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FACULTY OF LAW

PARLIAMENTARY PRIVILEGE AND THE CHARTER

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**DONALD LAWRENCE MUNN
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Parliamentary Privilege and the Charter

Introduction

A privilege in law is an advantage enjoyed by one person or group of persons not enjoyed by others. Parliamentary privileges are those special advantages enjoyed by members of legislative bodies not enjoyed by the general population. Privileges are necessary for the efficient and effective functioning of a legislative body and it is understood by both legislators and the electorate that these privileges should be exercised moderately and within reason.

Canadian parliamentary privilege finds its origins in the struggles waged over the centuries between the British monarch and Parliament. The enactment of the *Bill of Rights, 1689*¹ finally guaranteed the supremacy of Parliament. However, a struggle with the courts ensued since third parties turned to the courts for redress when the House of Commons or the House of Lords allegedly exceeded their powers. What evolved was a compromise whereby the Houses of Parliament allowed that the courts could determine the existence and extent of a privilege and the courts refused to inquire into the internal proceedings of these legislative bodies.

This compromise requires reconsideration. The twentieth century has seen the development of individual rights and, in Canada, the introduction of the

*Canadian Charter of Rights and Freedoms*² in 1982. Whereas the overriding philosophy in the nineteenth century was the supremacy of Parliament, a primary concern at the end of the twentieth century is limitations on governmental powers. Government must not intrude unnecessarily into the private sphere. The law of parliamentary privilege must be considered within this new context.

A key question that must be decided, ultimately by the Supreme Court of Canada, is whether the Charter applies to the privileges enjoyed and exercised by Canadian legislative bodies. A careful reading of the Charter, in light of the overall structure of the Constitution, suggests that these privileges are indeed subject to the Charter. If this is true then courts are faced with the task of ensuring that the rights and freedoms guaranteed by the Charter are not infringed, while at the time ensuring that the privileges enjoyed by Canadian legislative bodies are not unnecessarily interfered with. Individuals must be ensured of their rights, but it is also necessary to ensure that Canadian legislatures continue to function efficiently and effectively.

This paper will consider whether the Charter applies to the privileges enjoyed by Canadian legislative bodies, the consequences if it does apply and whether courts can continue to refuse to inquire into internal proceedings.

² Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K., 1982, c. 11 [hereinafter "the Charter"]).

The first chapter focuses on what privileges exist, their origin and their sources in Canadian law, and the approach the courts have traditionally taken when faced with matters involving a question of privilege. The second chapter focuses on the arguments that the Charter applies to legislative bodies and the exercise of their privileges. The third chapter examines whether the distinction between internal proceedings and matters involving rights exercisable apart from a legislative body can be maintained in light of the Charter and considers possible situations where the Charter may apply.

Chapter 1

Defining Parliamentary Privilege

Part 1 - Definition

The classic definition of "parliamentary privilege" is found in *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*:

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the ordinary law.¹

Thus, members of a legislative body enjoy certain rights and immunities to which their fellow citizens are not entitled. Possession of these privileges carries with it the right to punish for any breach. May has stated:

When any of these rights and immunities is disregarded or attacked, the offence is called a breach of privilege, and is punishable under the law of Parliament.²

The right to punish goes one step further, however. May continued:

¹ 21st ed., C.J. Boulton, ed. (London: Butterworths, 1989) at 69.

² *Ibid.*

Each House also claims the right to punish actions which, while not breaches of any specific privilege, obstruct or impede it in the performance of its functions, or are offences against its authority or dignity, such as disobedience of its legitimate commands or libels upon itself, its Members or its officers.³

A more workable definition of parliamentary privilege encompasses the rights enjoyed by persons, both members and non-members, taking part in legislative proceedings, the rights enjoyed by the House collectively and the power to punish. Maingot has provided the following "general definition":

Parliamentary privilege, which is an important part of the law and custom of Parliament, is part of the general and public law of Canada.

Parliamentary privilege is the necessary immunity that the law provides for members of Parliament, and for members of the legislatures of each of the provinces and two territories, in order for these legislators to do their legislative work. It is also the necessary immunity that the law provides for anyone while taking part in a proceeding in Parliament or in a legislature. Finally, it is the authority and power of each House of Parliament and each legislature to enforce that immunity.⁴

Certain privileges are enjoyed by individual members and others by a legislative body as a whole. Those enjoyed by individual members are freedom of

³ *Ibid.*

⁴ J. Maingot, *Parliamentary Privilege in Canada* (Toronto: Butterworths, 1982) at 12.

speech, freedom from arrest in civil process, exemptions from jury service and the right not to be summoned as a witness when the legislature is in session.⁵

Freedom of speech is the most important privilege enjoyed by individual members and ensures that anything said by a member during a legislative proceeding cannot be brought into question outside the legislature, particularly in a court of law. While the privilege developed primarily to protect members of the British Parliament from the censure of the Crown, it now protects members of legislative bodies from civil proceedings, including defamation actions. The privilege is easily justified because without it members of a legislative body would not be able to debate issues of public importance fully and freely. Maingot has stated:

The privilege of freedom of speech, though of a personal nature, is not so much intended to protect the members against prosecutions for their own individual advantage, but to support the rights of the people by enabling their representatives to execute the functions of their office without fear either of civil or criminal prosecutions.⁶

Those privileges enjoyed by a legislative body as a whole, often termed "corporate privileges", include the right to regulate its own internal affairs free from

⁵ *Ibid.* at 14.

⁶ *Ibid.* at 24. See also May, *supra*, note 1 at 84.

interference, the right to control its precincts, the right to discipline its own members, the right to regulate its own constitution, the right to institute inquiries and call witnesses, the right to control the publication of debates and proceedings and the power to punish for contempt.⁷

The right to regulate its own internal affairs free from interference means that a legislative body has the final say on how it conducts its day-to-day affairs.⁸ Thus, within the traditional British parliamentary system no other body, including the courts, should interfere with a legislative body's code of procedure and its interpretation of the statute law relating to its internal procedure:

The House has sole jurisdiction to determine a right to be exercised within the House or within a committee of the House. Thus, the House has, notwithstanding the election of a member, the right to discipline, to expel and to suspend the member, and the right through the committee itself to fix the procedure within the committee, including the role of counsel acting for witnesses. In this way, committees could with impunity deny a witness natural justice because the *Canadian Bill of Rights* of 1960 does not apply to the House of Commons since pre-existing rights such as the *lex et consuetudo parliamenti* have not been abrogated and could not be, save by express words in a statute.⁹

⁷ *Ibid.* at 152-77.

⁸ Whether the Charter has changed this basic rule is central to this paper.

⁹ Maingot, *supra*, note 4 at 158-59.

The other privileges, such as the right to discipline its own members and regulate its own constitution, are essentially related to this right to regulate internal affairs. The right to control its own precincts requires a determination of what area constitutes a legislative body's precincts,¹⁰ but it allows a legislative body to discipline its own members and members of the public so as to maintain order and ensure that its proceedings are conducted in a dignified manner.

The right to control the publication of debates and proceedings means that a legislative body has the final say as to how and when its proceedings are published. However, unless there is a wilful misrepresentation, it is unlikely that a legislative body would censure the publisher. In 1971 the British House of Commons resolved not to "entertain any complaint as contempt of the House or Breach of privilege in respect of the publication of the debates or proceedings of the House or its committees, except when any such debates or proceedings shall have been conducted with closed doors or in private, or when such publication has been expressly prohibited by the House."¹¹ The publication of defamatory matter contained in the debates and proceedings is another matter and may be protected by absolute privilege or qualified privilege depending on what is published and who published it.¹²

¹⁰ For a discussion of what constitutes the "precincts of Parliament" see *ibid.* at 138-51.

¹¹ United Kingdom, House of Commons, *Journals* (July 16, 1971), and see Maingot, *supra*, note 4 at 156.

¹² For a full discussion see Maingot, *ibid.* at 57-67.

The right to institute inquiries and call for witnesses is necessary if a legislative body is to gather information so as to legislate effectively within its jurisdiction. It is an extraordinary power which allows a legislative body, or in practice, its committees, to require the attendance of a person to answer any and all questions put to him or her. This power has been the subject of law reform proposals,¹³ but to date in Canada the protection of a witness's rights has depended largely on "the collective common sense of the members of the committee and their good graces."¹⁴

The right to commit for contempt or breach of privilege is an essential power if a legislative body is to protect its other privileges and ensure that its power and dignity is respected. In 1810, in *Burdett v. Abbot* Ellenborough C.J. stated:

I have already said that *à priori*, if there were no precedents on the subject [whether the House of Commons has the power to commit for a contempt of its privileges], no legislative recognition, no practice or opinions in the Courts of Law recognizing such an authority, it would still be essentially necessary for the Houses of Parliament to have it; indeed that they would sink into utter contempt and inefficiency without it, could it be expected that they should stand high in the estimation and reverence of the people, if, whenever they were insulted, they were obliged to wait the comparatively

¹³ See, e.g., Ontario Law Reform Commission, *Report on Witnesses Before Legislative Committees* (1981).

¹⁴ Maingot, *supra*, note 4 at 163.

slow proceedings of the ordinary course of law for their redress?¹⁵

A breach of privilege means there has been a breach of one of the known privileges enumerated above. The contempt power is wider, however, and allows a legislative body to punish actions which, while not breaches of any specific privilege, bring the authority or dignity of the legislative body into question.¹⁶

Technically, a contempt could be whatever a legislative body finds as contempt. Possible actions which could lead to a finding of contempt include assaulting a member or officer, bribing a member, misbehaviour before a committee, publishing false or perverted reports of debates, publishing comments on members and attempts to administer justice within the precincts.

The power to punish for contempt is analogous to that possessed by superior courts,¹⁷ and historically is derived from the British Parliament's origin as "the High Court of Parliament", although in Canada the power depends on the granting of such powers pursuant to the *Constitution Act, 1867*.¹⁸

¹⁵ 14 East. 1 at 151-52, 105 E.R. 501 (Exch.), *aff'd* (1817) 5 Dow. P.C.165, 3 E.R. 1289 (H.L.).

¹⁶ May, *supra*, note 1 at 115.

¹⁷ *Ibid.* at 122

¹⁸ (U.K.) 30 & 31 Vict., c. 3. A full analysis of the origin of the contempt power is beyond the scope of this paper. See generally, May, *supra*, note 1 at 115-34, and Maingot, *supra*, note 4 at 164-77.

Usually a breach of privilege or a finding of contempt results in a single censure. Nevertheless, Canadian legislative bodies do possess the power to commit for contempt or breach of privilege. The last time the Canadian House of Commons used the power was in 1913 when R.C. Miller, a lawyer who had refused to answer questions before a parliamentary committee, was called to the Bar of the House and committed to the common jail in the City of Ottawa until prorogation of the session.¹⁹

What is extraordinary about the power to punish, particularly when it results in a committal, is that a person is not guaranteed a full and fair hearing. The protection of a person's rights depends on the good graces of the members of the legislative body. Moreover, when there is a committal, while *habeas corpus* can be invoked, the rule to date has been that a court will not inquire into the causes of commitment unless they are stated in the Speaker's warrant.²⁰

If the Charter applies to the privileges enjoyed by Canadian legislative bodies, clearly certain of the privileges could be attacked as being contrary to guaranteed rights and freedoms. However, it is important to keep in mind that the privileges have evolved over centuries and for the most part must be viewed as

¹⁹ See N. Ward, "Called to the Bar of the House" (1957) 35 Can. Bar Rev. 531.

²⁰ See *Burdett v. Abbot*, *supra*, note 15; *Gosset v. Howard* (1847), 10 Q.B. 411, 116 E.R. 158; and generally, May *supra*, note 1 at 107 and Maingot, *supra*, note 4 at 176-77.

being necessary for the proper functioning of a legislative body. Both May and Maingot emphasize this element of necessity. May has stated:

The distinctive mark of a privilege is the ancillary character. The privileges of Parliament are rights which are "absolutely necessary for the due execution of its powers". They are enjoyed by individual Members, because the House cannot perform its functions without unimpeded use of the services of its Members; and by each House for the protection of its Members and the vindication of its own authority and dignity.²¹

Maingot has stated:

In order to perform its functions as a legislative body, a legislature requires absolutely certain privileges, rights or immunities; that is to say it cannot carry on unless it has them. It will be seen that a distinctive mark of a privilege is its ancillary character or subordinate nature -- it is a means to accomplish a purpose or fulfil a function.

The legislative body needs this legal protection or immunity to perform its function and to defend and vindicate its authority and dignity. The members of the legislative body enjoy these rights and immunities because the legislature cannot act or perform without the unimpeded use of the services of its members.²²

It is this concept of necessity which must be kept in mind when examining privileges from the standpoint of individual rights and the Charter. A

²¹ May, 20th ed., C. Gordon, ed., (London: Butterworths, 1983) at 70-71.

²² Maingot, *supra*, note 4 at 13.

legislative body's need to conduct its proceedings may of necessity infringe certain rights.

Part 2 - Sources of Privilege in Canada

The right of Canadian legislative bodies to claim certain privileges is found in the Constitution. The right of the House of Commons and Senate to claim the privileges of the United Kingdom House of Commons is specifically provided for in section 18 of the *Constitution Act, 1867*. Provincial legislative bodies enjoy similar privileges pursuant to their provincial constitutions and their power to amend the provincial constitutions.

A grant of power from the British Parliament was necessary since the British courts had decided²³ that in the absence of a specific grant colonial legislative bodies did not enjoy all the privileges of the British House of Commons, but only those that were necessary to perform their legislative function.²⁴

The grants of power in the Constitution ensured that Canadian legislative bodies would enjoy all the privileges the British House enjoyed. This also meant that the decisions of British courts were relevant, including an understanding of the ongoing dispute between the British House of Commons and British Courts.

²³ See *Keilley v. Carson* (1841), 4 Moore 63, 13 E.R. 225 (P.C.).

²⁴ Maingot, *supra*, note 4 at 4-5.

(a) **The Senate and the House of Commons**

Section 18 of the *Constitution Act, 1867*, as amended in 1875,²⁵ provides:

The privileges, immunities, and powers held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privilege, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

The Act defining the privileges of the Senate and House of Commons is the *Parliament of Canada Act*²⁶ which provides in section 4:

4. The Senate and House of Commons respectively, and the members thereof respectively, hold enjoy and exercise,
 - (a) such and the like privileges, immunities and powers as, at the time of the passing of the *British North America Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom, and by the members thereof, so far as the same are consistent with and not repugnant to that Act; and

²⁵ *Parliament of Canada Act, 1875* (U.K.), 38-39 Vict., c. 38.

²⁶ R.S.C. 1985, c. P-1.

- (b) such privileges, immunities and powers as are from time to time defined by Act of the Parliament of Canada, not exceeding those at the time of the passing of such act held, enjoyed and exercised by the Commons House of the Parliament of the United Kingdom and by the members thereof respectively.

The rights, immunities and privileges claimed pursuant to paragraph 4(a) of the *Parliament of Canada Act* are those exercised by the British House of Commons in 1867 – "at the time of the passing of the *British North America Act, 1867*". When originally enacted in 1867 section 18 provided that the privileges of the Senate and House of Commons "shall never exceed those at the passing of this Act held enjoyed and exercised by the Commons House of Parliament of the United Kingdom". Paragraph 4(a), originally enacted in 1868 and never amended, reflects the original version of section 18. It does not conflict with section 18 as amended in 1875 since what was claimed were the privileges of the British House enjoyed at the time it was passed. Paragraph 4(b) was inserted when the Acts of Parliament were first revised and consolidated in 1886,²⁷ and its wording reflects the amended section 18.

²⁷ R.S.C. 1886, c. 2, s. 3. See Maingot, *supra*, note 4 at 17, n. 19, who notes that "no statute can be found that was passed in Canada between 1868 and 1886 enacting what is now contained in paragraph (b)."

Section 18 is restrictive when compared to similar provisions in the constitutions of other Commonwealth countries. For example, section 49 of the Australian Constitution provides that the privileges of the Commonwealth Houses of Parliament shall be declared by the Parliament, but until then are to be those of the House of Commons of Great Britain.

Although it has the power to do so, Parliament has never chosen to legislate its privileges by specifically enumerating them. Instead, all the privileges of the British House in 1867 are incorporated by reference. The scope of the privileges is purposely left vague. An enumeration is possible since, at least according to the courts,²⁸ privileges are known. However, an enumeration would have to be complete if the privileges presently enjoyed by the House of Commons and the Senate were not to be curtailed in some way.

By reference, paragraph 4(a) adopts all the privileges of the British House as they existed in 1867. Thus, in order to understand what is encompassed by the decisions of the British House, judicial decisions, as well as legislation and the common law, must be consulted. Moreover, should Parliament now choose to legislate on the scope of its privileges, it cannot exceed those enjoyed by the British House at the time the Act is passed. At present this constitutional limitation in section 18, reflected in 4(b), is of theoretical interest only since the privileges of the British House of Commons have not changed in any significant way since 1867. However, this limitation may be of concern should the system of government in Britain, particularly the powers and privileges of the House, change at some future date. Should Parliament then wish to amend section 4 and claim privileges not then enjoyed by the British House it would have to first amend section 18.

Section 18 of the *Constitution Act, 1867* could be amended pursuant to section 44 of the *Constitution Act, 1982*²⁹ which provides:

44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

Section 44 replaced head 91(1) of the *Constitution Act, 1867*, first enacted in 1949.³⁰ In *Reference Re Upper House*,³¹ the Supreme Court of Canada gave 91(1) a narrow reading, holding that the power given to Parliament to amend the Constitution of Canada, except as regards certain matters,³² did not authorize the abolition or alteration of the Senate. The Court held that the reference to the "Constitution of Canada", which was not a defined term in the *Constitution Act, 1867*, as it now is in

²⁹ Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

³⁰ *British North America (No. 2) Act, 1949* (U.K.), 13 Geo. VI, c. 8.

³¹ [1980] 1 S.C.R. 54, and see P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 68-69.

³² 91(1) provided in full: 1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for Choosing the House; provided, however, that a House of Commons may in time of real or apprehended war, invasion, or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

section 52 of the *Constitution Act, 1982*, did not mean the whole of the *Constitution Act, 1867*, but only the constitution of the federal government as distinct from the provincial governments. "The power of amendment conferred by s. 91(1) is limited to matters of interest only to the federal government."³³ The Court did not specifically mention section 18 of the *Constitution Act, 1867*, but in light of *Fielding v. Thomas*,³⁴ discussed below, which held that privilege was an aspect of the provincial constitutions, it would appear that, since section 18 governs the privileges of the federal Houses, it is part of the constitution of the federal government.

Section 44 of the *Constitution Act, 1982* is similar in scope to the former head 91(1). Section 44 is subject to sections 41 and 42 which require the participation of the provinces on certain amendments affecting the composition and powers of the federal Houses, but otherwise allows Parliament to make laws amending the Constitution in relation to the Senate and the House of Commons. An amendment of section 18 respecting the privileges of the Senate and House of Commons could be accomplished unilaterally by Parliament. Thus, section 18, although part of the Constitution of Canada, can be amended by Parliament by ordinary legislation, in the same way that provincial legislatures can amend provincial constitutions. Arguably, although section 18 is part of the Constitution, because it can be amended by ordinary legislation, it has no special status such that it

³³ *Supra*, note 31 at 70.

³⁴ [1896] A.C. 600 (P.C.)

is not subject to the provisions of the Charter. Moreover, the present section 18 allows for privileges to be "defined by Act of Parliament". The Act defining privileges also appears to be ordinary legislation. This issue will also be discussed further in Chapter 2.

(b) Provincial Legislative Bodies

There is no provision similar to section 18 governing the privileges of the provincial legislative bodies.³⁵ However, each provincial legislature is given the power to make laws in respect of the constitution of the province and pursuant to this power, the legislatures can provide for privileges.

