are concerned with the conduct of particular persons, and royal commissions dealing with "broader issues of national importance." The *sub judice* convention would be applied to the former, but not the latter. I am not persuaded that this distinction is useful, since public inquiries do not typically fall neatly on one side or the other. A recent public inquiry in Nova Scotia, for example, arose from a fatal motor vehicle collision involving a young offender who should have been in custody. The inquiry report included both a close examination of the facts of the particular case, and broader recommendations about dealing with youth at risk. On which side of the *sub judice* line would this inquiry fall? It is really impossible to say, and pointless to try.

Appeals: There is some authority, principally in the United Kingdom, for the proposition that the *sub judice* convention applies to the appeal stage of judicial proceedings. The 1977 Special Committee of our House of Commons did not address the issue directly.

In keeping with the analysis I have been developing, the *sub judice* convention should not apply to appeals, for two reasons.

First, appeals never involve juries, or witnesses, or new evidence. Appeals are always heard by judges only. Indeed, Courts of Appeal are generally made up of the best, most experienced judges. In the entire judicial system, appeal judges are arguably the people least likely to be influenced by parliamentary comments. So where, exactly, is the "real and substantial risk of prejudice" that is supposed to form the basis for invocation of the *sub judice* convention? I cannot see it.

Second, appeals can sometimes go on for years, especially if a case goes to the Court of Appeal or even to the Supreme Court of Canada. One must wonder whether the right balance has been struck, if parliament restricts itself for a period of years from talking about a particular topic.

It seems to me much more sensible to end the use of the *sub judice* convention at the point where the evidence-giving phase of the trial has been completed, or where there is a jury, at the point where the jury is discharged. In the rare cases where an appeal is successful and a new trial is ordered, application of the *sub judice* convention can resume, following the same principles as before.

"Grey flags" for Presiding Officers

The administrative justice system is a grey area. It is a vast array of agencies, boards, commissions and tribunals that have the power to receive evidence and render decisions affecting citizens' rights and liabilities. Because of the vast number of these decision-making bodies, it is simply impossible to state any general rules that could sensibly apply to all of them. Some tribunals are very close to courts in their structure, process and powers. Others are regulatory or advisory, paid or unpaid, formal or informal, trained or untrained, staffed or unstaffed.

It is simply not clear how, if at all, the *sub judice* convention might apply to the administrative justice process. No tribunal shares the superior courts' inherent jurisdiction to punish for contempt. Therefore treating the *sub judice* convention as a parliamentary extension of the contempt

jurisdiction, for which I have argued in this paper, immediately breaks down.

Some commentators have attempted to deal with the issue by drawing a distinction between those tribunals which are a "court of record," and those which are not. The sub judice convention would apply to a "court of record." The difficulty here is that "court of record" is a vague and old-fashioned term. One cannot look at a given tribunal and know whether it is, or is not, a "court of record." This distinction is not helpful.

Ontario Standing Order 23(g) attempts to draw the same kind of distinction. It applies to "quasi-judicial" tribunals. The same criticism can be offered: The term "quasi-judicial" is not precise, and is now rather old-fashioned. It will not always be obvious whether a given tribunal is "quasi-judicial." The most we can say is that the closer a tribunal is to looking like and acting like a court, the more likely it is to be "quasi-judicial."

Despite these difficulties of application in a given case, it seems clear on the authorities that the *sub judice* convention should apply to administrative tribunals, because they are part of the justice system.

Indeed, I would argue that the threat of prejudice may be greater in the case of an administrative justice proceeding than in a criminal or civil trial. That is because the independence of judges (in criminal and civil trials) is constitutionally protected, and reinforced by salary, tenure and working conditions that practically guarantee insulation from worldly cares. They also have powerful procedural tools, and the power to punish for contempt.

Tribunal members, in contrast, typically have much shorter terms of office, much lower pay, and no power to punish or even reprimand anyone who is not a party before them. They are appointed by the government, and may be beholden to the government for their re-appointment, funding, and working conditions. If anyone is going to be influenced by captious comments in parliament, it is more likely to be at the tribunal level than in the courts.

On the other hand, there is a vast number of administrative proceedings at any given time, and over-broad application of the *sub judice* convention would render whole areas of public policy beyond parliamentary debate.

We must also bear in mind that most administrative proceedings, and parliamentary comments about them, will receive no publicity at all; that almost all administrative proceedings have a public-interest component that renders them a legitimate topic of interest to parliamentarians; that what is at stake is not usually as great as in a criminal trial; and that there is no administrative equivalent to the jury, the protection of which from unfair influence is a key focus of the *sub judice* convention.