Only certain provisions of the provincial constitutions are actually included in the various Acts that make up the "Constitution of Canada". For example, sections 58 to 68 of the *Constitution Act, 1867* set out various provisions of the constitutions of the four original provinces. Section 88 provides that the constitutions of the legislatures of Nova Scotia and New Brunswick continue as they existed in 1867 until altered under the authority of the Constitution. The *Manitoba Act, 1870*, part of the "Constitution of Canada" pursuant to paragraph 52(2)(b) of the *Constitution Act, 1982* contains various provisions that are part of the Constitution of Manitoba.³⁶ None of these provisions govern privilege, however.

³⁵ For a discussion of the privileges of the legislatures of the Territories, see Maingot, *supra*, note 4 at 5.

³⁶ See *Manitoba Act, 1870*, S.C. 1870, c. 3, ss. 6 to 21 which govern such things as the office of the Lieutenant Governor and the quorum in the Legislative Assembly.

The power to enact further provisions as part of the provincial constitutions, as well as the power to amend existing provisions, is found in section 45 of the *Constitution Act, 1982* which states:

45. Subject to section 41 the legislature of each province may exclusively make laws amending the constitution of the province.

This power was, until 1982, found in head 92(1) of the *Constitution Act, 1867*, and was part of the original *Constitution Act, 1867*.

Pursuant to this power over their constitutions all the provinces have passed legislation governing the privileges of their legislative bodies. The legislation varies. For example, in British Columbia section 2 of the *Legislative Assembly Privileges Act*³⁷ provides that the privileges enjoyed by the Legislative Assembly and its members "are hereby defined to be the same as on the fourteenth day of February, 1871, ... held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom". In Nova Scotia subsection 36(1) of the *House of Assembly Act*³⁸ provides that the privileges are those of the Senate and the House of Commons.

³⁷ R.S.B.C. 1979, c. 229.

³⁸ R.S.N.S. 1990, c. 210.

In Ontario the privileges of the Legislative Assembly are set out in considerable detail in sections 35 to 52 of the *Legislative Assembly Act*.³⁹ Section 45, which declares that the Assembly has the rights of a court of a record for purposes of inquiring into breaches of privilege and contempts, includes a list of eleven items that could be considered breaches of privilege or contempts. Section 52 is a saving clause and provides that the Act does not deprive the Assembly, a committee or member of any right, immunity, privilege or power otherwise enjoyed. Thus, while no specific reference is made in the Act to the privileges of the British or Canadian House of Commons, these latter privileges may be relevant when determining the privileges or the extent of the privileges not enumerated in the *Legislative Assembly Act*, but otherwise enjoyed by the Ontario Assembly pursuant to the common law.

The right of the provincial legislative bodies to claim all the privileges of the British and Canadian House of Commons was not always clear in law. Until 1896 it was thought that the provinces could only claim the privileges to which they were entitled at common law since there was no specific grant from the Imperial Parliament. In 1842 in *Kielley v. Carson* ⁴⁰ the Privy Council held that the House of Assembly of the Island of Newfoundland did not have the power to punish for a contempt committed outside of the House, since it only had such powers as were

³⁹ R.S.O. 1990, c. L.10.

⁴⁰ (1843), 4 Moore 63, 13 E.R. 225 (P.C.) For discussion of the case see Maingot, *supra*, note 4 at 168-69.

reasonably necessary for the proper exercise of its functions and duties as a local legislature. Newfoundland was a colony established by letters patent of the Crown, and an Imperial Statute was necessary if a local legislature was to enjoy the power to commit for contempt and other privileges of the British House not essential to the functioning of the local legislature.

At first it was thought that the provincial legislatures stood in the same position after Confederation and the rule in *Kielley v. Carson* continued to apply. However, in 1896 in *Fielding v. Thomas*⁴¹ the Privy Council held that the Nova Scotia House of Assembly had the authority under 92(1) of the *Constitution Act, 1867* to legislate in respect of privilege, including the power to punish for contempt. Lord Halsbury L.C. noted that no enactment similar to section 18 of the *Constitution Act, 1867* had been made in respect of the privileges of the Nova Scotia House of Assembly,⁴² but held that pursuant to both section 5 of the *Colonial Laws Validity Act, 1866*⁴³ and section 92 of the *Constitution Act, 1867* the provincial legislature had the power to make laws respecting its constitution. He stated:

It surely cannot be contended that the independence of the provincial legislatures from outside interference, its protection, and the protection of its members from insult while in the discharge of their duties, are not matters which may be classed as part of the

⁴¹ *Supra*, note 34.

⁴² *Ibid.* at 609-10.

⁴³ (U.K.), 28 & 29 Vict., c. 63.

constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitutional law of the province.⁴⁴

Thus, the provincial legislatures were found to have the same power to legislate in respect of privilege as was enjoyed by the Senate and the House of Commons. However, the provincial power has a different constitutional underpinning than the federal power. While both the provincial legislatures and Parliament legislate in respect of their constitutions when legislating on matters of privilege, Parliament does so pursuant to section 18 of the *Constitution Act, 1867*. The fact that there is no similar provision governing the provincial legislatures creates an interesting constitutional problem which will be discussed below in Chapter 2.

Part 3 - Jurisdiction of the Courts

The origins of parliamentary privilege can be traced back as far as the reign of Edward I.⁴⁵ Over time the British House of Commons laid claim to three things:

- (1) the immunity of its proceedings from the jurisdiction of the courts;
- (2) the power to punish for contempt; and

⁴⁴ *Supra*, note 34 at 610-11.

⁴⁵ See Viscount Kilmuir, *The Law of Parliamentary Privilege*, (London: Athlone Press, 1959) at 7.

- (3) the exclusive right to knowledge of its branch of the law.⁴⁶

The most dramatic developments occurred during the seventeenth century constitutional struggles when parliamentary privilege became the House of Commons' defence against the powers of the Crown and the willingness of the royal courts to enforce these powers. With the enactment of the *Bill of Rights, 1689* and the emergence of a constitutional monarchy, the struggle with the Crown ended. The struggle with the courts continued, however, since the courts were the forum in which outside parties and, occasionally, members of the House, sought redress when the House allegedly overstepped its powers.⁴⁷ The courts, particularly during the course of the eighteenth century, laid claim to three things:

- (1) that the *lex et consuetudo parliamenti* was part of the general and public law and therefore known to the courts,
- (2) that the courts had the right to question decisions of the House regarding privilege; and
- (3) that decisions of the House respecting privilege were not binding on the courts.⁴⁸

⁴⁶ H. Evans "*Privilege: What to Remember and What to Forget*" (1986) 1 *Legislative Studies* 5 at 5. See also, May, *supra*, note 1 at 145-54.

⁴⁷ For a discussion of the early cases see May, *supra*, note 1 at 145-50; Kilmuir, *supra*, note 45 at 7-12; and Maingot, *supra*, note 4 at 232-40.

⁴⁸ Maingot, *supra*, note 4 at 238.

Clearly, those things claimed by the House and those things claimed by the courts were not compatible. What emerged was what May has termed the "old dualism":⁴⁹ a conflict which cannot be resolved. A case in 1837 brought the conflict into the open. After Hansard published a report which had been tabled in the House, Stockdale sued for libel. Hansard won on the basis of the jury's finding that the report was accurate, but during the course of the proceedings Denman C.J. held that the order of the House to print the report was no defence.⁵⁰ After examining the findings of Denman C.J. the House resolved:

- (1) that to dispute its privileges in a court was a breach of privilege;
- (2) that it had sole and exclusive jurisdiction to decide the existence of its privileges; and
- (3) that the publication of its proceedings was privileged.⁵¹

Stockdale commenced a second action and the Attorney General was instructed to defend on the basis of the resolutions. Four important points emerged from this lengthy decision:⁵²

⁴⁹ May, *supra*, note 1 at 206.

⁵⁰ *Stockdale v. Hansard* (1837), 7 Car. & P. 731, 173 E.R. 319.

⁵¹ United Kingdom, House of Commons, *Journals* (May 30, 1837) at 418-20. May, *supra*, note 1 at 151.

⁵² *Stockdale v. Hansard* (1839), 9 Ad. & E. 253, 113 E.R. 1112.

- (1) the court had the right to ascertain the extent of the House's privileges since they were part of the law of the land;
- (2) no new privileges could be created;
- (3) the court was not bound by a resolution of the House when declaring whether a matter falls within the privileges of the House; and
- (4) whatever is done within the walls of the House must pass without question in another place.⁵³

The Court also held that there was no privilege allowing the House to publish with impunity and found for the plaintiff. The House paid the damages and costs but passed a further resolution that parties to any future actions would be punished for contempt. Stockdale sued again for another publication of the same report and got judgment in default.⁵⁴ Sheriffs levied for the amount of the damages. The House committed Stockdale for contempt, and then the sheriffs, when they refused to refund the damages. The sheriffs were caught by the conflict. The Court held that the resolutions of the House served on the sheriffs did not excuse them from paying over the damages. Denman C.J. stated:

The plaintiff has recovered damages in an action, and has sued out process of execution in due course of law. What is to prevent him from obtaining the fruits of that execution? Nothing that I am able to perceive. I infer, from the resolutions brought before us, that the House of

⁵³ *Ibid.* at 107-08 and 145-48.

⁵⁴ *Stockdale v. Hansard* (1840), 11 Ad. & E. 253, 113 E.R. 411.

Commons disapprove of our judgment in the former case between these parties, and I deeply lament it; but the opinion of that House on a legal point, in whatever manner communicated, is no ground for arresting the courts of law, or preventing the operation of the Queen's writs in behalf of everyone of her subjects who sues in her courts.⁵⁵

However, when a writ of *habeas corpus* was brought on behalf of the sheriffs the court refused to release them, holding that the House had the power to commit for contempt.⁵⁶ The writ did not state the grounds for contempt, and on the basis of *Burdett v. Abbot*⁵⁷ the Court held it had no power to inquire.⁵⁸

What emerged after *Stockdale v. Hansard* was a compromise. May has stated:

The House of Commons claims that its admitted right to adjudicate on breaches of privilege implies in theory the right to determine the existence and extent of the privileges themselves. It has never expressly abandoned

⁵⁵ *Ibid.* at 263.

⁵⁶ *Case of the Sheriff of Middlesex* (1840), 11 Ad. & E. 273, 113 E.R. 419.

⁵⁷ *Supra*, note 15.

⁵⁸ *Supra*, note 55 at 289-90 per Denman C.J. and at 296 per Coleridge J. *Stockdale* brought a further action, *Stockdale v. Hansard* (1840), 11 Ad. & E. 297, 113 E.R. 428 but by then Parliament had passed the *Parliamentary Papers Act, 1840* which provided that no suit could be brought in respect of parliamentary publications. The Court held this Act was a complete defence. Thus, a privilege, the power to punish with impunity, which the House had claimed but the Court had disallowed was put into legislation. Interestingly, the House did not fully concede that publishing with impunity was not a privilege since section 3 of the Act provides that nothing is a reflection on the privileges of either House.

its claim to treat as a breach of privilege the institution of proceedings for the purpose of bringing its privileges into discussion or decision before any court or tribunal elsewhere than in Parliament. In other words, it claims to be the absolute and exclusive judge of its own privileges, and that its judgments are not examinable by any other court or subject on appeal.

On the other hand, the courts regard the privileges of Parliament as part of the law of the land, of which they are bound to take judicial notice. They consider it their duty to decide any question of privilege arising directly or indirectly in a case which falls within their jurisdiction, and to decide it according to their own interpretation of the law.

The decisions of the courts are not accepted as binding by the House in matters of privilege, nor the decisions of the House by the Courts. Thus the old dualism remains unresolved.⁵⁹

Thus, when a question of privilege came before them, the courts would inquire as to the extent of the privilege, but they would not interfere with internal proceedings. The House did not abandon its claim to be the sole judge of the existence and extent of its privileges, but neither did it object when its privileges were questioned in a court, and after *Stockdale v. Hansard*, did not use its contempt power to punish those who brought actions.⁶⁰

⁵⁹ May, 20th ed., *supra*, note 21 at 203.

⁶⁰ Kilmuir, *supra*, note 45 at 13-14. S.A. de Smith "Parliamentary Privilege and the Bill of Rights" (1958) 21 Mod. L. Rev. 465 at 469-71.

*Bradlaugh v. Gossett*⁶¹ which continues to be the law in Britain, best demonstrates the position of the courts after *Stockdale v. Hansard*. Bradlaugh was elected as a member of the House of Commons but because he was an atheist,⁶² the House passed a resolution that he should not be allowed to take the oath required by the *Parliamentary Oaths Act, 1866* and that he should be excluded from the House unless he undertook not to do so. Bradlaugh brought an action seeking to have the resolution declared void. Stephen J. stated:

The legal question which this statement of the case appears to me to raise for our decision is this: - Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and, in order to enforce its prohibition, directs its executive officer to exclude him from the House by force if necessary, is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out? In my opinion, we have no such power. I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings ...⁶³

Stephens J. then referred to *Stockdale v. Hansard*, noting that a court is not bound by resolutions of the House declaring the extent of its privileges, but also citing the various statements in that case to the effect that "whatever is done within

⁶¹ (1884), 12 Q.B.D. 271.

⁶² See the earlier case of *Clarke v. Bradlaugh* (1881), 7 Q.B.D. 339 (C.A.) in which Bradlaugh was sued for having taken an oath contrary to the *Parliamentary Oaths Act, 1866*.

⁶³ *Supra*, note 61 at 278.

the walls of either assembly must pass without question in another place".⁶⁴ Thus, even though the *Parliamentary Oaths Act, 1866* and the resolution contradicted each other, "the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned."⁶⁵ Stephens J. allowed,⁶⁶ as Coleridge C.J. seemed to,⁶⁷ that "extraordinary circumstances" might require the Court to declare a resolution of the House void, but so far as Bradlaugh was concerned the Court was of the opinion that his case was a matter of "internal proceedings".

Similarly, in *R. v. Graham-Campbell, Ex Parte Herbert*⁶⁸ when an applicant attempted to bring a prosecution against certain members of the House of Commons on the basis that the sale of liquor within the precincts of the House was contrary to the *Licensing Consolidation Act, 1910*, the Court agreed with the magistrate that it was a matter that fell within the scope of the internal affairs of the House and therefore, within its privileges, and that no court of law had jurisdiction to interfere.

⁶⁴ *Ibid.* at 278-79.

⁶⁵ *Ibid.* at 280.

⁶⁶ *Ibid.* at 282.

⁶⁷ *Ibid.* at 274-75.

⁶⁸ [1935] 1 K.B. 594.

Canadian courts have followed the British courts with respect to their power to adjudicate on matters of parliamentary privilege. However, in some instances they have gone much further than the British Courts in scrutinizing the powers of legislative bodies and it is not clear what role they might be prepared to assume, particularly if the privileges of Canadian legislative bodies are subject to the Charter.

Canadian courts have assumed the jurisdiction to determine the existence and extent of privileges. In *Re Clark*⁶⁹ after reviewing the British position, Evans C.J.H.C. stated:

Notwithstanding the submission of counsel for the respondent, I have no hesitation in proceeding to evaluate the effect of SOR/76-644 on the privileges of members of Parliament. *Roman Corp. Ltd. et al. v. Hudson's Bay Oil & Gas Co. Ltd. et al.*, [1941] 2 O.R. 418, 19 D.L.R. (3d) 134 (Houlden J. [Ont.H.C.]); affirmed [1973] S.C.R. 820, 36 D.L.R. (3d) 413 (discussed, *infra*), is sufficient authority for the proposition that the Courts of law in Canada have jurisdiction to adjudicate on matters involving the privileges of Members of Parliament.⁷⁰

The power of the Canadian courts is actually greater than their British counterparts in some instances because of legislation. With respect to the Senate and House of Commons, section 5 of the *Parliament of Canada Act* provides that

⁶⁹ (1977), 81 D.L.R. (3d) 33 (Ont. H.C.). See also *Wallace v. A.G. British Columbia* (1977), 82 D.L.R. (3d) 423 at 425 (B.C.S.C.)

⁷⁰ *Ibid.* at 52.

privilege is part of the general and public law of Canada and may be taken notice of judicially. Thus, legislation clarifies an issue which is not settled, at least formally, in Britain.

Canadian courts have also refused to inquire into internal proceedings, thus following *Bradlaugh v. Gossett*. In *Tolfree v. Clark*⁷¹ the Courts held that the power to determine the right to sit in the Legislative Assembly of Ontario was not within the jurisdiction of a court. *Tolfree* was followed in *Wallace v. A.G. British Columbia*,⁷² where Dryer J. quoted May for the proposition that "with respect to rights exercisable within a House the jurisdiction of the House is complete ...".⁷³ Dryer J. also relied on a decision of the British Columbia Court of Appeal, *Chamberlist v. Collins*,⁷⁴ which concerned a duly elected member of the Council of the Yukon Territory who had been expelled when he acquired an interest in a contract involving a public work. Both the trial judge and the Court of Appeal refused to declare that he had been wrongly expelled on the basis that a legislative assembly had exclusive jurisdiction to determine its own membership and the courts had no jurisdiction unless conferred by statute.

⁷¹ [1943] 2 D.L.R. 554 (Ont. H.C.), aff'd [1943] 3 D.L.R. 684 (C.A.).

⁷² *Supra*, note 69.

⁷³ *Ibid.* at 427.

⁷⁴ (1962), 34 D.L.R. (2d) 414.

In *Re MacLean*,⁷⁵ Glube C.J.T.D. held that the section of *An Act Respecting Reasonable Limits for Membership in the House of Assembly* imposing restrictions on who can run in elections was contrary to section 3 of the Charter, which governs the right to vote and the right to be elected. However, she upheld the section which specifically expelled MacLean from the Assembly since the Assembly had a historical right to suspend or expel members as part of its duty to discipline members and regulate its affairs. After citing passages from Bourinot, Beauchesne and May,⁷⁶ Glube C.J.T.D. stated:

In my opinion the power to expel a person by resolution of the Assembly remains a valid function of the Assembly, and if by resolution, would normally not be reviewable by the court. In my opinion s. 3 of the *Charter* on its plain meaning does not encompass s. 2 of the Act which I find is severable and could stand on its own.

...

I agree that proper standards for its sitting members may be set by the House.⁷⁷

In *Re Ouellet* ⁷⁸ Hugesson J. disagreed with the holding of the Ontario

⁷⁵ (1987), 27 C.R.R. 212 (N.S.S.C.).

⁷⁶ *Ibid.* at 221.

⁷⁷ *Ibid.* at 222.

⁷⁸ (1976), 67 D.L.R. (3d) 73 at 89-90 (Que. S.C.).

Courts in *Roman Corp. Ltd. v. Hudson's Bay Oil & Gas Ltd.*⁷⁹ that statements made by members in a press release and telegram were extensions of statements made in the House and therefore, protected by the privilege of freedom of speech. However, both the Quebec Court and the Ontario Courts recognized that "proceedings in Parliament" could not be the subject of a court action. The disagreement concerned the ambit of the phrase "proceedings in Parliament".

*Re Clark*⁸⁰ is interesting because Evans C.J.H.C. was concerned that in seeking a declaration that a Member of Parliament was not prevented from using in Parliament information protected by the Regulations in question, the applicants were seeking "absolution before sinning", since they had not been charged.⁸¹ Nevertheless, he dealt with the issue, and concluded:

Following the authorities set out above, I have come to the conclusion that a Member of Parliament may utilize information prescribed by SOR/76-644 in Parliament and may release that information to the media.⁸²

⁷⁹ [1971] 2 O.R. 418 (Ont. H.C.) aff'd [1972] 1 O.R. 444 (C.A.), aff'd [1973] S.C.R. 820. The Supreme Court of Canada did not specifically address the issue of freedom of speech, but decided the case on the broader ground that statements regarding policy and proposed legislation made in good faith by a Minister should not be the basis of an action at law.

⁸⁰ *Supra*, note 69.

⁸¹ *Ibid.* at 43.

⁸² *Ibid.* at 58.

It is worth noting that Evans C.J.H.C. was not, as Stephens J. also refused to do in *Bradlaugh v. Gossett*, declaring what the effect of the legislation was so far as internal proceedings were concerned. Instead, Evans C.J.H.C. recognized that the courts would have no jurisdiction if a charge were brought pursuant to the legislation for something that constituted proceedings in Parliament. The House was still free to interpret the legislation for the purpose of disciplining its own Members. Maingot⁸³ has reviewed the debate that ensued in the House following Evans C.J.H.C.'s decision. Certain Members felt that the decision violated the right of the House to determine the extent of its privileges. Maingot pointed out:

This was unfortunate, because the power of the House lies not in deciding what their privileges are which are well known, but rather deciding what actions constitute their breach, or a contempt of Parliament.⁸⁴

Evans C.J.H.C.'s judgment accords with the decisions in *Stockdale v. Hansard* and *Bradlaugh v. Gossett*. He was deciding the extent of a privilege and not attempting to make a decision regarding internal proceedings.

Thus, the decisions of Canadian courts are, for the most part, consistent with decisions of the British courts regarding jurisdiction over privilege. However, Canadian courts have gone much further than their British counterparts, a

⁸³ *Supra*, note 4 at 249-51.

⁸⁴ *Ibid.* at 251.

reflection of Canada's colonial origins and the fact its Constitution is different than that of Britain, despite the preamble of the *Constitution Act, 1867*.⁸⁵

In *Landers v. Woodworth*⁸⁶ the Supreme Court of Canada carefully reviewed the proceedings in the Nova Scotia House of Assembly leading to the expulsion of the plaintiff and concluded that the action for trespass against the Speaker and certain members could be maintained. The Court was concerned with applying the rule laid down in *Kielley v. Carson*⁸⁷ and *Doyle v. Falconer*⁸⁸. The Privy Council had decided that a colonial legislature, in the absence of an express grant,⁸⁹ had no power to remove one of its members for contempt unless the member was actually obstructing the business of the House. Thus, a rule limiting the powers of colonial legislatures forced the Supreme Court to look carefully at the internal proceedings in order to decide whether Woodworth was obstructing the business of the House at the time he was expelled.

⁸⁵ Which states the "Desire" of the four original provinces for a "Constitution similar in Principle to that of the United Kingdom".

⁸⁶ (1878), 2 S.C.R. 159.

⁸⁷ *Supra*, note 34.

⁸⁸ (1866), L.R. 1 P.C. 328.

⁸⁹ Overruled by *Fielding v. Thomas*, *supra*, note 34.

*Reference Re Manitoba Language Rights*⁹⁰ did not concern privilege, but it demonstrates a concern with legislative process on the part of Canadian courts that is outside the jurisdiction of British courts. In *Reference Re Manitoba Language Rights* the Supreme Court of Canada concluded that manner and form provisions in the Constitution are mandatory and since it is up to the courts to ensure that all provisions of the Constitution are complied with it is up to the courts to determine whether a legislature complies with the procedure set out in a constitutional manner and form provision. The Court was not required to investigate the actual legislative process of the Manitoba Legislature since the Attorney General of Manitoba had to concede that there had been no French versions of Manitoba Acts since 1890 as required by section 23 of the *Manitoba Act, 1870*.⁹¹ However, the case demonstrates a concern with internal procedure since the Court was concerned that the Acts be "enacted" in both official languages.

The Court imposed an even greater requirement than that set out in *A.G. Québec v. Blaikie*⁹² and stated that "simultaneity of the use of both English and French is therefore required throughout the process of enacting bills into law [emphasis added]". Such a requirement dictates examination of the legislative

⁹⁰ [1985] 1 S.C.R. 721.

⁹¹ *Supra*, note 36, part of the Constitution of Canada under 52(3) of the *Constitution Act, 1982*.

⁹² [1979] 2 S.C.R. 1016 at 1022, which imposed a "requirement of simultaneity in the use of both languages in the enactment process". Discussed in *Reference Re Manitoba Language Rights supra*, note 90 at 774-76.

process by a court. This is not the rule in Britain where courts will only look to the Parliamentary roll to see if a Bill has passed both Houses of Parliament and received Royal Assent.⁹³ However, because of the nature of the Canadian Constitution, Canadian courts are prepared to go further. For Canadian courts parliamentary procedure is not beyond the realm of investigation, which suggests that if the Constitution so requires, the exercise of a privilege might also be carefully investigated, as it was in 1878 in *Landers v. Woodworth*.

*Reference Re Legislative Privilege*⁹⁴ is of interest since it indicates that claims of privilege are subject to any limitations imposed by the Constitution. In answering questions put by the Lieutenant Governor in Council, the Ontario Court of Appeal held that the Legislature did not have the power to enact legislation protecting its members from being compelled by a court in a criminal case to disclose the source or content of a communication from an informant since the Province did not have legislative jurisdiction over criminal procedure. Houlden J.A., speaking for the Court on this issue, stated:

⁹³ *Edinburgh & Dalkeith Railway Co. v. Wauchope* (1842), 8 Cl. & Fin. 710 at 725, 8 E.R. 279 (H.L. (Sc.), per Lord Campbell C.J.):

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

See also *Pickin v. British Railways Boards*, [1974] A.C. 765 and K. Swinton "Challenging the Validity of an Act of Parliament: the Effect of Enrolment and Parliamentary Privilege" (1976) 14 Osgoode Hall L.J. 345.

⁹⁴ (1978), 18 O.R. (2d) 529 (C.A.).

I think it is clear, therefore, that by virtue of s. 92(1) of the *British North America Act, 1867*, the Legislative Assembly of the Province of Ontario, in respect of proceedings over which it has legislative jurisdiction, has the power to enact legislation to protect its members from being compelled to disclose the existence, source or content of a communication from an informant.

Criminal law and procedure in criminal matters are not, however, within the legislative jurisdiction of a provincial Legislature. By s. 91(27) of the *British North America Act, 1867*, exclusive legislative authority with respect to these subjects is given to the Parliament of Canada. The Legislative Assembly could not, therefore, enact legislation which would protect its members from being compelled to make disclosure in criminal proceedings.⁹⁵

Maingot⁹⁶ has criticized this decision on the basis that since a provincial legislature has jurisdiction over its constitution it can claim the privileges of the British House of Commons.⁹⁷ This would include legislation preventing a member from being compelled to testify in criminal proceedings.⁹⁸

⁹⁵ *Ibid.* at 542.

⁹⁶ Maingot, *supra*, note 4 at 5 and 7.

⁹⁷ See *Fielding v. Thomas*, *supra*, note 34.

⁹⁸ The power of the House of Commons to legislate on matters of privilege that might otherwise fall under 92(13) of the *Constitution Act, 1867*, property and civil rights, is not an issue since s. 18 allows for such an encroachment. However, it could be argued that s. 18 only allows for legislation that otherwise conforms to the Constitution. This issue is discussed below.

Nevertheless, *Reference Re Legislative Privilege* indicates a willingness on the part of at least one Canadian Court to determine the extent of a legislative body's privileges in light of the Constitution. This suggests that if legislative bodies are subject to the Charter, the issue discussed in Chapter 2, then the Charter, being part of the Constitution of Canada must place limits on the extent to which privileges exist. Since the courts have already claimed the power to determine the extent of privileges, they are put in a difficult position because in many instances they will come very close to interfering with internal procedure, something they have not chosen to do to date.

Chapter 2

Application of the Charter

Part 1 - The Issues

The extent to which the Charter has affected parliamentary privilege in Canada has yet to be determined by the courts. Two recent decisions have dealt with the issue, but they are not conclusive.

In *Southam Inc. and Rusnell v. A.G. Canada*,¹ after a newspaper reporter was denied entrance to meetings of a Senate committee and subcommittee held *in camera*, Southam and the reporter applied to the Federal Court for declarations, *certiorari* and an injunction, alleging violations of the Charter and the *Canadian Bill of Rights*, most importantly, that the Senate's refusal of access infringed the freedom of expression guaranteed by paragraph 2(b) of the Charter. At first instance Strayer J. ordered that the Senate and its committee, as well as Her Majesty, be struck as defendants, but gave leave to file an amended statement of claim naming the individual members of the Senate committee as defendants, along with the Attorney General. In Strayer J.'s opinion a Senate committee was a "federal board, commission or other tribunal" within section 2 of the *Federal Court Act*² and the Trial Division had jurisdiction under section 18 of the *Federal Court Act*. Although he did not decide the issue, Strayer J. also stated that he was not

¹ (1989), 27 F.T.R. 139 (Strayer J.), appeal allowed (1990), 114 N.R. 255 (F.C.A., Iacobucci C.J., Stone and Décary JJ.A.). Southam is now seeking relief in Ontario Court (General Division).

² R.S.C. 1985, c. F-7.

prepared to strike out the claim on the basis that the Charter did not apply to the Senate or its committees.

The Federal Court of Appeal allowed the appeal on the basis that the Federal Court lacked jurisdiction. Iacobucci C.J., delivering the reasons of the Court, held that there was no statutory grant by the federal Parliament which would give the Federal Court jurisdiction. The *Parliament of Canada Act* was not the source of the jurisdiction or powers being conferred. Instead, the privileges, immunities and powers of the Senate were conferred by section 18 of the *Constitution Act, 1867*, not by a statute. Iacobucci C.J. was also of the opinion that "it is not part of normal parlance to speak of the Senate as merely another federal board subject to judicial review jurisdiction."³ Iacobucci C.J. went on to comment on the question of "the jurisdiction of the courts generally to apply constitutional restraints to the exercise of privileges by the Senate",⁴ casting doubt on Strayer J.'s conclusion that paragraph 32(1)(a) of the Charter meant that the Charter applied to the constituent parts of Parliament, as well as Parliament as a whole. In conclusion, Iacobucci C.J. stated:

[T]here are questions and arguments to the contrary. For example, as noted already, s. 32(1)(a) of the Charter applies to Parliament which by s. 17 of the *Constitution Act, 1867* means all three components of the House of Commons, the Senate and Her Majesty the Queen. But does s. 32(1)(a) apply where only one of the House of Commons and the Senate (or one of its committees) is involved? Do the

³ *Supra*, note 1 at 262.

⁴ *Ibid.* at 265.

provisions of the Charter not apply because another pre-existing section of the *Constitution Act, 1867*, namely s. 18, expressly confers privileges, powers and immunities on the House of Commons and the Senate? What is the relevance in the Charter era of the jurisprudence to the effect that courts have been reluctant to interfere with internal proceedings of Parliament (assuming only such proceedings were involved herein.)⁵

Southam has now taken its case to the Ontario Court (General Division), a court of inherent jurisdiction, which must now deal directly with the issue of whether the Charter affects the rights and privileges of the Senate.

In the meantime, in *New Brunswick Broadcasting Co. v. Donahue*,⁶ the Nova Scotia Supreme Court, Appeal Division has concluded, a majority of three to two agreeing with the trial judge, that Charter rights prevail over the privileges of the Nova Scotia House of Assembly. In this case the Canadian Broadcasting Corporation brought an action seeking a declaration that the Nova Scotia House of Assembly's refusal to allow broadcasting companies to televise from the galleries infringed freedom of expression as guaranteed by paragraph 2(b) of the Charter. The Nova Scotia courts agreed that the effect of the ban on television coverage was a violation of the guarantee of freedom of expression, that a total ban was not justified under section 1 of the Charter and that televising proceedings would have a minimum impact on the proceedings of the House.

⁵ *Ibid.* at 265-66.

⁶ (1990), 70 D.L.R. (4th) 23 (N.S.S.C.), *aff'd* (1991), 80 D.L.R. (4th) 11 (C.A.), leave to appeal to S.C.C. granted May 16, 1991.

Leave to appeal to the Supreme Court of Canada has now been granted in this case.⁷ The Supreme Court of Canada must now decide whether the powers and privileges of provincial assemblies are subject to the Charter. This determination will also answer, at least in part, whether the privileges of the Senate and the House of Commons are subject to the Charter.

The starting point for an argument that the privileges of any Canadian legislative body are subject to the Charter is section 52 of the *Constitution Act, 1982* and subsection 32(1) of the Charter, which provide:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes:

- (a) the *Canada Act 1982*, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

32.(1) This Charter applies:

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

Section 52 declares that the Constitution, including the Charter, is the supreme law and section 32 determines which bodies must comply with the Charter.

Basically, there are two arguments as to why the Charter does not apply to the privileges of Canadian legislative bodies. First, it can be argued that the privileges of the Senate, the House of Commons and the provincial assemblies are themselves guaranteed in the Constitution of Canada and are therefore not subject to the Charter. Second, it is arguable that these legislative bodies are not included within the application provision of the Charter, section 32. The first argument is relatively weak, particularly in respect of the provincial assemblies. The second argument, although it was not accepted by the Court of Appeal in *New Brunswick Broadcasting*, has some merit. However, any conclusion that the Charter does apply must still be balanced against the traditional rule that courts will not inquire into internal proceedings.

Part 2 - Whether Privileges Guaranteed by the Constitution

If the privileges of the Canadian legislative bodies are guaranteed or confirmed by the Constitution then they cannot be overridden by Charter rights. It would appear to be a rule of constitutional interpretation that one provision of the Constitution cannot override another provision. In *Reference Re Roman Catholic Separate High Schools Funding*⁸ Wilson J. stated:

The Charter cannot be applied so as to abrogate or derogate from rights or privileges guaranteed by or under the constitution.⁹

The context of Wilson J.'s statement will be more carefully considered below, but arguably, if legislative privileges are enjoyed pursuant to one section of the Constitution of Canada they cannot be abrogated by another section, i.e., the Charter.

(a) The Privileges of the Provincial Legislative Bodies

This argument has little merit so far as the privileges of the provincial assemblies are concerned. While these privileges are part of the provincial constitutions they are not part of the "Constitution of Canada", as that term is defined in section 52 of the *Constitution Act, 1982*. This was the conclusion reached by Jones J.A. for the majority in *New Brunswick Broadcasting*.

⁸ (1987), 77 N.R. 241 (S.C.C.).

⁹ *Ibid.* at 293.

Lord Halsbury L.C.'s decision in *Fielding v. Thomas*, quoted in Chapter 1,¹⁰ established quite clearly that legislation on privilege was part of the constitution of a province. Pursuant to the power over its own constitution, now found in section 45 of the *Constitution Act, 1982*, each provincial legislature can enact laws regarding privilege. However, the provincial constitutions are not part of the Constitution of Canada.

Subsection 52(1) of the *Constitution Act, 1982* declares the Constitution of Canada to be the supreme law of Canada. Subsection 52(2), quoted above, states what is included in the Constitution of Canada. The constitutions of the provinces are not among the Acts and orders set out in the schedule referred to in paragraph 52(1)(b). This is not surprising, particularly when no province has a single instrument which is its constitution. In *OPSEU v. A.G. Ontario*,¹¹ Beetz J. pointed out:

The constitution of Ontario, like that of other provinces and that of the United Kingdom, but unlike that of many states is not to be found in a comprehensive written instrument called a constitution. It is partly contained in a variety of statutory provisions. Some of these provisions have been enacted by the Parliament at Westminster, such as ss. 58 to 70 and ss. 82 to 87 of the *Constitution Act, 1982*. Other provisions relating to the constitution of Ontario have been enacted by ordinary statutes of the Legislature of Ontario, for instance the *Legislative Assembly Act*, R.S.O. 1970, c. 240; *The*

¹⁰ Chapter I, note 44.

¹¹ [1987] 2 S.C.R. 1.

Representation Act, R.S.O. 1970, c. 413; and *The Executive Council Act*, R.S.O. 1970, c. 153.¹²

Subsection 52(2) employs the word "includes" which suggests there may be Acts and orders other than the *Canada Act 1982* and those Acts listed in the schedule which make up the Constitution of Canada, but as pointed out by Peter Hogg, little turns on the use of the word "includes":

The definition of the "Constitution of Canada" in s. 52(2) is introduced by the word "includes". In general, in Canadian statutes, the word "includes" indicates that the definition is not exhaustive. The word "means" is customary for an exhaustive definition. But considering the specificity of the list of Acts and orders, and the grave consequences (namely, supremacy and entrenchment, described in the next two paragraphs) of the inclusion of other instruments surely no court would be so bold as to make additions to the 30 instruments in the schedule. It seems only realistic, therefore, to regard the definition as exhaustive, although it omits many instruments of importance to the government of Canada or the provinces.¹³

As pointed out by Beetz J., certain parts of the provincial constitutions appear in the Constitution of Canada. However, none of these provisions guarantee the privileges of the provincial assemblies. Thus, privilege is part of the provincial

¹² *Ibid.* at 37.

¹³ P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 6. McEachern C.J.S.C. agreed with Hogg's conclusion in *Dixon v. A.G. British Columbia*, [1987] W.W.R. 313 at 323-24 (B.C.S.C.).

constitutions, but not guaranteed by the Constitution of Canada. Since they are not part of the Constitution of Canada the privileges of the provincial legislatures can be overridden by the Charter. Legislation with respect to privileges, like all parts of a provincial constitution, with the possible exception of those parts still contained in the Constitution of Canada, is no more than ordinary legislation.

(b) Privileges of the Senate and the House of Commons

Unlike the privileges of the provincial assemblies, the privileges of the Senate and the House of Commons are provided for in the Constitution of Canada -- in section 18 of the *Constitution Act, 1867*. The problem is whether section 18 entrenches or confers the privileges so that they cannot be overridden by the Charter. Section 18 states that the privileges "shall be such as are from time to time defined by Act of Parliament", but it is not clear whether once defined by Act, those privileges have constitutional status. Arguably, section 18 is no more than a grant of power and the Act defining the privileges, should be treated as ordinary legislation.

This is the position taken by Strayer J. in *Southam Inc.* in reaching the conclusion that the Senate committee was exercising powers conferred by an Act of Parliament and therefore subject to the jurisdiction of the Federal Court.

Further, the power to legislate on the subject of privileges, immunities and powers of the respective Houses of Parliament is in essence a legislative power to control the

privileges, immunities and powers which each House of Parliament and its committees shall enjoy. It is open to Parliament to "define" those privileges, etc., very narrowly or very broadly up to the level enjoyed by the U.K. House of Commons, and in doing so Parliament confers jurisdiction or powers on those exercising them including the power of each House to make its own rules. The fact that Parliament has adopted by reference the recognized principles governing the privileges, etc., of the U.K. House of Commons does not mean that the Parliament of Canada has not legislated on the subject.¹⁴

Strayer J.'s opinion was not shared, however, by Iacobucci C.J. in the Federal Court of Appeal:

More specifically, as noted already, s. 18 of the *Federal Court Act* gives exclusive original jurisdiction to the Trial Division for specified relief against any federal board, commission or other tribunal which is defined in s. 2 of the same *Act* as any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers *conferred* by or under an Act of the Parliament of Canada. Counsel for the appellant emphasized that conferred means "granted" or "bestowed" and that the privileges, immunities and powers of the Senate or its committees were not "granted" or "bestowed" on them by or under an Act of Parliament but by s. 18 of the *Constitution Act, 1867*. Counsel for the respondents argued that s. 18 of the *Constitution Act, 1867* simply conferred the "*power*" to define the privileges, immunities and powers to be held, enjoyed and exercised by the Senate". Once the power to define has been put into statutory form, the requirements of the definition of section 2 of the *Federal Court Act* are met and jurisdiction under section 18 thereof perfected as Strayer, J., correctly decided.

¹⁴ *Supra*, note 1 at 148-49.

However, in my view, the words "conferred by or under an Act of the Parliament of Canada" in s. 2 mean that the Act of Parliament has to be the source of the jurisdiction or powers which are being conferred. The privileges, immunities and powers of the Senate are *conferred* by the *Constitution*, not by a statute, although the latter defines or elaborates upon the privileges, immunities and powers. Such a statute then is the manifestation of Senate privileges but it is not its source; the source is s. 18 of the *Constitution Act, 1867*.¹⁵

The ratio of Iacobucci C.J.'s decision is that an Act of Parliament does not confer privileges for the purpose of section 2 of the *Federal Court Act*. The underlying reasoning is that since the privileges are conferred by section 18 of the *Constitution Act, 1867* they are therefore entrenched in the Constitution.