Procedural Options for Presiding Officers

A presiding officer who sees one of the "red flags" has a number of procedural options that may satisfactorily contain the risk, without having to resort to the drastic remedy of ruling a member out of order.

Certainly a presiding officer will want to start by cautioning the member, since we can safely presume that no member wishes deliberately to prejudice a judicial proceeding. Once alerted to the risk, most members will gladly take the opportunity to re-think or re-phrase their approach to the issue.

Other procedural options, depending on the circumstances, might include excusing a witness from answering a question or going in camera (in the case of a committee), or calling for a brief recess in order to have an informal discussion with the member about his or her intentions. Depending on the nature of the debate, a presiding officer might also inquire of the member whether he or she is willing to defer further discussion of the issue in order to give the presiding officer sufficient time to get the facts about a particular judicial proceeding.

If a presiding officer hears something that he or she believes poses a real and substantial risk of prejudice, but has not been able to stop the member in time, there may be an option of striking the comment from *Hansard*, so there is at least no permanent written record of the prejudicial remark.

In order to strike the right balance between free parliamentary speech and fair trials, it is reasonable to expect that ruling a member out of order, curtailing all debate, will be the last resort.

Two Recent Examples of *sub judice* in Action

Let us now take the principles and guidance and apply them to two cases, one in Ontario and one in Nova Scotia where the *sub judice* convention was invoked.

In 2006, an Ontario MPP made comments outside the legislature voicing his very strong opposition to the possibility that a plea-bargain in a specific criminal case might include a restitution order (that is, the payment of money by the defendants to the victim). The member's essential point, as I understand it, was that a criminal defendant with money should not be able to "buy" a lesser sentence by paying the victim. The member certainly supported compensation to the victim through other processes, such as criminal injuries compensation.

A complaint was then made under the *Members' Integrity Act*. The complaint was that the member had violated

the *sub judice* convention, and thereby fell afoul of the *Members' Integrity Act*. The complaint was upheld by the Integrity Commissioner in his report dated October 25, 2006, although he recommended that no penalty be imposed. This recommendation was endorsed by a majority vote in the legislature.

I confess to being utterly perplexed by the Integrity Commissioner's ruling, for a number of reasons:

- The MPP's comments were made outside the legislature, so by definition the sub judice convention cannot apply. The Standing Orders, on their own terms, apply only to what happens inside the legislature. How can an MPP violate the Standing Orders if he or she is speaking outside the legislature?
- The Integrity Commissioner's report appears to misquote the Standing Order, which requires not only a finding that there is a judicial proceeding, but also a finding that there is "real and substantial danger of prejudice to the proceeding." The Integrity Commissioner addressed only whether there was an ongoing judicial proceeding (there was). He did not address, at all, how the MPP's remarks posed a "real and substantial danger of prejudice" in the particular case.
- The Integrity Commissioner notes that the MPP's comments did not, in fact, have any impact on the plea bargaining process or the sentence imposed by the judge. I suspect most prosecutors would deny absolutely that their judgment could be swayed by other than professional considerations. A prosecutor's conduct is governed by well-established case-law, departmental policy, and professional standards. In some provinces, the prosecution service is formally independent of government.
- As the Integrity Commissioner notes, the plea bargain was carried on between the Crown prosecutor and defence counsel, under the supervision of an experienced judge. If the judge had any fear for the fairness of the proceeding, he could have cited the MPP for contempt. The complaint under the *Members' Integrity Act* came from another MPP (as required under the Act), apparently acting at the request of the victim and her counsel.

It may be that the victim in this particular case had the right to be unhappy with, even outraged by the MPP's comments. Some might even judge the MPP's comments to have been ill-conceived, given that the possibility of a restitution order is provided for in the *Criminal Code*, and that restitution orders are not all that unusual. Nevertheless, applying the sub judice convention in these circumstances effectively suppresses all discussion, even outside parliament, of criminal plea bargains, which are a legitimate subject of public-policy debate. Respectfully, I suggest this to be an unwarranted extension of the sub judice convention.

The Nova Scotia case involved a controversial quarry development in Digby County, Nova Scotia, that was a factor in the election of a new MLA in the August 2003 general election. The new MLA opposed the quarry.

In October 2003, the developer filed two defamation suits, naming a citizen, the local newspaper, the newspaper's owner, and a reporter as defendants. The paper had run a story which quoted the citizen alleging certain wrongdoing by the company.