However, section 18 does not use the word "confers". Instead, it provides that the privileges "shall be such" as are "defined" by an Act of Parliament. Parliament had first to legislate before any privileges actually existed. It would be that legislation or the privileges exercised pursuant to the *Parliament of Canada Act*, since sections 4 and 5 only define privileges by reference, which must conform to the Charter.

In *Reference Re Roman Catholic Separate High Schools Funding*¹⁶ the Supreme Court of Canada, Wilson J. delivering the reasons of the Court, held that

¹⁵ *Supra*, note 1 at 261-62.

¹⁶ *Supra*, note 8.

section 93 of the *Constitution Act, 1867* gave Ontario plenary power over education, including a power to add new rights and privileges to denominational schools, and the Charter did not abrogate or derogate from this power. Section 29 of the Charter, which provided that nothing in the Charter could abrogate or derogate from rights or privileges guaranteed to denominational schools, was not necessary to achieve this result. Even when a province acted pursuant to its plenary power in 93(1) and its power to add new rights and privileges under 93(3), the rights and privileges were not subject to the Charter because read as a whole section 93 represented a compromise which naturally led to the possibility of legislation which would be in conflict with the Charter. Wilson J. stated:

It cannot be concluded, therefore, that rights or privileges conferred by post-Confederation legislation under 93(3) are "guaranteed" within the meaning of s. 29 in the same way as rights or privileges under 93(1).

This does not mean, however, that such rights or privileges are vulnerable to attack under ss. 2(a) and 15 of the *Charter*. I have indicated that the rights or privileges protected by s. 93(1) are immune from *Charter* review under s. 29 of the *Charter*, I think this is clear. What is less clear is whether s. 29 of the *Charter* was required in order to achieve that result. In my view, it was not. I believe it was put there simply to emphasize that the special treatment guaranteed by the constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the *Charter* because not available to other schools, is nevertheless not impaired by the *Charter*. It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the *Constitution*, particularly a provision such as s. 93, which represented a fundamental part of the Confederation compromise. ...

The Confederation compromise in relation to education is found in the whole of s. 93, not in its individual parts. The s. 93(3) rights are not guaranteed in the sense that the 93(1) rights and privileges are guaranteed i.e. in the sense the legislature which governs them cannot later pass laws which prejudicially affect them. But they are insulated from *Charter* attack as legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise. Their protection from Charter review is not in the guaranteed nature of the rights and privileges conferred by the legislation but in the guaranteed nature of the province's plenary power to enact that legislation.¹⁷

Arguably, the nature of the plenary power granted under section 93 differs substantially from the power granted under section 18 of the *Constitution Act, 1867*. The "nature" of the section 93 power, allowing for special rights for certain groups, must necessarily infringe equality rights guaranteed by the Charter. The privileges which can be defined by Act under section 18 need not necessarily infringe any Charter right. Under section 18 the privileges defined by legislation are subject to the limitation that they cannot exceed those of the British House of Commons, but it is possible they could be subject to the further limitation that they not infringe Charter rights. This second limitation would not detract to any significant extent from Parliament's power to define the privileges. The Charter cannot be used to invalidate other provisions of the Constitution according to Wilson J., but it is also a principle of statutory interpretation that whenever possible two provisions should be read together.¹⁸

¹⁷ *Ibid.* at 294-95.

¹⁸ E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 91-92.

It would appear that, unlike section 93, section 18 of the *Constitution Act, 1867*, does not represent "a fundamental part of the Confederation compromise". L.P. Pigeon has suggested that the reason section 18 was included in 1867 was because Parliament, unlike the provincial legislatures, was not given the power to amend its own constitution.¹⁹ This power was not granted until 1949²⁰ and is now found in section 44 of *Constitution Act, 1982*. It would be an odd situation indeed if a provincial legislature, as discussed above, when amending the constitution of a province so as to provide for privileges of the provincial assembly, did so by ordinary legislation subject to the Charter, but when Parliament amended the Constitution of Canada so as to provide for privileges of the Senate and House of Commons, it did so by ordinary legislation not subject to the Charter. Such a result could only follow because section 18 happens to be in the *Constitution Act, 1867* while no similar provision was provided for the provinces.

The power granted pursuant to section 18 is little different than that granted under section 91 of the *Constitution Act, 1867*, allowing Parliament to make laws in respect of the enumerated matters. The Charter places certain limitations on legislation passed under section 91. Likewise, when Parliament passes an Act under section 18 defining privileges, that Act is also subject to the Charter. Since section 18

¹⁹ L.P. Pigeon, "Are The Provincial Legislatures Parliaments?" (1943) 21 Can. Bar Rev. 826 at 830.

²⁰ *British North American (No. 2) Act, 1949* (U.K.), 13 Geo. VI, c. 8, now repealed; see the Schedule of the *Constitution Act, 1982*.

does not represent any special compromise, legislation passed pursuant to section 18 would appear to be more akin to legislation passed under section 91 than under section 93. Section 93 guarantees rights. Section 18, to use Iacobucci C.J.'s language, only confers privileges or, more precisely, the power to legislate in respect of privileges.

Of course, the argument could be made that because section 18 deals with privilege and courts have traditionally deferred to legislatures on matters of internal proceedings, then legislation passed pursuant to section 18, like legislation passed pursuant to section 93, should be given special status. But again, section 18 was not a special compromise like section 93, and what results is a different status for the privileges of the Senate and the House of Commons, as opposed to the privileges of the provincial assemblies. If courts wish to give privileges a special status, this might better be accomplished by narrowly interpreting subsection 32(1) of the Charter, discussed below, or, the approach advocated by this paper, by recognizing that the Charter applies to questions of privilege, but refusing to interfere in matters of internal proceedings.

Thus, it would appear that neither the privileges of the Senate and House of Commons, nor the privileges of the provincial assemblies are guaranteed by the Constitution so as to be immune from the Charter. There is still the question whether these legislative bodies are exempt from the application of the Charter, and therefore exempt when exercising their privileges.

Part 3 - Whether Canadian Legislative Bodies Included Within Section 32

It is clear that legislation passed by Parliament or the legislature of a province must conform with the Constitution and thus, the Charter. Moreover, the Supreme Court of Canada has now held that matters governed by the common law, but in respect of which Parliament or the legislatures could legislate, are also subject to the Charter. What is not clear is whether the constituent parts of Parliament and the legislatures must conform to the Charter.

At issue in *Operation Dismantle v. R*²¹ was whether the executive when exercising the prerogative powers of the Crown was subject to the Charter. The Supreme Court of Canada gave a broad interpretation to what was meant by "laws" in section 52 of the Charter,²² and concluded that the executive, although not acting pursuant to statute when invoking a prerogative power, was still subject to the Charter under paragraph 32(1)(a). Wilson J. stated:

The respondents submit that at common law the authority to make international agreements (such as the one made with the United States to permit the testing) is a matter which falls within the prerogative powers of the Crown and that both at common law and by s. 15 of the Constitution Act, 1867 the same is true of decisions relating to national defence. They further submit that since by s. 32(1)(a) the Charter applies 'to the Parliament and government of Canada in respect of all matters

21 [1985] 1 S.C.R. 441.

22 See Dickson C.J.'s statement, *ibid.* at 459.

within the authority of Parliament', the Charter's application must, so far as the government is concerned, be restricted to the exercise of powers which derive directly from statute. It cannot, therefore, apply to an exercise of the royal prerogative which is a source of power existing independently of Parliament; otherwise, it is argued, the limiting phrase 'within the authority of Parliament' would be deprived of any effect. The answer to this argument seems to me to be that those words of limitation, like the corresponding words 'within the authority of the legislature of each province' in s. 32(1)(b), are merely a reference to the division of powers in ss. 91 and 92 of the Constitution Act, 1867. They describe the subject matters in relation to which the Parliament of Canada may legislate or the government of Canada may take executive action. As Le Dain J. points out, the royal prerogative is 'within the authority of Parliament' in the sense that Parliament is competent to legislate with respect to matters falling within its scope. Since there is no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the Charter, I conclude that the latter do so also.

Privilege is a matter in respect of which Parliament and the legislatures can legislate. This power is not found in sections 91 and 92 of the *Constitution Act*, 1867, but Wilson J.'s reference to sections 91 and 92 may not be conclusive since the power to legislate on certain subjects can be found outside sections 91 and 92. As discussed above, Parliament's power to legislate in respect of privilege is found in section 18 of the *Constitution Act*, 1867, which provides that the privileges of the House of Commons and Senate are those "defined by Act of the Parliament of Canada", while the provincial legislatures' power to legislate in respect of privilege is an aspect of their power to make laws amending the constitutions of the

provinces under section 45 of the *Constitution Act, 1982*. In light of Wilson J.'s statements it would follow that since Parliament and the provincial legislatures have the power to legislate on matters of privilege, privilege is subject to the Charter.

Neither Parliament nor the provincial legislatures, with the exception of Ontario, have legislated extensively on privilege. Instead, the legislation adopts the privileges enjoyed by the British House of Commons or, in the case of some provinces, the privileges enjoyed by the Senate and the House of Commons. This absence of legislation or, more precisely, this reliance on the common law does not preclude the application of the Charter according to Wilson J. The prerogative is also largely governed by the common law, but the fact that Parliament can legislate on the matter brings it within the ambit of the Charter. In *New Brunswick Broadcasting* Jones J.A. used a quote from Dicey which draws on analogy between prerogative and privilege:

Between "prerogative" and "privilege" there exists a close analogy: the one is the historical name for the discretionary authority of the Crown; the other is the historical name for the discretionary authority of each House of Parliament.²³

Where government action depends on the common law the Charter applies. In

²³ *Supra*, note 6 at 21.

*Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*²⁴ McIntyre J. stated:

It is my view that s. 32 of the *Charter* specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is involved in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the *Charter* will apply and it will be unconstitutional. This action will also be unconstitutional to the extent that it relies for authority or jurisdiction on a rule of the common law which constitutes or creates an infringement of a *Charter* right or freedom. In this way the *Charter* will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only insofar as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.²⁵

McIntyre J. was concerned that if the common law was the basis of some governmental action which infringed a guaranteed right or freedom then the common law would be contrary to the Charter. By analogy it is easily argued that if

²⁴ [1986] 2 S.C.R. 573

²⁵ *Ibid.* at 598-99.

the common law is the basis of an action by a legislative body that infringes a right or freedom then it should be declared unconstitutional.

This is not the end of the matter, however. McIntyre J., like the Court in *Operation Dismantle* was not concerned with privilege. McIntyre J. refers to the legislative, executive and administrative branches of government, but focuses on action by the executive or administrative branch. These latter two are clearly within section 32, which states that it applies to the “government of Canada” and “the government of each province”. Earlier in his judgment McIntyre J. stated:

The word “government” ... must then, it would seem, refer to the executive or administrative branch of government. This is the sense in which one generally speaks of the Government of Canada or of a province.²⁶

With respect to the legislative branch, McIntyre J. states that “[i]t would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom [emphasis added].” This passage is clearly *obiter*, but it suggests that privilege, or more precisely the exercise of a privilege, is not subject to the Charter. Such a conclusion would follow from the fact that a legislature is made up of constituent parts and it is a part, not the whole, that enjoys and exercises privileges. Section 32 refers to “Parliament” and “the legislature ... of each province” and not to the Senate, the House of Commons and the provincial

²⁶ *Ibid.* at 194.

assemblies. A legislature as a whole does not enjoy privileges and, therefore can only infringe Charter rights by the passage of legislation.

The problem is whether section 32 of the Charter, in referring to the whole, necessarily includes the constituent parts. A strict reading of section 32 would preclude the application of the Charter to the Senate, the House of Commons and the provincial assemblies. "Parliament" and "legislature", terms used in section 32, are defined elsewhere in the Constitution.

"Parliament" is defined in section 17 of the *Constitution Act, 1867*:

17. There shall be One Parliament for Canada consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

"Legislature", as that term is used in respect of Ontario and Quebec, is defined in sections 69 and 71 of the *Constitution Act, 1867*:

69. There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of One House, styled the Legislative Assembly of Ontario.

71. There shall be a Legislature for Quebec consisting of the Lieutenant Governor and of Two Houses, styled the

Legislative Council of Quebec and the Legislative Assembly of Quebec.²⁷

Arguably, it is only "Parliament" the Queen, the Senate and the House of Commons acting together, and "Legislatures", the Assemblies and the Lieutenant Governors acting together, that are subject to the Charter under section 32.

However, certain authorities suggest the contrary and opt for a less strict reading of section 32. Roger Tassé has written:

[W]hat is the position when the Senate and the House of Commons act alone? Although the Senate and the House of Commons are fundamental components of Parliament and play an essential role in the process of enacting federal statutes, strictly speaking, they do not constitute Parliament. Does it follow that inquiries or disciplinary proceedings undertaken by the House of Commons, for example, are not subject to the Charter? Could this reasoning apply to the administrative apparatus of the Senate and the House of Commons? Are those who administer this apparatus, including the speakers of the Senate and the House, bound by the Charter in their dealings with support staff? Can any person who has

²⁷ *The Act Respecting the Legislative Council of Quebec*, S.Q. 1968, c. 9 abolished the Legislative Council and provided that the Legislature for Quebec shall consist of the Lieutenant Governor and the National Assembly of Quebec.

There is no similar provision in the *Constitution Act, 1867* for New Brunswick or Nova Scotia. Instead, section 88 provided:

88. The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.

Presumably, it was understood that "Legislature" included the Lieutenant Governor, as well as the Assembly. Likewise for all provinces entering Confederation after 1867.

dealings with this apparatus insist on compliance with the Charter?

There can be no doubt that legislation enacted by Parliament respecting the Senate and the House of Commons as well as their personnel is subject to the Charter. ...

The supremacy of the Charter over the Senate and the House of Commons is much greater than this, however. In my view, it extends to every action taken by the Senate and the House of Commons, by virtue of their traditional rights and privileges, which affects individual rights. Thus it would apply, for example, to the penal sanctions which may be imposed on a person found guilty of contempt of Parliament. The Charter applies to Parliament in the exercise of its legislative power. It would be incongruous if the Houses of Parliament could ignore the Charter in circumstances where their non-legislative actions violate fundamental values protected by the Charter.²⁸

The majority in *New Brunswick Broadcasting* adopts these passages of Tassé and concludes that a broad interpretation of section 32 is appropriate. The Court does not explore the exact wording of section 32, but a strict interpretation would have been contrary to the broad and liberal approach adopted. Indeed, a broad interpretation of the Charter has been mandated by the Supreme Court of Canada. Jones J.A. relied on a passage of Dickson J. in *Hunter v. Southam Inc.*²⁹ Dickson J. stated:

²⁸ R. Tassé, "Applications of the Canadian Charter of Rights and Freedoms" in Beaudoin & Ratushny, *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Butterworths, 1989) 65 at p. 71-72. This passage was adopted by Jones J.A. in *New Brunswick Broadcasting Co.*, *supra*, note 6 at 18-19.

²⁹ [1984] 2 S.C.R. 145.

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines rights and obligations. It is easily enacted and easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of government power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must therefore be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.³⁰

Strayer J., the trial judge in *Southam Inc.*, also preferred a more liberal interpretation of section 32 and stated:

[I]n the *Operation Dismantle* case ... in 1985 the Supreme Court had little difficulty in finding that by virtue of s. 32 the Charter had been made applicable so as to potentially limit the exercise of the royal prerogative. I find it difficult to believe that s. 32 does not also, in referring to "Parliament", impose on the constituent elements of Parliament such restraints as may otherwise flow from the language of the Charter just as the reference to "governments" in s. 32 makes the Charter binding on every component and officer of government while acting as such.³¹

30 *Ibid.* at 155-56.

31 *Supra*, note 1 at 146.

If the Charter is to be interpreted liberally and so as to be capable of growth, it is very difficult to argue that section 32 should be interpreted strictly so as to preclude its application to the constituent parts of Parliament and the legislatures. There is a good reason to argue that the whole necessarily includes the parts. If a liberal interpretation is required then the Supreme Court of Canada should follow the Nova Scotia Court of Appeal and conclude that section 32 applies the Charter to the actions of the Senate, the House of Commons and the provincial assemblies.

However, interpreting section 32 so as to include the constituent parts of Parliament and the Legislatures seems to run afoul of the traditional deference accorded legislative bodies. This problem was addressed in Hallett J.A.'s dissent in *New Brunswick Broadcasting*. In support of his argument³² that the reasoning in *Operation Dismantle* should not be extended so as to allow courts to review not only legislation but also the exercise of a privilege by the House of Assembly, Hallett J.A. relied on a passage in *Reference Re Amendment of the Constitution of Canada* (Nos. 1, 2 and 3):

How Houses of Parliament proceed, how a provincial Legislative Assembly proceeds is in either case a matter of self-definition, subject to any overriding constitutional or self-imposed statutory or indoor prescription. It is unnecessary here to embark on any historical review of the "court" aspect of Parliament and the immunity of its procedures from judicial review. Courts come into the picture when legislation is enacted and not before It would be incompatible with the self-

regulation -- "inherent" is as apt a word -- authority of Houses of Parliament to deny their capacity to pass any kind of resolution. Reference may appropriately be made to art. 9 of the *Bill of Rights* of 1689, undoubtedly in force as part of the law of Canada, which provides that "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament".³³

Hallett J.A. then stated:

I recognize that the foregoing statement describing Parliament as self-regulating is made with the caveat that self-regulation is subject to any overriding constitutional prescription. This decision was also prior to its judgment in *Operation Dismantle*. However, I am of the opinion that the Charter should not be interpreted so broadly that the courts are in a position to dictate how the members of a legislature or Parliament are to conduct themselves in the exercise of their recognized privileges.³⁴

What Hallett J.A.'s judgment fails to recognize is the importance of "the overriding constitutional prescription". Where such a prescription exists, as demonstrated by *Reference Re Manitoba Language Rights*,³⁵ discussed in Chapter 1,³⁶ the courts will require compliance by a legislative body and may even go so far as to inquire into the legislative process to ensure that legislation is properly passed.

³³ [1981] S.C.R. 753 at 785.

³⁴ *Supra*, note 6 at 51.

³⁵ [1985] 1 S.C.R. 721 at 745.

³⁶ At 34-35.

The issue is whether there is an overriding constitutional prescription so far as the privileges of a legislative body are concerned. If section 32 of the Charter is given a liberal interpretation then there is such a prescription. If section 32 applies to the constituent parts of Parliament and the legislatures of the provinces then, like the executive and administrative branch of the governments, these constituent parts must comply with the Charter so as not to deny the rights and freedoms guaranteed therein. In exercising their privileges, these legislative bodies must conform with the Charter.

There is an additional issue involved here, recognized by the last statement of Hallett J.A. quoted above, and that is the extent to which the courts can require legislative bodies to comply with the Charter if it does apply. This, however, is a separate issue and primarily a question of jurisdiction, which is the focus of Chapter 3. Whether the Charter applies to the constituent parts of Parliament and the provincial legislatures is easily confused with the question of jurisdiction since it usually follows that if a public body must comply with the Charter then the courts have jurisdiction over that body. The issue of application and jurisdiction can, however, be approached separately.

The Charter guarantees individual rights and freedoms in the face of government action. It would be an odd situation if the one branch of government responsible for the most important form of "government action", legislation, need

only be concerned that its legislation, in order to pass judicial scrutiny under section 52, comply with the Charter, but could otherwise ignore individual rights. In dealing with any aspect of government, including a legislative body and its members, individual Canadians would expect their Charter rights to be recognized. Of course, most legislators, in part because they are elected, ensure that individual rights are respected, but if the Charter does not apply to legislative bodies there is no guarantee. Inquiries undertaken by legislative bodies could ignore fundamental freedoms and legal rights. A legislative body as a whole could discriminate against individual members on grounds otherwise prohibited by section 15 of the Charter.

If courts should conclude now that the Charter does not apply to the Senate, the House of Commons and the provincial assemblies, the courts leave open the possibility for abuse in the future. As discussed above, such a finding is open to the courts on the basis of a narrow reading of section 32. The Charter applies to privileges to the extent they are part of the common law and the basis of governmental action, but section 32, the application section, does not specifically enumerate the constituent parts of Parliament and the provincial legislatures, and it is only these constituent parts that can exercise privileges.

The problem with the two cases now before the courts, *New Brunswick Broadcasting* and *Southam Inc. and Rusnell*, is that they are "easy" cases. They do not present difficult fact situations that pit the personal rights and freedoms guaranteed by the Charter against the rights of legislators necessary for the effective

functioning of a legislative body. Freedom of the press is at stake in both cases, but whether television cameras are allowed access to the Nova Scotia House or *in camera* meetings of Senate committees are made more accessible will not dramatically affect any individual's rights. Arguably, there is good reason to curb the power of the press in these situations and allow the legislative bodies greater control over their proceedings. However, in deciding these cases the courts, particularly the Supreme Court of Canada, must consider the possibility of "hard" cases arising in the future. What if the House of Commons should exercise its contempt power and silence a critic by having him or her committed to jail after nothing more than a peremptory hearing at the bar of the House? What if during a time of unrest and insurrection the House should decide to ban all publication of its proceedings and conduct all sessions *in camera*? If the courts should decide now that privilege is not subject to the Charter, there is no basis, absent a constitutional amendment, for curbing such abuses in the future. The possibility of hard cases such as these is an additional reason for the courts to conclude that Canadian legislative bodies are subject to the Charter. The courts must be concerned with possible future developments if individual rights are to be fully protected.

Thus, while there are arguments to the contrary, the better view would appear to be that the Senate, the House of Commons and the provincial assemblies are within section 32, the application provision of the Charter, and, as discussed earlier, their privileges are not guaranteed elsewhere in the Constitution so as to be excluded from the application of the Charter. However, if this is the correct

conclusion, it is not the end of the matter. There is still the question of jurisdiction. Canadian courts must also decide to what extent they will require that the Senate, the House of Commons and the provincial assemblies comply with the Charter.

The courts are the branch of government which must ultimately interpret the Constitution. However, in concluding that the Charter applies to legislative bodies, and thus their privileges, it does not necessarily follow that the Courts must require compliance. It is possible that the legislatures, while subject to the Charter, must police themselves. The traditional rule that courts will not interfere with internal proceedings must still be weighed.

Chapter 3

Striking a Balance

Part 1 - The Issue of Jurisdiction

If it is accepted that the Charter applies to the Senate, the House of Commons and the provincial assemblies, the issue is how far Canadian courts can and should go to ensure that, in exercising their privileges, these legislative bodies comply with the Charter. Arguably, if a privilege affects a Charter right, then the courts should take appropriate measures to ensure the protection of the Charter right. In light of statements, such as that of Dickson J. in *Hunter v. Southam* that the “judiciary is the guardian of the Constitution”,¹ it could be argued that the courts have a duty to ensure compliance with the Charter on the part of legislative bodies even when it means dictating internal procedures. In *Reference Re Manitoba Language Rights* the Supreme Court of Canada declared it to be the duty of the courts “to ensure that the constitutional law prevails” and cited *Amax Potash v. Government of Saskatchewan* for the proposition that “it is the duty of this Court to ensure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power”.² However, while the Court in *Reference Re Manitoba Language Rights* did require compliance with a constitutional manner and form provision during the legislative process, neither Supreme Court case evidences a judicial power to dictate internal procedures. It may be “the duty of the judicial department to declare what the law is”, to quote

¹ [1984] 2 S.C.R. 145 at 156.

² [1985] 1 S.C.R. 721 at 745.

Marshall J. in the early American Supreme Court case, *Marbury v. Madison*,³ but it is another matter if, in enforcing Charter rights, a court can control a legislative body.

The issue is one of jurisdiction. It would appear that the traditional rule that courts will not interfere with internal proceedings should remain intact. However, this rule must be balanced against the importance of Charter rights and the rule that courts are entitled to determine the extent of a privilege. The problem is one of properly circumscribing the courts' jurisdiction.

(a) Defining Jurisdiction

If a right or freedom guaranteed by the Charter is infringed or denied then a person may apply under subsection 24(1) for a remedy. Subsection 24(1) provides:

Anyone whose rights or freedoms, as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The issue is how far the courts may go in fashioning a remedy under subsection 24(1) in light of the traditional rule that courts may inquire into the scope of a privilege, but they may not interfere in matters of internal proceedings.

³ (1803), 1 Cranch. 137 at 177-78.

Defining "internal proceedings", Maingot has stated:

"Internal proceedings" are proceedings which do not affect the rights of persons exercisable outside the House of Commons because those rights are within the jurisdiction of the courts. Thus the order to print the defamatory paper in *Stockdale v. Hansard* was not an "internal proceeding"; there the court did examine the proceedings of the House to determine legality. ...

Therefore, where an order of the House does not affect the rights of a person that he would ordinarily exercise outside the House, that is an "internal proceeding" in which the courts would not interfere. Orders of the House affecting the liberty of the subject are by this definition not "internal proceedings" and any such action of the House would be examinable by the courts to determine whether the privileges of Parliament justify the action.⁴

May has stated:

Most of the modern instances of interaction between the courts and Parliament have their origin in the determination of the proper limits of proceedings in Parliament, some of them with a particular concern for what is internal to Parliament. The courts have recognised the need for an exclusive Parliamentary jurisdiction, as a necessary bulwark of the dignity and efficiency of either House. The judges have further admitted that when a matter is a proceeding of the House, beginning and terminating within its own walls, it is obviously outside the jurisdiction of the courts, though there may be an exception for criminal acts so far as they may be comprehended within the term proceedings in

Parliament. Equally clearly, if a proceeding of the House issues in action affecting the rights of persons exercisable outside the House, the person who published the proceedings or the servant who executed the order (for example) will be within the jurisdiction of the courts, who may inquire whether the act complained of is duly covered by the order, and whether the privilege claimed by the House does, as pleaded, justify the act of the person who executed the order.⁵

On the basis of the law as expressed in these passages the courts have jurisdiction when the exercise of a privilege affects a right "exercisable outside the House", but no jurisdiction "when a matter is a proceeding of the House, beginning and terminating within its own walls". If the exercise of a privilege affects a right or entitlement a person has apart from legislative proceedings, for example, his or her liberty or right to publish, then a court would have jurisdiction and in assuming jurisdiction could ensure that Charter rights are protected. Likewise, if the right affected is only one exercised within the context of a legislative proceeding, for example, the right of a member to sit and vote or the right of a witness to answer questions, the courts have no jurisdiction and, it would seem, no jurisdiction even if a Charter right is affected. However, Charter rights are problematic because they are fundamental rights possessed by a person irrespective of what type of proceeding he or she may be involved in. The right to sit as a member is a right of a different nature than the right not to be discriminated against on the basis of sex or race. The former only exists within the context of a legislative proceeding, while the latter is

⁵ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st ed., C.J. Boulton, ed. (London: Butterworths, 1989) at 154-55.

attributed to a person irrespective of the context. Arguably, Charter rights can even be characterized as rights “exercisable outside the House” since it is not only within the context of a legislative proceeding that a person possesses such rights. However, any rule that because a Charter right is at issue the courts have jurisdiction would appear to conflict with the rule that courts do not have jurisdiction over internal proceedings.

An argument could be made, on the basis of the passages from *May and Maingot* and the case law regarding the phrase “court of competent jurisdiction” in section 24, that even if a Charter right is affected the courts simply have no jurisdiction over matters of internal proceedings. Ordinarily when a government body, for example, a government ministry or agency, infringes a Charter right the question of jurisdiction does not arise. The courts have always, at one time pursuant to the prerogative writs, had jurisdiction over these bodies. However, where legislative bodies are concerned, courts have never presumed to have jurisdiction over internal proceedings. Section 24 of the Charter requires an application to a “court of competent jurisdiction” when a Charter right is infringed or denied. Arguably, since courts have never presumed to have jurisdiction over internal proceedings they are not a court of competent jurisdiction when the exercise of a privilege infringes a Charter right, but a matter of internal proceedings is at issue.

The meaning of the phrase "court of competent jurisdiction" has yet to be fully defined by the case law. To date the case law in which the phrase is defined concerns rights of appeal and whether the appeal court can determine a Charter issue given the nature of the proceedings below. However, the courts, including the Supreme Court of Canada, have provided definitions which could be applied when determining whether a court in protecting Charter rights has jurisdiction over internal proceedings.

In *Singh v. Minister of Employment and Immigration*, Wilson J. stated:

Section 24(1) of the *Charter* provides remedial powers to "a court of competent jurisdiction". As I understand this phrase, it premises the existence of jurisdiction from a source external to the *Charter* itself.⁶

A similar test is set out in *Mills v. R.*,⁷ where McIntyre J. and a majority of the Supreme Court of Canada adopted the reasons of Brooke J.A. in *R. v. Morgentaler*.⁸ Basically, it is a three part test: a court is a court of competent jurisdiction if pursuant to the laws governing its procedures (presumably both

⁶ [1985] 1 S.C.R. 177 at 222.

⁷ [1986] 1 S.C.R. 863 at 959-65.

⁸ (1984), 41 C.R. (3d) 262 at 271 (Ont. C.A.).

statutory and common law), it has jurisdiction over the person and subject matter in question and, in addition, has the authority to make the order sought.

If these tests are applied to the question of the courts' jurisdiction over internal proceedings, then arguably there is no court of competent jurisdiction, apart from a legislative body itself, to the extent the latter can be considered a court. There is no statute giving courts jurisdiction over internal proceedings and the common law rule has developed so as to preclude such jurisdiction. This common law rule is reflected in a passage from one of the cases discussed in Chapter 1, in which the right of a member to sit was at issue. In *Chamberlist v. Collins*, Sheppard J. stated:

The ordinary civil jurisdiction of the Court does not extend to determining the rights of members to sit in the Council. In *Lamb v. McLeod*, [1932] 1 W.W.R. 206, Turgeon, J.A., at p. 208 said:

In acting in cases of election petitions, the Court is not exercising its ordinary civil or criminal jurisdiction. The Assembly is the guardian of its own prerogatives and privileges, and the Courts have nothing to do with questions affecting its membership except in so far as they have been specially designated by law to act in such matters: ...

Davis v. Barlow (1910), 15 W.L.R. 49; *Redman v. Buchanan* (1913), 11 D.L.R. 389, Hence the Court would not have that jurisdiction unless conferred by statute.⁹

⁹

(1962), 34 D.L.R. (2d) 414 at 416 (B.C.C.A.), discussed in Chapter 1 at note 74.

Hallett J.A.'s dissent in *New Brunswick Broadcasting v. Donahoe*¹⁰ focused on the jurisdictional issue, although he did not discuss the phrase "court of competent jurisdiction". Hallett J.A. recognized that "a strong argument can be made that the exercise of privileges is a matter within the scope of the wording of s. 32",¹¹ but he dealt with the issue before him, the media's right to televise proceedings of the Assembly, by starting from the premise that it was an internal proceeding. On the basis of the rule that courts have no jurisdiction over internal proceedings and his view that "[s]ection 24 of the Charter does not confer jurisdiction; it enables the court to provide a remedy",¹² Hallett J.A. then concluded that the Charter did not put the courts in a position "to dictate how members of a legislature or Parliament are to conduct themselves in the exercise of their recognized privileges."¹³ This conclusion seems to go too far in that it suggests that courts have no jurisdiction at all in respect of privilege, but it must be kept in mind that Hallett J.A. characterized the issue as dealing with internal proceedings.

Whether a legislative body itself is a court for purposes of determining whether a matter of internal proceedings infringes a Charter right is really a moot point, since such an argument would be suggesting that the legislative body must sit

¹⁰ (1990), 71 D.L.R. (4th) 23 (N.S.S.C.), *aff'd.* (1991), 80 D.L.R. (4th) 11 (C.A.), leave to appeal to S.C.C. granted May 16, 1991.

¹¹ *Ibid.* at 49.

¹² *Ibid.* at 51.

¹³ *Ibid.*

in judgment on itself. It is better to assume that a legislative body can simply as a matter of course determine the extent to which Charter rights must be protected. What is important in this regard, however, is whether the Charter applies. If the courts determine that section 32 precludes the application of the Charter to legislative bodies, then legislative bodies need not, as a matter of law, be concerned with the Charter in respect of internal proceedings, although, because of their public profile, it is assumed that legislative bodies would. If the Charter applies, however, there is, in effect, a legal obligation to ensure compliance even though judicial scrutiny may not be allowed in respect of internal proceedings.

There is, however, a contrary argument with respect to jurisdiction over internal proceedings and this argument focuses on the importance of judicial scrutiny whenever Charter rights are at issue. This argument was advanced by the majority in *New Brunswick Broadcasting*. Jones J.A. stated:

There is no doubt as to the power of the court to grant a remedy under s. 24 in this case. The courts have been the ultimate arbiters of the Constitution since 1867. I have already quoted from the decisions in *Operation Dismantle, supra*, and *Southam Inc., supra*.

...

Section 52 now imposes a duty on the courts to uphold the Constitution. For the same reasons the respondent was entitled to seek a declaration against the members of the House under s. 24 as the only persons denying its right.¹⁴

¹⁴ *Ibid.* at 41-42.

In coming to this conclusion Jones J.A. relied on a passage from *B.C.G.E.U. v. British Columbia (Attorney General)*,¹⁵ in which Dickson C.J.C. held that the rights guaranteed by the Charter were of no value if a person was denied access to a court and that sections 52 and 24 of the Charter guaranteed such access. This argument assumes that on the basis of the Charter itself courts have jurisdiction to grant a remedy that is appropriate and just when a Charter right is infringed. Although it was not addressed in *New Brunswick Broadcasting*, the case law to date regarding "court of competent jurisdiction" could be distinguished on the basis that it only deals with the question of which court is the proper court and is not concerned whether access is precluded altogether. Thus, on the basis that a Charter right has been infringed, courts have jurisdiction to consider all questions of privilege, even when a matter of internal proceedings is involved.

The interesting aspect of Jones J.A.'s decision is that he refused to dictate terms to the Assembly and only granted a declaration, stating:

There is no doubt as to the power of the legislature to control its proceedings and maintain discipline. However, I am satisfied that the request of the respondent will have minimum impact on the proceedings.¹⁶

¹⁵ (1988), 53 D.L.R. (4th) 1 at 11-12.

¹⁶ *Supra*, note 10 at 40-41.

Thus, Jones J.A.'s judgment recognizes the importance of not interfering in internal proceedings and he seems to have worked out a compromise by resorting to a declaration, whereby he could give recognition to a Charter right, freedom of expression, and at the same time allow the Assembly to control its own proceedings.

What must be kept in mind is that, while courts should not interfere in matters of internal proceedings, they do have jurisdiction to determine the scope of a privilege. In determining whether a Charter right is infringed within the context of internal proceedings, arguably, a court is not assuming jurisdiction over internal proceedings, but only determining the scope of a privilege on the basis of its jurisdiction pursuant to the Charter. The courts' right to determine the scope of a privilege in light of the Charter need not conflict with the rule that courts have no jurisdiction over internal proceedings so long as the courts find a way of also recognizing "the power of the legislature to control its own proceedings and maintain discipline". As long as a court leaves it up to a legislative body to give effect to a ruling when a matter of internal proceedings is at issue, arguably, the powers of a legislative body are properly recognized.

There is no clear distinction between matters of internal proceedings and rights exercisable "outside the House", at least not when what is at issue are Charter rights. An argument can be made that courts should simply decline jurisdiction if an internal proceeding is at issue. However, such an approach may

not adequately recognize Charter rights and on the basis of sections 52 and 24 the courts would appear to have jurisdiction. If this is true then a remedy that is appropriate and just must be found. What is appropriate could be the basis on which courts refuse to interfere with internal proceedings, thus giving effect to both the traditional rule and the Charter.

(b) Fashioning a Remedy

Subsection 24(1) of the Charter requires a remedy that is appropriate and just in the circumstances. In most instances whenever a privilege infringes a Charter right, a declaration will be both appropriate and just and therefore, a sufficient remedy. A declaration does not actually change anything, since, unlike other remedies it does not prevent illegal action, redress a wrong, provide compensation or nullify a decision.¹⁷ Therefore, the courts are not requiring that something be done. However, compliance, assuming some sort of action or forbearance is required, can be expected, particularly on the part of governments. Thus, in *New Brunswick Broadcasting Co.*,¹⁸ should the Supreme Court of Canada agree with the Nova Scotia Court of Appeal and declare that the broadcasting companies have a right to televise the proceedings of the House of Assembly, in all likelihood, the House will comply.

¹⁷ B. Strayer, *The Canadian Constitution and the Courts*, 3rd ed. (Toronto: Butterworths, 1988) at 148.

¹⁸ *Supra*, note 10.

A declaration will not always be the appropriate and just remedy when a Charter right is at issue. Although it involved a constitutional provision, as opposed to a Charter right *per se*, *Reference Re Manitoba Language Rights*¹⁹ demonstrates that a court may allow a more complex remedy and take an active role to ensure that a right is not infringed. All the laws of the Manitoba Legislature enacted in English only were declared to be invalid, but deemed temporarily valid. The Supreme Court then allowed the Attorney General time to develop a timetable for enacting the laws in both French and English, and subsequently issued a detailed order providing for the translation and re-enactment of all invalid legislation.²⁰

Charter litigation also demonstrates that courts are prepared to allow remedies more complex than declarations in order to reach a result that is "appropriate and just". Damages is one possibility. In *Crossman v. R.*²¹ the Federal Court, Trial Division, awarded damages to an accused whose right to counsel was infringed in obtaining a breathalyser. The possibility of damages has been discussed in various other cases.²² Injunctions are also a possibility. In *Vancouver General*

¹⁹ [1985] 1 S.C.R. 721.

²⁰ *Reference Re Manitoba Language Rights (Order)*, [1985] 2 S.C.R. 347.

²¹ (1984), 23 D.L.R. (4th) 588.

²² See, for example, *Bertram S. Miller Limited v. R.* (1985), 18 D.L.R. (4th) 600 (F.C.T.D.); *Lussier v. Collin*, [1985] 1 F.C. 124 (C.A.), rev'g *Collin v. Lussier*, [1983] 1 F.C. 218 (T.D.); and *R. v. Esau* (1983), 147 D.L.R. (3d) 561 (Man. C.A.); as well as M.L. Pilkington, "Damages for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can. Bar Rev. 517.

Hospital v. Stoffman,²³ the British Columbia Court of Appeal allowed an interlocutory injunction preserving the admitting privileges of doctors over sixty-five until such time as the courts could determine whether the Hospital's policy was contrary to section 15 of the Charter. More interesting is *Marchand v. Simcoe County Board of Education*,²⁴ where Sirois J. issued a mandatory order pursuant to subsection 24(1) of the Charter directing the defendant Board to provide French language instruction to the children of the plaintiff and the class he represented, the plaintiff's right to such instruction being guaranteed by section 23 of the Charter. The French Language Education Council of the Board and Ministry of Education eventually disagreed over what facilities had to be provided pursuant to the Order and were forced to reattend before Sirois J. for clarification.²⁵

In *Southam Inc.*²⁶ the plaintiffs not only sought declarations that the refusal to allow them access to the Senate hearings and the rule allowing a committee to make such an order infringed paragraph 2(b) of the Charter, but also sought *certiorari* to quash the decisions of the Senate Committee and an injunction

²³ (1986), 23 D.L.R. (4th) 146, rev'd (1990), 118 N.R. 240 (S.C.C.). See also, *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439.

²⁴ (1986), 55 O.R. (2d) 638 (H.C.).

²⁵ *Marchand v. Simcoe County Board of Education No. 2* (1987), 61 O.R. (2d) 651. For discussions of the use of the injunctive remedy in Charter litigation, see R.J. Sharpe, "Injunctions and the Charter" (1984) 22 Osgoode Hall L.J. 473 and W.A. Bogart, "'Appropriate and Just': Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy" (1986), 10 Dalhousie L.J. 81.