The new MLA rose in the House on October 22, 2003, during Question Period, to ask the Premier what he intended to do to protect Digby citizens' right of free speech. The Speaker ruled the question out of order on the grounds that it was on a matter before the courts.

At the end of Question Period, the MLA's House Leader raised a point of order, asking the Speaker to rule whether the sub judice convention applies to civil cases. The following day, the Speaker read a formal ruling. He found that the sub judice convention can apply to both criminal and civil proceedings. He noted that defamation suits in Nova Scotia are heard by a jury. Consequently, he ruled that he had correctly found the question to be out of order.[8]

Respectfully, I would suggest there were several problems with this ruling. According to the 1977 Special Committee report, which the Speaker cited in his ruling, the *sub judice* convention should apply only in exceptional cases, where the risk of prejudice is clear. Moreover, the Special Committee recommended that the convention should almost never be invoked during Question Period. Finally, the Special Committee recommended that the burden of establishing prejudice should rest on the person seeking to restrict debate. In this case, the Speaker himself invoked the *sub judice* convention, without any objection (at least, on the record) having been made from the government benches.

The Speaker's ruling relied heavily on the fact that defamation trials are, in Nova Scotia, heard by a jury. What the Speaker's ruling did not take into account was that the lawsuit had been filed only days before, and therefore the selection of a jury was years away, if indeed the matter ever came to trial at all.

With the benefit of hindsight, we now know that the plaintiff took no further action to advance its case. The lawsuits were formally discontinued, one in late 2005 and the other in early 2006. That is usually a sign that the parties have reached a settlement. The cases will never come to trial.

Practical Guidance for Members: Restraint

I would be remiss to conclude this paper without pointing out the most practical guidance of all: that is, that almost all *sub judice* issues can be resolved if parlia-

mentarians show some restraint in their approach to judicial proceedings.

Parliamentarians need to show restraint because the damage can be done before a presiding officer can intervene.

Parliamentarians must also remind themselves that anything that might be contemptuous, if said outside parliament, is unlikely to be a constructive contribution to debate, if said inside parliament.

The most likely scenario is that a parliamentarian will, in the heat of the moment, accidentally stray into "red flag" areas. In these cases, where the trespass is truly accidental, a word of caution from the presiding officer should be sufficient to encourage the member to re-think or re-phrase the thought in a more acceptable way.

In cases where the trespass is not accidental, the member would be well advised to let the presiding officer know in advance that the reference to a judicial proceeding will be made. This affords the presiding officer an important courtesy, which is time to gather the facts so that the presiding officer is in a good position to judge whether there is a "real and substantial risk of prejudice" to the judicial proceeding.

A presiding officer may have some procedural options if a *sub judice* case arises without notice. The presiding officer may (especially in committee) have other procedural options, such as moving in camera, taking a brief recess to make informal inquiries of the member, or excusing a witness from answering a question.

If the member persists, and the presiding officer is persuaded that the statement might be in contempt of court if stated outside the chamber, the presiding officer may then invoke the sub judice convention, and rule the member out of order.

But if presiding officers have a realistic idea of what behaviour constitutes contempt, and if members exercise a modicum of restraint, invocation of the sub judice convention should be very rare indeed.

Notes

1. See Marleau and Montpetit, *House of Commons Procedure and Practice,*(Ottawa: House of Commons, p. 104.
2. See Canada, House of Commons *Journals*, April 29, 1977, pp. 720-729. This report followed a fine article by Phillip Laundy, "The Sub Judice Convention in the Canadian House of Commons," *The Parliamentarian*, Vol. 57, No. 3 (July 1976), which noted that no attempt had hitherto been made to codify the practice around *sub judice*.
3. See Joseph Maingot, *The Law of Privilege* (2nd Edition) pp 29 – 31.
4. *Re Ouellet (No. 1)* (1976), 67 D.L.R. (3d) 73 (Que.S.C.). pp. 85 – 87.
5. *Re Ouellet (Nos. 1 and 2)* (1976), 72 D.L.R. (3d) 95 (Que.C.A.).
6. Most of the following section on the law of contempt is my paraphrase of Jobb's chapter 5, "Contempt of Court." Mr. Jobb is a former journalist, and currently a professor in the journalism department at the University of King's College, Halifax.
7. See "Application of the Sub Judice Convention," in *The Table*, Volume 64 (1996) at p. 92, recording a ruling of the Speaker of the U.K. House of Commons on June 27, 1994.
8. Nova Scotia House of Assembly, *Hansard*, October 22, 2003, pp. 1480-1481 (question) and pp. 1501-1502 (point of order); and October 23, 2003, pp. 1571-1572 (Speaker's ruling).