²⁶ *Southam Inc. and Rusnell v. A.G. Canada* (1989), 27 F.T.R. 139 (F.C.T.D.), appeal allowed (1990), 114 N.R. 255 (F.C.A.).

against the Committee continuing to refuse the plaintiffs access to the hearings. If a court grants a declaration the Senate will in all likelihood comply, making the more intrusive remedies, *certiorari* and an injunction, unnecessary. However, if a court concludes that these latter remedies are also necessary, it creates an interesting dilemma for itself because it will actually be interfering with the internal proceedings of the Senate. A question arises as to just how far a court would go in order to enforce the injunction, should it be disobeyed.

It must be remembered that the House of Commons, the Senate and the provincial assemblies have not abandoned the claim of the British House of Commons that the questioning of a privilege before a court is itself a breach of privilege. While section 5 of the *Parliament of Canada Act*, allowing copies of the Journal of either House to be submitted as evidence in a judicial proceeding, may anticipate a judicial inquiry regarding privilege, the "old dualism"²⁷ remains unresolved. Should a court attempt to enforce an injunction, a re-enactment of *Stockdale v. Hansard*²⁸ is conceivable. A "truce" can only be maintained so long as the courts do not actively interfere with internal proceedings.

Resorting to remedies other than a declaration would lead a court well beyond the decision in *Bradlaugh v. Gossett*,²⁹ where Stephens J. held that the

²⁷ See Chapter 1 at note 49.

²⁸ See Chapter 1 at notes 49 to 58.

²⁹ (1884), 12 Q.B.D. 271.

House of Commons had exclusive power to interpret a statute so far as the regulation of its own proceedings was concerned. If privilege is subject to the Charter it can be conceded that a court can declare whether the exercise of a privilege is contrary to the Charter. However, going further appears to be both unnecessary and unwise absent "extraordinary circumstances", a possibility acknowledged by Stephen J.³⁰

Although the Charter may have increased the courts' jurisdiction in respect of ruling on matters of privilege, the courts should hesitate before proceeding any further than Stephens J. did in *Bradlaugh v. Gossett* or Evans C.J.H.C. did in *Re Clark*.³¹ As pointed out in Chapter 1,³² while Evans C.J.H.C. found he had authority to declare the extent of a privilege, he was not interfering with internal proceedings. It may be an odd result that a Charter right is found to be infringed and a court is left unable or unwilling to ensure that any wrong which ensues is fully redressed, but given the nature of privileges this may be the only desirable result.

However, this does not preclude the possibility that there may be instances where a privilege infringes a Charter right and something more is

³⁰ *Ibid.* at 282.

³¹ (1977), 81 D.L.R. (3d) 33 (Ont. H.C.).

³² Chapter 1 at notes 81 to 85.

required -- "extraordinary circumstances". In *Bradlaugh v. Gossett*, Stephens J. stated:

I may observe, in conclusion, that, apart from these considerations, I should in any case whatever feel a reluctance almost invincible to declare a resolution of the House of Commons to be beyond the powers of the House and to be void. Such a declaration would in almost every imaginable case be unnecessary and disrespectful. I will not say that extraordinary circumstances might not require it, because it is impossible to foresee every event which may happen. It is enough to say that the circumstances which would justify such a declaration must be extraordinary indeed, and that, even if relief had been given in this case, I should think it sufficient to restrain the Serjeant-at-Arms from acting on order of the House.³³

Thus, Stephens J., if he had found that the House could not prevent Mr. Bradlaugh from taking his seat, would not have declared the resolution void, but he would have found a remedy by asserting jurisdiction over the Serjeant-at-Arms and ordering him not to carry out the resolution. Of course, the Serjeant-at-Arms would have had difficulty answering to two masters, but the plaintiff would have had a remedy and the House would have been put in the awkward position of acting contrary to a decision of the courts.

In the 1885 Ontario case, *R. v. Bunting*, Wilson C.J. quoted an interesting passage from *Hallam's Constitutional History*, 10th ed., to underline the

³³ *Supra*, note 29 at 282.

proposition that the courts have jurisdiction to determine the existence of a privilege:

And after referring to the bad precedents of the House of Lords, he [Hallam] adds: "If the matter is to rest upon precedent, or upon what overrides precedent itself, the absolute failure of jurisdiction in the ordinary Courts, there seems nothing (decency and discretion excepted) to prevent their repeating the sentences of James I.'s reign -- whipping, branding, hard labour for life; nay, they might order the Usher of the Black Rod to take a man from their bar and hang him up in the lobby."

The Courts have truckled too much to the assumed privileges of Parliament; but the case of *Ashby v. White*, 9 A. & E. 1, and *Stockdale v. Hansard*, 1. Sm. L. C., 8th ed., 264, have stripped the law of Parliament of all mystery, and have brought it, as part of the general law, within the judgment of the legal Courts of the country.³⁴

It is to be hoped, as Lord Ellenborough C.J. suggested in *Burdett v. Abbot*,³⁵ that the "extravagant case" will never arise. Nevertheless, the courts must be prepared to deal with such a case should it arise, which means that they must be prepared to grant something more than a simple declaration should a Charter right be infringed. Should the House of Commons ever commit a person to jail, arguably, the person should be released on a writ of *habeas corpus* because of a failure to accord him or her legal rights as guaranteed by sections 10 and 11 of the Charter. Should the House of Commons decide that all sessions will be held *in*

³⁴ [1885] O.R. 524 at 538 (Q.B.).

³⁵ (1806), 14 East 1 at 128, 105 E.R. 501 (Exch.), *aff'd*. (1817) 5 Dow. 165, 3 E.R. 1289 (H.L.).

camera, arguably, given a violation of freedom of expression and freedom of the press, the courts could refuse to enforce any laws passed during the *in camera* sessions.

If the Charter applies to legislative bodies and the privileges exercised by them, the question is how to define the courts' jurisdiction so that Charter rights are protected in appropriate circumstances, allowing the courts sufficient flexibility to deal with "extraordinary circumstances", while ensuring that legislative bodies are given sufficient latitude to function efficiently and effectively without unnecessary interference. Section 24 of the Charter requires a remedy that is both appropriate and just. Unlike the remedies available when other government bodies infringe Charter rights, the remedies available when the exercise of a privilege infringes a Charter right may be more limited in scope.

What this paper advocates is a combination of the two approaches evidenced by the minority and majority decision in *New Brunswick Broadcasting*.³⁶ Legislative bodies, and therefore their privileges, are subject to the Charter pursuant to section 32. However, if Canadian legislative bodies are to function efficiently and effectively then courts must not unnecessarily interfere with internal proceedings. The traditional rule that courts have jurisdiction to determine the scope of a privilege, but no jurisdiction to interfere in matters of internal proceedings is still workable in the post-Charter era. Courts must continue to recognize the importance

³⁶ *Supra*, note 10.

of internal proceedings when questions of privilege come before them. They must then develop approaches so that their jurisdiction over internal proceedings is properly circumscribed, but Charter rights are properly recognized.

(c) Possible Approaches

There appear to be three possible approaches the courts could take in developing Charter jurisprudence so as to avoid interfering in matters of internal proceedings while at the same time recognizing Charter rights. First, the courts could decline jurisdiction whenever a matter involves internal proceedings. Second, the courts, in applying section 1 of the Charter, could defer to the legislative body in question when determining what is a reasonable limit. Third, the courts could avoid granting a remedy more intrusive than a declaration when internal proceedings are at issue, except in extraordinary circumstances.

(i) Declining Jurisdiction

One means by which the courts could maintain the distinction between internal proceedings and matters affecting Charter rights, the justification for which was discussed above in section (a), is by declining jurisdiction when the issue before them involves a matter which is strictly a matter of internal proceedings. For example, if the issue is a member's right to sit in the legislative chamber, the member having been expelled by a vote of the legislative body, the issue would appear to be strictly a matter of internal proceedings, and it would appear that the

courts should decline jurisdiction. In addressing this issue in *Re MacLean*,³⁷ Glube C.J.T.D. concluded that it was up to the House to set proper standards for its sitting members.³⁸ Whether an expulsion was by way of legislation, which it was in *Re MacLean*, or by resolution, Glube C.J.T.D. was of the opinion that this was a function of the Assembly not normally reviewable by the courts. Thus, any infringement of a Charter right within the context of internal proceedings would be up to a legislative body itself to address.

What is interesting about Glube C.J.T.D.'s decision is that in *obiter* she also found that the expulsion was not contrary to the Charter. The problem is if the expulsion had been contrary to the Charter, perhaps because it was clearly discrimination on the basis of sex or race, whether Glube C.J.T.D. would have come to the same conclusion. If such an expulsion is strictly a matter of internal proceedings then the courts must not interfere. However, the difficulty posed is whether discrimination on a ground prohibited by the Charter involves a right exercisable outside a legislative body and therefore invites judicial intervention. Leaving the issue entirely to the legislative body itself may not be sufficient.

To date the case law regarding the definition of "internal proceedings" and "proceedings in Parliament" has not dealt with such an issue. From cases such

³⁷ (1987), 27 C.R.R. 212 (N.S.S.C.).

³⁸ *Ibid.* at 222.

as *Stockdale v. Hansard*,³⁹ *Bradlaugh v. Gossett*,⁴⁰ and *Re Clark*,⁴¹ it is clear that what is said and done within the four walls of a legislative chamber is an internal proceeding. Clearly, the disciplining of members can only occur within the four walls and does not involve the rights of a party not involved in the proceedings. However, the case law to date, including *Re Maclean*, has not had to consider the special nature of members' Charter rights. The right not to be discriminated against on a ground prohibited by the Charter is a right a member enjoys apart from the legislative proceedings. On the basis that courts have jurisdiction pursuant to sections 52 and 24 whenever a Charter right is infringed and have always had jurisdiction over rights exercisable outside a legislative body, it could be argued that the courts have jurisdiction although the matter is otherwise strictly a matter of internal proceedings.

The issue in *New Brunswick Broadcasting*⁴² presents a similar problem. As illustrated by Hallett J.A.'s dissent, the use of cameras in the legislative chambers can be characterized as strictly a matter of internal proceedings. However, refusing the media access may be contrary to freedom of the press and freedom of expression as guaranteed by the Charter. Freedom of the press and freedom of

³⁹ (1839), 9 Ad. & E. 253, 113 E.R. 1112.

⁴⁰ *Supra*, note 29.

⁴¹ *Supra*, note 31.

⁴² *Supra*, note 10.

expression are rights exercisable outside a legislative body and therefore the courts would again seem to have jurisdiction.

One way to approach the problem is a strict refusal by the courts to deal with any matter that can be characterized as internal proceedings. If the Charter right is ancillary and its exercise not infringed except within the legislative proceedings, then the courts could decline jurisdiction. Clearer definitions of "internal proceedings" and "rights exercisable outside the House" would have to be developed, but such an approach would leave it up to the legislative bodies to determine the extent to which its internal proceedings must conform to the Charter.

A more liberal approach, however, may be appropriate. The courts could conclude that if a Charter right is involved then they are dealing with a right exercisable apart from a legislative body and therefore have jurisdiction. They could also assume jurisdiction pursuant to sections 52 and 24 of the Charter. By adopting such an approach it would appear that courts are interfering with internal proceedings. However, by incorporating the two other approaches discussed below unnecessary interference with internal proceedings could still be avoided. This more liberal approach could be justified on the basis that courts are only declaring the extent of a privilege. If the courts do not require compliance, but only state their view regarding the applicability of the Charter, arguably, they are not interfering.

(ii) **The Section One Approach**

A second possible approach that would allow courts to avoid interfering in matters of internal proceedings is on the basis of section 1 of the Charter. Section 1 is not itself a remedy, but it allows courts to balance interests when determining the scope of a Charter right. Under section 1 the rights and freedoms guaranteed by the Charter are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Where the infringement of a Charter right is found the defendant has the burden of proving that a limitation is justified. The twofold test is set out in *R. v. Oakes*:⁴³

First, the objective to be served by measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The objective must at least relate to societal concerns which are pressing and substantial in a free and democratic society. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. A proportionality test balancing the factors must be used. It has three components: whether a rational connection exists between the means and the objective; whether the means impairs the infringed right as little as possible, and whether the limiting measure and the objective are properly balanced.⁴⁴

Most privileges easily satisfy the first test since the objective to be served is the proper and effective functioning of the legislature, the institution

⁴³ [1986] 1 S.C.R. 103.

⁴⁴ *New Brunswick Broadcasting*, *supra*, note 10 at 63 of trial decision.

designed to control a free and democratic society. As discussed in Chapter 1,⁴⁵ privileges developed because they are necessary if a legislative body is to function. Thus, there may be an important reason to allow a Charter right to be overridden. For example, if the use of television cameras will unnecessarily interfere with proceedings, freedom of the press could be overridden. This conclusion was reached by Hallett J.A. in *New Brunswick Broadcasting*, who stated:

[I]n my opinion, there can be no doubt that if one were to conclude there was an infringement of the respondent's freedom of expression by the ban on filming in the legislative chamber, it would be saved under s. 1 of the Charter as there is a pressing and substantial need to maintain decorum in the House so that the business of the province can be conducted in an orderly manner.⁴⁶

The second test is more difficult to apply, but does leave a court some discretion. Where a privilege affects a right a person would normally exercise apart from a legislative body and internal proceedings are only an ancillary issue, there is a greater possibility that a privilege or the exercise of a privilege may not affect the right as little as possible. For example, the exercise of the contempt power may unnecessarily infringe a person's liberty. The contempt power may be necessary for preserving the dignity of a legislative body. However, in exercising the power, a legislative body may in effect reach beyond its four walls so as to impose sanctions

⁴⁵ Chapter 1 at notes 21 and 22.

⁴⁶ *Supra*, note 10 at 56.

on an outside party. Internal proceedings are not compromised if in imposing a sanction the legislative body must recognize the outside party's Charter rights.

Where the privilege at issue primarily concerns a matter of internal proceedings, however, greater latitude can be given to the means chosen by the legislative body. For example, a legislative body may have valid reasons, including the protection of state secrets, for limiting media access to proceedings. The concern here is with the proper and efficient conduct of the legislative process itself and arguably, a privilege or the exercise of a privilege may outweigh a Charter right. Moreover, the legislative body, rather than a court, may be in a better position to determine to what extent a right can be exercised without unnecessarily affecting the legislative process and courts may want to give weight to how the legislative body itself has chosen to limit a right.

Thus, where matters of internal proceedings are at issue, the courts can avoid interference by applying section 1 of the Charter. A court may come to the conclusion that the exercise of a privilege infringes a Charter right, but section 1 allows a court to avoid unnecessary interference. The court would not simply be declining jurisdiction. Instead, it would be defining the scope of a privilege in such a way that it can override a Charter right.

Again, the problem is one of defining internal proceedings and rights exercisable outside a legislative body. The exercise of a privilege usually involves

internal proceedings. Strictly speaking, only when an order requires that something be done beyond the four walls, for example, that an article be published, as in *Stockdale v. Hansard*, or that someone be imprisoned, can it actually be said that internal proceedings are not at issue. As discussed earlier, Charter rights present an interesting problem since by their nature they are rights which a person possesses at all times, subject to such limitations as can be demonstrably justified.

If courts are to assume jurisdiction over all infringements of Charter rights, including those at issue within the context of an internal proceeding, then section 1 takes on special significance. Courts can justify their jurisdiction to the extent that they are only determining the scope of a privilege. However, they must not unnecessarily interfere. Section 1, in allowing such limits as can be demonstrably justified, allows a court to give weight to the necessary importance of a privilege, as well as the means chosen by a legislative body in exercising its privilege in light of the Charter right at issue. Declining jurisdiction so as to avoid any interference whatsoever is not necessary if interests are properly balanced under section 1.

(iii) The Use of Declarations

The use of the declaration as an appropriate remedy also allows courts to recognize Charter rights and determine the scope of a privilege while still avoiding any unnecessary interference with internal proceedings.

As discussed above, remedies other than declarations can put the courts in a position where they are dictating how a legislative body must proceed. To avoid such interference courts, when a matter of internal proceedings is before them, could refuse to grant anything more than a declaration. The extent to which the majority in *New Brunswick Broadcasting* actually allowed the appeal is interesting. The trial judge, Nathanson J., in concluding his decision, provided:

The claim of the plaintiffs is granted. The court will issue a declaration that the plaintiffs have a right of access pursuant to s.2(b) of the *Canadian Charter of Rights and Freedoms* to televise the proceedings of the House of Assembly from the galleries with their own unobtrusive cameras.

The right of access so declared is limited by the privileges of the House of Assembly reflected in such timely and reasonable rules as shall infringe freedom of expression as little as possible. The courts will, if necessary, be the judge of timeliness and reasonableness.⁴⁷

The majority in the Court of Appeal dismissed the appeal with respect to the basic declaration as to the right of access, but allowed the appeal with respect to the remaining clauses in Nathanson J.'s order. Jones J.A. stated:

It is unnecessary at this stage for the court to consider what procedures, if any, are required in order to control the exercise of the right. That is a matter for the House in the first instance. Freedom of expression is not absolute. The House may impose reasonable time, place and manner restrictions upon the exercise of the right

where there are pressing and substantial reasons for limiting the exercise of the right.⁴⁸

Jones J.A. went on to quote the passage from *B.C.G.E.U. v. A.G., British Columbia*⁴⁹ to the effect that where a Charter right is infringed there must be a remedy. However, the Court of Appeal was obviously reluctant to determine what rules would be “timely and reasonable”. While the Court was prepared to determine the extent of a privilege, it did not go so far as to dictate what would constitute compliance with its declaration on the part of the Assembly. Thus, the Court seems to have concluded that it would not interfere with internal proceedings. Absent “extraordinary circumstances” a declaration may be the only plausible remedy under subsection 24(1) of the Charter where it is found that a privilege infringes a Charter right and the courts are faced with the possibility of interfering in a matter of internal proceedings.

The use of the declaration, even when a matter of internal proceedings is clearly involved, can be justified on the basis that courts are entitled to determine the scope of a privilege. In declaring the extent to which a privilege infringes a Charter right, the courts are imposing a standard, the Charter, imposed by the Constitution on all public law.

⁴⁸ *Ibid.* at 41 of appeal decision.

⁴⁹ *Supra*, note 15.

The traditional rule that courts will not interfere in matters of internal proceedings can still be maintained since a legislative body need not take any specific action. The legislative body can treat the declaration as the opinion of the courts and continue to maintain its right to determine the scope of its own privileges. There will, however, be public pressure on the legislative body to conform with the judicial interpretation.

The use of the declaration also allows for a remedy under section 24. If a legislative body refuses to comply with the declaration, the person whose rights are infringed may not be fully vindicated. However, section 24 requires a remedy that is "appropriate and just in the circumstances" and when matters of internal proceedings are also at issue, a declaration may be the only appropriate remedy.

Arguably, even the granting of declarations is an unnecessary interference with internal proceedings since a legislative body will be expected to conform. However, this concern must be balanced against the need to protect Charter rights and the role the courts are expected to play in protecting those rights. Simply declining jurisdiction when matters of internal proceedings are involved, as discussed above, does not fully address the distinction between matters of internal proceedings and rights exercisable apart from a legislative body, since Charter rights, arguably, are the latter. The use of a declaration allows this concern to be addressed.

Of course, declarations are not the only remedy. Where matters of internal proceedings are not involved, other remedies may be appropriate. For example, *habeas corpus* may be available should a person be held in contempt and committed to prison. And, as discussed above, "extraordinary circumstances" may require more than a declaration, although as illustrated by Stephen J.'s suggestion in *Bradlaugh v. Gossett*, that effect could be given to a court order by asserting jurisdiction over the Serjeant-at-Arms,⁵⁰ even when "extraordinary circumstances" present themselves, there may be means by which a court can avoid interfering with matters of internal proceedings.

Thus, the use of declarations may be the most appropriate way of giving effect to Charter rights, assuming a limitation on the Charter right is not justified under section 1, while at the same time ensuring that the traditional rule that courts will not interfere with matters of internal proceedings is maintained.

(d) Justifying a Canadian Approach

Unlike the American Constitution, the Canadian Constitution does not encompass a separation of powers doctrine.⁵¹ It is, however, a long standing tradition within the British system of government, that a legislature is supreme within its own sphere and courts should defer to the powers of the legislature and avoid, wherever possible, interfering with the legislative process. The enactment of

⁵⁰ *Supra*, following note 33.

⁵¹ See P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto, Carswell, 1985) at 150.

the Charter has given Canadian courts new powers and transformed the former system of Parliamentary supremacy. The issue is whether the system has been transformed to such an extent that courts must now interfere with the legislative process.

Should the Supreme Court of Canada ultimately decide that the Charter does not apply to legislative bodies then the issue is moot. However, given that certain privileges and powers can detrimentally affect Charter rights, such a decision could leave rights unprotected. Should the Supreme Court decide that legislative bodies are subject to the Charter then the issue becomes one of how much courts should interfere. Arguably, so far as internal proceedings are concerned, courts should interfere as little as possible. In applying section 1 of the Charter the courts can limit their control over legislative bodies. Declining jurisdiction precludes interference, but it should be kept in mind that this approach does not allow room for the balancing that section 1 requires. A third possibility is to refuse any remedy more intrusive than a simple declaration leaving it up to the legislative bodies to determine what sort of compliance is necessary. Whichever one of these approaches is chosen courts are still allowed clear jurisdiction when rights exercisable apart from the legislature are at issue and the power to determine the extent of a privilege. It is only the traditional deference to a legislative body's right to control its own proceedings that is being protected.

Unfortunately, there is really no other constitutional system to which Canadian courts can look for precedents when attempting to develop a satisfactory approach to a Constitution that encompasses a concept of Parliamentary supremacy, but also requires that the privileges exercised by legislative bodies be subject to individual rights and therefore judicial scrutiny.

Although the Preamble of the *Constitution Act, 1867* states the "Desire" of the colonies entering Confederation for a "Constitution similar in principle to that of the United Kingdom", the Canadian Constitution is remarkably different. The underlying principle in the Canadian federal system has always been the supremacy of the law, not the supremacy of Parliament. Unlike their Canadian counterparts, British courts have never been required to interpret and enforce a basic underlying constitutional document which imposes limits on the powers of legislatures. The basic rules regarding privilege developed within the British system and while the courts could determine the extent of a privilege, privilege being part of the general law, the courts did not have the power to interfere with the legislative process. If the Charter now applies to legislative bodies, Canadian courts must apply it and are faced with a dilemma as to what extent the traditional deference afforded the legislative process should be preserved. The Australian system, while it is based on a written constitution provides little guidance since it does not yet guarantee fundamental rights and freedoms. Nothing in the Australian Constitution subjects the exercise of privileges to judicial scrutiny on the basis that privileges should not infringe constitutionally guaranteed rights and freedoms.

The American Constitution guarantees individual rights, but in respect of the exercise of privileges it too is different than the Canadian system because the American Constitution also protects privileges from judicial scrutiny. The Canadian system would be similar, at least in the federal sphere, if section 18 of the *Constitution Act, 1867* was a clear guarantee of rights that could not be overridden by the Charter.

Article I, section 6, of the American Constitution specifically provides:

The senators and representatives ... shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

The American courts have determined that the immunity conferred is absolute,⁵² and the courts are only concerned with the kinds of congressional actions not protected by the immunity.⁵³ However, the American system does in one respect parallel the Canadian system under the Charter, if the Charter applies to the exercise of a privilege. Congressional authority to conduct investigations and

⁵² See, e.g., *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

⁵³ See generally, L.H. Tribe, *American Constitutional Law*, 2nd ed. (New York: Foundation Press, 1988) at 370-74.

compel testimony is not explicitly recognized by the American Constitution and therefore, there is no absolute immunity in this respect. The American Supreme Court has recognized that the investigatory power is "an essential and appropriate auxiliary to the legislative function",⁵⁴ and judicial review of the power has been limited. However, the Supreme Court has required Congress to adopt procedural safeguards and comply with the Bill of Rights when conducting investigations. In *Quinn v. United States*,⁵⁵ the Court found that a person who properly invoked the Fifth Amendment could not be tried for contempt of Congress. Warren C.J. stated:

But the power to investigate, broad as it may be, is subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. ... Still further limitations on the power to investigate are found in specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination.⁵⁶

Thus, as would appear to be the case with the privileges of Canadian legislative bodies, the investigatory power of the American Congress is

⁵⁴ See *McGrain v. Daugherty*, 273 U.S. 135 at 174 (1927); *Anderson v. Dunn*, 6 Wheat 204 (1821); and generally, Tribe, *ibid.* at 375-78.

⁵⁵ 349 U.S. 155 (1955). See also, for example, *Barenblatt v. United States*, 360 U.S. 109 (1959); and *Emspak v. United States*, 349 U.S. 190 (1955).

⁵⁶ *Ibid.* at 161. It should be noted that Congress does not have an inherent power to punish for contempt: *Kilbourn v. Thompson*, 103 U.S. 168 (1881). However, legislation allowed for prosecution by the executive for a contempt and thus questions came before the courts when persons were charged. However, the courts were still required to assess the powers of Congress. Several of these cases came before the courts during the McCarthy era.

not constitutionally protected and therefore, subject to the Bill of Rights and judicial scrutiny. However, judicial review has been narrow. Review is limited to an extent by the Speech and Debate clause, quoted above,⁵⁷ but it is clear that when a person's rights are affected, the American courts will impose restrictions.

Arguably, Canadian courts should follow a similar approach, according legislative bodies considerable deference in order that they can manage their own internal proceedings, but stepping into protect those rights guaranteed by the Charter and exercisable apart from the legislative process. Canadian courts must decide to what extent they can and should interfere.

While no exact parallel can be found to the Canadian Charter and its effect on the privileges of legislative bodies, the American system provides some guidance to the extent the exercise of privileges is limited by Charter rights. More importantly, given the special status privileges continue to be accorded in the British, Australian and American systems, it is clear that the Charter has created a rather unique situation. However, the traditional rule that courts will not interfere with internal proceedings is still workable within the Canadian system given the possibility of declining jurisdiction, section 1 limitations and the availability of the declaration as a remedy, thus allowing for a narrowing of judicial review even though privileges are not accorded a special status in the Constitution.

Part 2 - Privileges that May Be Affected

What remains to be considered are certain privileges which when exercised may infringe Charter rights and require judicial scrutiny. Not every privilege exercisable by a legislative body necessarily poses the possibility of an infringement of a Charter right, although it is impossible to predict what cases will be brought before the courts. However, certain privileges are more troublesome than others since, unless exercised with care or circumscribed by a legislative body's own internal rules, they could infringe Charter rights. Courts will then be forced, assuming, of course, that they first declare privileges to be subject to the Charter, to distinguish internal proceedings and determine to what extent they should interfere.

(a) Freedom of Speech

The privilege of freedom of speech allows members of legislative bodies to debate fully and freely and nothing that is said during the course of proceedings can be challenged in the courts. This privilege has little impact on the rights and freedoms guaranteed by the Charter since debate alone can have little substantial effect on rights such as freedom of the press, freedom of religion, freedom of assembly, equality, or specific legal rights such as the right to be secure against unreasonable search and seizure. Arguably, however, freedom of speech, since the right is absolute, could affect the right to life, liberty and security of the person. This right, guaranteed by section 7 of the Charter, has not yet been given

any clearly defined limits,⁵⁸ and should a speech in a legislature detrimentally affect a person's livelihood or reputation, arguably, depriving that person of any remedy, such as a defamation action before a court, is contrary to the Charter.

The absolute nature of the privilege was established in *Ex parte Wason*,⁵⁹ where Cockburn C.J. stated:

It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue in their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person.⁶⁰

In *Roman Corp. Ltd. v. Hudson's Bay Oil & Gas Co. Ltd.*, Houlden J. had to consider statements of Prime Minister Trudeau and Mr. Greene, the Energy Minister, made in the House and later repeated in a telegram, regarding Roman Corporation's intention to sell shares in a uranium corporation to a non-Canadian. Holding that both constituted "proceedings in Parliament", he stated:

The court has no power to inquire into what statements were made in Parliament, why they were made, who made them, what was the motive for making

⁵⁸ See *Reference Re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486.

⁵⁹ (1868), L.R. 4 Q.B. 573.

⁶⁰ *Ibid.* at 576. See also *Dillon v. Balfour* (1887), 20 L.R.Ir. 600, where a cause of action based on words spoken in the House was stayed.

them or anything about them On the basis of the foregoing, it seems to be well established that no person can have a judgment awarded against him in civil proceedings arising out of a speech made in the House of Commons⁶¹

The decision as a whole was affirmed by the Supreme of Canada, although the latter did not consider the arguments regarding privilege.⁶²

The problem with the absolute nature of the privilege is that it can leave persons whose interests are seriously compromised by statements made in a legislature without a remedy. For example, in *Roman Corp.* the plaintiff had entered into a legally binding oral agreement with the foreign defendant corporation for the sale of shares, but when the announcement was made in the House and by telegram that legislation would be passed to prevent the sale, the sale fell through, even though legislation was never passed. The plaintiffs sued for, among other things, inducing breach of contract. As illustrated by the Supreme Court of Canada's decision, an announcement regarding government policy is not sufficient grounds for the tort of inducing breach of contract. However, the case

⁶¹ [1971] 2 O.R. 418 at 423 (Ont. H.C.), aff'd [1972] 1 O.R. 444 (C.A.), aff'd [1973] S.C.R. 820.

⁶² Martland J., *ibid.* at 824 S.C.C. decision, stated: "Without dissenting from the views expressed in the Courts below as to the privilege attached to statements *made in Parliament*

illustrates the effect that statements made in a legislature can have on economic interests.⁶³

Attacks on private persons have also occurred. In 1950 George Drew, the leader of the Conservative opposition, rose in the House to question the intentions of Leopold Infeld, then a mathematics professor at the University of Toronto, who had requested a one year sabbatical to teach in Poland.⁶⁴ Drew quoted from a right-wing magazine, *The Ensign*, in respect of Infeld's familiarity with atomic energy and proceeded to insinuate that Infeld intended to share secrets with the Soviets. The story in *The Ensign* had been largely ignored, but following Drew's statements, was picked up by all major newspapers, and Infeld was forced to leave the country and give up his Canadian passport. Only after his departure did anyone in Canada come to his defence. Drew was concerned about national security, but his remarks were made without any careful consideration of their accuracy or possible effect. Moreover, they were made on an occasion of absolute privilege, leaving a private citizen with no recourse against the speaker.

⁶³ Leaving aside the issue whether a corporation would be able to bring any suit under section 7 of the Charter.

⁶⁴ See House of Commons, *Debates* (March 16, 1950) at 793; and J. Zeidenberg, "Persecuted Professor: Celebrated Scientist was Driven into Exile by Cold War Witch-Hunt in Canada", *The [Toronto] Globe and Mail* (Friday, March 15, 1990) at A7.

Instances suggesting an abuse of the privilege of freedom of speech, it must be conceded, are rare. Usually, members of a legislative body are careful to police themselves. May states:

The Speaker having claimed and statutory recognition having been granted to the privilege of freedom of speech, it becomes the duty of each Member to refrain from any course of action prejudicial to the privilege he enjoys.⁶⁵

Outside political pressure will also curb abuses. Thus, when Evelyn Gigantes, the Ontario Minister of Health, revealed in the Legislature the name of a cocaine addict who had undergone treatment, the breach of confidentiality led to her resignation.⁶⁶

Nevertheless, the possibility for abuse exists. The problem is made more acute by the widespread use of television. When the absolute nature of the privilege of freedom of speech was first recognized the public did not have immediate access to the debates in the British House of Commons. Any damage to a

⁶⁵ May, *supra*, note 5 at 85. See also A. Fraser, A.B. Dawson & J.A. Holtby, *Beauchesne's Rules & Forms of the House of Commons of Canada with Annotations, Comments and Precedents*, 6th ed. (Toronto: Carswell, 1989) at 22 who explains that "it is the duty of the Speaker to restrain those who abuse the rules"; and at 129-30 where it is explained that government papers "reflecting on the personal competence or character of an individual" will not be tabled.

⁶⁶ See M. Maychak "Gigantes Gaffe Sparks Calls for Resignation" *The Toronto Star* (Friday, April 19, 1991) at A13 and R. Mackie and G. York "Gigantes Promised Quick Return to Cabinet", *The [Toronto] Globe and Mail* (Saturday, April 20, 1991) at A1. Although she allegedly breached the province's freedom of information and privacy laws, Gigantes might have defended her statement as being absolutely privileged.

person's reputation could be controlled by disciplining the member responsible or by subsequent debate.⁶⁷ Now, the damage is immediate and any subsequent control action will not necessarily erase the effect of a damaging statement. Reforms have been suggested. In 1989 Mr. Friesen introduced a private member's bill in the House of Commons which sought to amend section 4 of the *Parliament of Canada Act* so as to add a subsection (2):

(2) The freedom of speech and debates or proceedings in Parliament guaranteed by article 9 of the *Bill of Rights, 1689* does not apply to grant immunity to any member of the Senate or of the House of Commons for words spoken that reflect on the character or conduct of a person, who is not a member, acting in his or her private capacity outside Parliament.⁶⁸

The explanatory notes provided that members of Parliament, where they made irrelevant reflections on a person's character or conduct, should be subject to the ordinary laws of libel and slander. De Smith has pointed out that properly motivated members of Parliament should not be concerned if there were only a qualified privilege since qualified privilege can be rebutted by proof of no malice.⁶⁹

⁶⁷ Tied into this issue is the qualified privilege afforded the press if a report of a debate is full and fair. See Maingot, *supra*, note 4 at 38-42. A full discussion of the protection afforded the press is beyond the scope of this paper.

⁶⁸ *An Act to Amend the Parliament of Canada Act, Privileges and Immunities*, Bill C-259, 2nd Sess., 34th Parliament (1989).

⁶⁹ S.A. de Smith "Parliamentary Privilege and the Bill of Rights" (1958) 21 Mod. L. Rev. 465 at 481. See also A.G. Davis, "Parliamentary Broadcasting and the Law of Defamation" (1947) 7 U.T.L.J. 385, who suggests that absent legislation dealing specifically with the broadcasting of debates, a member only enjoys qualified privilege since a broadcast statement is not made "within the walls" of the House.

Reform has not occurred, however, and should a case now come before a Canadian court the issue is whether a member of a legislative body should be accorded privilege in light of section 7 of the Charter.⁷⁰ Arguably, if a person's interests are detrimentally affected by something said in a legislative proceeding he should be accorded a remedy and a rule of law that allows a person to hide behind an absolute privilege detrimentally affects another's right to life, liberty and security of the person.

It remains to be seen what a court will do if ever faced with the situation. However, such a ruling would not run contrary to the rule that courts should not interfere with internal proceedings, since it would not in any way prevent a legislative body from carrying out its functions. Only the member who spoke the defamatory words would be affected. The necessary result could also be achieved by way of a declaration. By declaring that an absolute privilege is contrary to the Charter, assuming that a Charter violation can be properly made out in light of developing section 7 jurisprudence, a court would then allow the person detrimentally affected the right to sue.

⁷⁰ The issue could be avoided by declaring the defamatory words not to be part of the "proceedings in Parliament", but this is unlikely given the broad interpretation of this phrase in *Roman Corp.*, *supra*, note 61.

(b) The Right To Control the Precincts

It would appear that the right of a legislative body to control its own precincts is clearly a matter of internal proceedings. Any attempt by a court to impose time, place or manner restrictions on rights of access interferes with a legislative body's necessary right to determine itself when and how persons should be allowed access to its proceedings. In his affidavit submitted in *New Brunswick Broadcasting* supporting the argument that the House of Assembly could exclude television cameras, the Speaker stated:

As a Speaker, one of my duties is to maintain order and decorum in the Legislative Chamber and in the Gallery ... I do verily believe that it would be impossible for the members of the House of Assembly to perform their duties if strangers were permitted to be on the floor of the Chamber or the Gallery uncontrolled by the members of the House, whether with television cameras or not, and particularly with cameras.⁷¹

If the legislative proceedings are to be conducted efficiently and effectively then the legislature must have control. In *Payson v. Hubert, Davies J.*, in the Supreme Court of Canada, stated:

[T]he public have access to the Legislative Chamber and to the precincts of the House as a matter of privilege only, and under either express or tacit license, which can at any time be withdrawn or revoked when in the interest of order and decorum it is judged to be necessary. That withdrawal of license can either be general as regards the

⁷¹ *Supra*, note 10 at 31 of trial decision.

whole public or special with respect to individuals who make themselves so offensive as to prejudice the proper conduct of public affairs committed to the Assembly or its Committees. ... Any other rule would leave the Assembly ... at the mercy of any individual or body of men who might obtrude themselves into the Chamber or its Committee Rooms and prevent the public business being carried on. Of course I do not refer to any arbitrary or capricious action on the part of the Speaker or his officers ...⁷²

*New Brunswick Broadcasting*⁷³ appears to be the correct approach when questions involving a legislative body's right to control its precincts come before a court. While the Nova Scotia Court of Appeal declared that freedom of the press was infringed by a ban on television access, the Court was not prepared to determine how that Charter right could be exercised; leaving it to the Assembly to determine time, manner and place restrictions. Individual rights cannot be ignored, but in deciding how these rights are exercised a legislative body must have final say. Seemingly a court, given full and adequate evidence, could determine exactly how a legislative body should control the exercise of a given right, but should a court ever proceed to do so it would be wresting control from the legislative body and setting itself above the legislature. Any decision by a legislative body regarding procedure would not be final since it could always be appealed to a court. All manner of unnecessary challenges could develop.

⁷² (1904), 34 S.C.R. 400 at 413.

⁷³ *Supra*, note 10.

A similar approach to the use of *in camera* sessions by legislative bodies would appear to be appropriate. A court is not in a position to judge when and how *in camera* proceedings should be used. A court could declare that any ban is contrary to freedom of the press as guaranteed by the Charter, but such a decision would be contrary to the decisions regarding media access to the courts which allow that restrictions on media access, although not a complete ban, are appropriate in certain circumstances.⁷⁴ Whether or not a ban is appropriate in a given legislative proceeding should be up to the legislative body to decide. A legislative body should not be required to appear before a court to justify every instance in which it seeks to hold an *in camera* session. If, as argued above, a legislative body should be concerned with the rights of third parties when its members speak freely during a debate, then *in camera* proceedings can actually be viewed as a means of protecting rights, at least when a sensitive topic arises. Further, matters of state security may require *in camera* hearings, and it should be left up to the legislative body in question to determine when restrictions are required.

Public access, the underlying issue in *Payson v. Hubert*,⁷⁵ also warrants a similar approach in respect of Charter rights. Freedom of expression and freedom of assembly are guaranteed by the Charter, but a legislative body has the right to limit these freedoms within its own precincts. In *Committee For the*

⁷⁴ See *R. v. Squires* (1989), 69 C.R. (3d) 337 (Ont. Dist Ct.); *Re Southam Inc. and the Queen* (No. 1) (1983), 41 O.R. (2d) 113 (C.A.); and *Moyse v. Alberta (Labour Relations Board)* (1987), 79 A.R. 118 (C.A.).

⁷⁵ *Supra*, note 72.

*Commonwealth of Canada v. Canada*⁷⁶ the Supreme Court of Canada held that the freedom of expression which an individual may have to communicate in a place owned by the government may be circumscribed by the interests of the government and citizens as a whole. Lamer C.J.C. and Sopinka J. held that the form of expression must be compatible with the principle function and purpose of the public place. La Forest, Gonthier and McLachlin JJ. each proposed more precise tests. La Forest J. allowed for the use of such areas as streets, parks and airports, subject to reasonable regulation to ensure intended use. Cory and L'Heureux-Dubé JJ. each proposed more liberal tests, the latter allowing for non-violent expression on government property, but setting a test for determining what is a public area that takes into account the traditional openness of the property for expressive activity, whether the public is ordinarily admitted as of right, the compatibility of the place with expressive activities, the impact on freedom of expression if access to a particular property is restricted, the symbolic significance of the property for the message being communicated and the availability of other public arenas. Thus, freedom of expression in public places may be circumscribed by section 1 of the Charter. The precincts of a legislative body have not traditionally been thought of as public property equivalent to streets. In order to properly conduct its business a legislative body must place limits on access and expression. An outright ban on access may not be warranted, but in all likelihood, a court will give effect to restrictions prescribed by a legislative body in respect of its precincts.

⁷⁶ (1991), 77 D.L.R. (4th) 385 (S.C.C.)

The right to control the precincts is a matter of internal proceedings, but access also involves Charter rights. If courts simply decline jurisdiction, certain rights such as freedom of the press and freedom of expression may not be adequately protected since an outright ban on access could detrimentally affect these rights. Section 1 allows courts to prescribe limitations and at the same time limit their own involvement. If a remedy is required, then a declaration would appear to be sufficient since legislative bodies would in all likelihood comply. In a time of political turmoil, should a legislative body attempt to restrict access so as to avoid all public scrutiny, "extraordinary circumstances" may require a more serious remedy. It would then be up to the courts to fashion a remedy, perhaps refusing to enforce legislation passed behind closed doors, which would protect Charter rights but interfere with internal proceedings as little as possible.

(c) **The Right to Control Its Own Constitution and the Right to Discipline Its Own Members**

In controlling its own constitution and disciplining its members, a legislative body is again dealing with matters that are primarily matters of internal proceedings. Unless a legislative body chooses to impose specific restrictions on its individual members' rights, it appears unlikely that issues involving Charter rights would arise.

Section 3 of the Charter guarantees that every citizen of Canada has the right to be qualified for membership in the House of Commons and a legislative

assembly, but this provision does not give an elected person any special rights as a member. This is made clear in *Re MacLean*⁷⁷ where Glube C.J.T.D. held that the Assembly could not impose restrictions on who could run for office, but it could expel members as part of its duty to discipline members and regulate its affairs. Maingot has stated:

In the final analysis, the House of Commons may exclude, suspend, or expel any member for any reason.

What is clear is that the ordinary civil and criminal jurisdiction of the courts does not extend to determining the rights of members to sit in the House, and the courts equally have nothing to do with questions affecting its membership except in so far as they have been specially designated by law to act in such matters as, for example, under the *Dominion Controverted Elections Act*.⁷⁸

However, as discussed above, a difficult issue arises as to the distinction between internal proceedings and rights exercisable outside a legislative body, if the Charter applies to the privileges of a legislative body. Arguably, a member's rights as guaranteed by the Charter are rights exercisable apart from the legislative body of which he or she is a member, and if the member is discriminated against contrary to section 15 of the Charter or contrary to freedom of thought, belief, opinion and expression as guaranteed by paragraph 2(b) of the Charter, the member has a right to

⁷⁷ *Supra*, note 37.

⁷⁸ *Supra*, note 4 at 161-62.

seek a remedy before the courts. Arguably, it would be on the basis of the Charter that the courts are "specially designated by law" to intervene.

Interestingly, if this approach is correct, *Bradlaugh v. Gossett*,⁷⁹ would not necessarily be decided the same way under modern Canadian law as it was in 1884, since the House had refused to allow *Bradlaugh* to take the necessary oath and be seated because he was an atheist.

If this approach is correct, then the problem is one of a suitable remedy. The courts could, of course, decline jurisdiction altogether and leave it up to the legislative body to deal properly with its members since the legislative body would ultimately have to answer to the electorate. However, such an approach may not adequately clarify the importance of the Charter right. Depending on the right at issue, limitations could be justified under section 1. For example, freedom of expression is obviously limited by the need for decorum. If a remedy is required, a declaration would appear to be sufficient. Only if a legislative body continued to discriminate against a member, for example, by continuing to refuse to seat him or her, would a different remedy be required. Again, a remedy could be devised that does not interfere with proceedings. For example, there is Stephen J.'s suggestion in *Bradlaugh v. Gossett* that if extraordinary circumstances required the Court's intervention, then "I should think it sufficient to restrain the Serjeant-at-Arms

⁷⁹ *Supra*, note 29.

from acting on the order of the House.”⁸⁰ More drastic measure by the courts, such as an injunction or contempt proceedings do not appear to be warranted since they would unnecessarily challenge the powers of the legislative body and interfere in internal proceedings. Ultimately voters would have the final say.

It can be assumed that legislators do their utmost to deal with each other fairly and to respect each others’ rights. Therefore, there should be little reason for a court to interfere with a legislative body’s constitution and its right to discipline its own members. However, should an individual member mount a Charter challenge on the basis that his or her rights have been unnecessarily infringed, courts will have to clearly enunciate a definition of “internal proceedings”. If a remedy is required because the right constitutes a right exercisable apart from the legislative body, a court will also be required to determine whether a declaration is sufficient in the circumstances.

(d) The Right to Institute Inquiries and Call Witnesses

A legislative body’s right to institute inquiries and call witnesses affects rights exercisable outside the legislative body since the legislative body is calling persons who are not members to appear before it and give evidence. Summoning such persons raises concerns as to what protections they should be afforded and the

⁸⁰ *Supra*, note 29 at 282. See also *Powell v. McCormack*, 395 U.S. 486 at 501-06 (1969), where the U.S. Supreme Court held that it had not jurisdiction over member of Congress because of the Speech and Debate Clause, but it did have jurisdiction over House employees.

issue has been the subject of relatively recent reports, including one in Ontario⁸¹ and one in Australia.⁸²

The Charter now affords certain protections which did not exist prior to its enactment, particularly in respect of the legal rights guaranteed in sections 7 through 14. Of these, section 13, which prevents incriminating evidence from being used in a subsequent proceeding, is the most important. However, the Charter protections are few, particularly in light of the way that witnesses are summoned and examined. If greater protections are desirable, some having been recommended by the recent Reports, then legislative reform will be necessary since the Charter only allows the courts a limited jurisdiction, primarily with respect to the use of evidence in subsequent proceedings. Maingot has stated:

The committee [calling and hearing witnesses] is free from adherence to rules of evidence such as the hearsay rule and the requirement of relevance. Furthermore, the ordinary courts offer no protection to a witness.⁸³

⁸¹ Ontario Law Reform Commission, *Report on Witnesses Before Legislative Committees* (1981). See also Ontario, Standing Procedural Affairs Committee, *Report on Witnesses Before Committees* (December 1980); and Ontario, *Standing Committee on Procedural Affairs, Report on Standing Orders and Procedure (No. 1)* (December 1982).

⁸² The Parliament of the Commonwealth of Australia, *Parliamentary Committees: Powers Over and Protection Afforded Witnesses* (1972, Parliamentary Paper No. 168).

⁸³ *Supra*, note 4 at 163.

For the most part, these statements remain true in the post-Charter era. The power to institute inquiries and call on witnesses is very wide. In *Howard v. Gosset*, Coleridge J. stated:

That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit: it would be difficult to define any limits by which the subject matter of their inquiry can be bounded: it is unnecessary to attempt to do so now: I would be content to state that they may inquire into every thing which it concerns the public weal for them to know; and they themselves, I think, are entrusted with the determination of what falls within that category. Coextensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, to enforce it by arrest where disobedience makes that necessary, and, where attendance is required, or refused, in either stage, of summons or arrest, there need be no specific disclosure of the subject matter of inquiry, because that might often defeat the purpose of the examination.⁸⁴

In the Canadian federal system an inquiry can only be instituted in respect of subject matter over which a particular legislature has jurisdiction, but this requirement only limits the subject matter of inquiries. Under the Charter, particularly section 7, the right to life, liberty and security of the person, it could also be argued that any inquiry must be directed to a valid legislative purpose. The American Supreme Court has held that there is "no congressional power to expose for the sake of exposure".⁸⁵ Should a Canadian legislative body commence an

⁸⁴ (1845), 10 Q.B. 359 at 379-80, 116 E.R. 139, rev'd in respect of validity of warrants (1845), 10 Q.B. 411, 116 E.R. 158 (Exch.).

⁸⁵ *Watkins v. United States*, 345 U.S. 178 at 200 (1957). See also *Eastland*, *supra*, note 52.

inquiry that has no valid legislative purpose and unnecessarily ask questions that put a person's life or livelihood at risk a court application might be appropriate. However, if a declaration proved to be insufficient and the legislative body continued with its inquiry, there would be little a court could do to the extent that other remedies might unnecessarily interfere with matters of internal proceedings.

The rights of witnesses are very limited. May has stated:

A witness is bound to answer all questions which the committee sees fit to put to him, and cannot excuse himself, for example, on the ground that he may thereby subject himself to a civil action, or because he has taken an oath not to disclose the matter about which he is required to testify, or because the matter was a privileged communication to him, as where a solicitor is called upon to disclose the secrets of his client; or on the ground that he is advised by counsel that he cannot do so without incurring the risk of incriminating himself or exposing himself to a civil suit, or that it would prejudice him as defendant in litigation which is pending, some of which would be sufficient grounds of excuse in a court of law. Nor can a witness refuse to produce documents in his possession on the ground that, though in his possession, they are under the control of a client who has given him instructions not to disclose them without his express authority.⁸⁶

The rules of evidence which govern court proceedings are not relevant when a person appears before a legislative committee, although a legislative body or its committees may impose certain rules of their own. However, section 13 of the

Charter guarantees persons appearing before legislative committees one important safeguard. Section 13 provides that a person who testifies in any "proceedings", presumably a word which would encompass legislative proceedings, has the right not to have any incriminating evidence used in other proceedings. Interestingly, courts can enforce this right without interfering in a committee's work or the legislative process since it is subsequent use of the evidence given which is protected.

There is no right, such as that afforded under Fifth Amendment in the United States, allowing a witness to refuse to answer a question on the ground that it might incriminate him. This right, which existed at common law, was abolished in 1893 by the enactment of what is now section 5 of the *Canada Evidence Act*.⁸⁷ Section 13 precludes subsequent use of evidence, but does not prevent it being given in the first instance. However, section 13 goes further than the *Canada Evidence Act*, since incriminating evidence is excluded even if no objection is taken at the time testimony is given in earlier proceedings.

The problem for those appearing before legislative committees is that section 13 may not go so far as to exclude the use of evidence in subsequent civil proceedings. The reference to "other proceedings" would include civil proceedings, but the evidence must be used "to incriminate" which suggests that the subsequent proceeding must involve a criminal charge, penalty or forfeiture. It is within a

⁸⁷ R.S.C. 1985, c. C-5. The right is also abolished by the provincial Evidence Acts.

legislative body's power to hold in contempt any plaintiff in a civil proceeding who attempts to use evidence given before a legislative committee.⁸⁸ This is not a complete protection, however, since it requires action on the part of the legislative body. In *Goffin v. Donnelly*,⁸⁹ the court held that an action for slander would not lie in respect of statements given before a committee of the House of Commons because the statements were absolutely privileged, but this was not a matter of using only some evidence given before a legislative committee within the context of a larger action. Arguably, on the basis of *Goffin v. Donnelly* all statements should be excluded in subsequent civil proceedings, but Canadian courts have yet to clarify the matter. In Australia, legislation was required to protect witnesses after a judicial ruling that statements by witnesses could not be the cause of an action, but could be used in support of an action.⁹⁰

The other Charter rights are of less significance in respect of inquiries and witnesses. It has been suggested that a legislative committee has a search and seizure power,⁹¹ although it would appear that such a power has never been exercised in Canada. Presumably, in using such a power a legislative committee should conform to what is a reasonable search and seizure as dictated by the case law that has developed under section 8 of the Charter. However, here a question arises

⁸⁸ Maingot, *supra*, note 4 at 201.

⁸⁹ (1881), 6 Q.B.D. 307.

⁹⁰ May, *supra*, note 5 at 159-60.

⁹¹ See Australian Report, *supra*, note 82 at 31-32.

as to what sort of jurisdiction a court could exercise. Once the evidence was seized and placed before a committee, a declaration that the evidence was improperly seized would appear to be the only remedy. The court could not prevent the use of the evidence if the legislative body disagreed with its declaration, without unnecessarily interfering in internal proceedings.

Section 14 entitles a witness "in any proceedings" to an interpreter if he or she does not understand or speak the language in which the proceedings are conducted. Since legislative committees are unlikely to call a witness who can neither understand nor be understood, this guarantee is of little practical consequence.

Finally, it should be noted that there is no automatic right to counsel for persons appearing before legislative committees. Paragraph 10(b) of the Charter guarantees a right to counsel, but only on arrest or detention. It would be a rare event if a witness was compelled to attend by being arrested. However, if such an event occurred and an application was made to a court, the court would have grounds for declaring that counsel must be present since section 10 does not necessarily limit arrest or detention to criminal proceedings. However, again, a legislative body may decide not to comply with the declaration. The Ontario Law Reform Commission Report examined the right to counsel before legislative committees and recommended that a right to counsel be confirmed by legislation, although not the role counsel was to play, for example, whether counsel could cross-

examine.⁹² In reviewing the practice in other jurisdictions the Report noted that generally counsel was permitted. Given an extreme situation like arrest, presumably a legislative body would not object to counsel, even in the absence of a court application.

The Charter imposes few limitations on a legislative body's right to institute inquiries and call witnesses, although it does, in section 13, impose an important restriction on the subsequent use of evidence. This protection does not require interference by the courts in the legislative process.

(e) The Power to Punish for Contempt or Breach of Privilege

Maingot describes the power to commit for contempt as "the keystone of parliamentary privilege",⁹³ while other commentators insist that it is necessary for the protection of the legislative institution.⁹⁴ Various reports and papers, while viewing the power as necessary, have also suggested the need for reform.⁹⁵ If not properly exercised the contempt power is in direct conflict with rights and freedoms guaranteed under the Charter, particularly the legal rights guaranteed in sections 7

⁹² *Supra*, note 81 at 61-69.

⁹³ *Supra*, note 4 at 164.

⁹⁴ See, for example, E. Campbell, *Parliamentary Privilege in Australia* (Melbourne: University Press, 1966) at 31.

⁹⁵ See Ontario Report, *supra*, note 81 at 45-56; S. Walker, *Contempt of Parliament and the Media* (Adelaide Law Review, Research Paper No. 4, 1984); and United Kingdom, *Third Report from the Committee of Privileges* (1977).

to 14. Judicial intervention could be required. Since a person's liberty is at issue the courts would have jurisdiction on the basis that what is involved is a right exercisable "outside the House".

The possibility for abuse exists, but it is important to keep in mind that the contempt power and the power to punish for breach of privilege are used sparingly. Legislatures seldom find reason to exercise the powers. A recent comment of the Speaker of the House of Commons is quoted in Beauchesne:⁹⁶

It is very important ... to indicate that something can be inflammatory, can be disagreeable, can be offensive, but it may not be a question of privilege unless the comment actually impinges upon the ability of Members of Parliament to do their job properly.⁹⁷

Usually, a finding of contempt or breach of privilege will result in a censure and more extreme punishment is not necessary. Thus, in 1975 when Mr. Reid, a member of the House of Commons complained that an article in the *Montreal Gazette* accused him of breaching the *Official Secrets Act* and misusing his privileges as a member, the Committee on Privileges and Elections criticized the newspaper for falling short of "the standards expected of a newspaper" and the House took no

⁹⁶ *Supra*, note 65 at 20.

⁹⁷ House of Commons, *Debates* (November 25, 1987) at 11179.

further action.⁹⁸ Cases such as these do not come in conflict with a Charter right such as freedom of the press since a legislative body is not attempting to control the press, but only stating its views in an effort to ensure that reports are fair and accurate.

The censure of a legislative body should not invoke fears that Charter rights are being infringed since life, liberty and security of the person are not threatened. However, should a legislative body resort to a more severe form of punishment, namely imprisonment, then it would appear that the legislative body should ensure that a person's legal rights as guaranteed by the Charter are protected.

Section 10 of the Charter provides that on arrest or detention everyone has the right to be informed of the reasons, a right to instruct counsel and the right to have the validity of the detention determined by *habeas corpus*. One basis of the complaint in *Howard v. Gosset*,⁹⁹ was that the plaintiff had been brought as a witness before a Committee and subsequently imprisoned but the warrant requiring his attendance before the committee did not state the reasons. On writ of error from the Court of Queen's Bench, the Court of Exchequer Chamber held that "the House has undoubtedly the power to cause a person charged to be taken into custody, and

⁹⁸ See Beauschene, *supra*, note 65 at 20 and House of Commons, *Journals* (October 17, 1975) at 781-82.

⁹⁹ *Supra*, note 84.

to be brought to the Bar to answer the charge"¹⁰⁰ and held that the warrant was valid. In light of paragraph 10(a) of the Charter, requiring that a person be informed promptly of the reasons on arrest or detention, *Howard v. Gossett* may no longer be good law in Canada. In issuing a warrant requiring the arrest of a person a legislative body should state a reason.

A legislative body is unlikely to refuse to allow an opportunity to instruct counsel if a person is arrested for contempt or breach of privilege. However, as noted above in respect of the right of a witness to consult counsel, it is not clear what role counsel could play should a legislative body proceed with a hearing. However, in 1913, the last time a person was imprisoned after being called to the Bar of the House, Mr. Miller was allowed counsel and his counsel was also permitted to address the House.¹⁰¹

Paragraph 10(c) of the Charter guarantees that on arrest or detention everyone has the right "to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful". The Charter does not impose a new right when a person is committed by a legislative body since the right of a person committed to apply for *habeas corpus* has long been recognized by the courts.¹⁰²

¹⁰⁰ *Ibid.* at 451.

¹⁰¹ See N. Ward "Called to the Bar of the House" (1957) 35 Can. Bar Rev. 529 at 539-40.

¹⁰² See, May, *supra*, note 5 at 107-09, and Maingot, *supra*, note 4 at 176-77.

However, the right as guaranteed by the Charter poses an interesting problem since the rule confirmed by the 1811 decision of *Burdett v. Abbot*,¹⁰³ has been that if the form of the warrant committing a person for contempt of Parliament is general and does not set out the reason, courts are not competent to inquire into the nature of the contempt and a party is not entitled to bail.¹⁰⁴ *Burdett v. Abbot* has been followed by Canadian courts, although cases have not arisen since the nineteenth century.¹⁰⁵ Maingot has stated:

With respect to the Speaker's warrants of the House of Commons to commit to prison, on the basis that the House of Commons of Canada has the same power and authority held and enjoyed by the U.K. House of Commons, it is clear that the courts may not inquire into the causes of commitment unless stated on the warrant, and irregularities of form do not vitiate the warrant. Furthermore, it is not necessary for the warrant to show that the person had been adjudged guilty of contempt.¹⁰⁶

Since the Charter now guarantees a right to *habeas corpus*, the rule as enunciated in *Burdett v. Abbot* may no longer be binding. If a court should inquire into the cause of a commitment pursuant to a Speaker's warrant, a court is not interfering in

¹⁰³ *Supra*, note 35.

¹⁰⁴ See Maingot, *supra*, note 4 at 166.

¹⁰⁵ See *Ex parte Lavoie* (1855), 5 Low. Can. R. 99, discussed in Maingot, *supra*, note 4 at 176-77.

¹⁰⁶ *Supra*, note 4 at 177.

internal proceedings since a person's liberty is at issue. It is the Charter right that must be protected. This does not mean, however, that a court would necessarily have reason to release a person. Unless another Charter right has been infringed in the course of detaining and committing a person, a court should recognize the validity of the detention on the basis that a legislative body has a right to commit for contempt or breach of privilege.

Paragraph 11(d) of the Charter requires a hearing by an independent and impartial tribunal. Should a person ever be imprisoned for contempt, difficult questions could arise on the basis of paragraph 11(d). One suggestion for reform has been the adoption of the American model where statutory enactments allow contempt of Congress to be dealt with by the courts. In meting out punishment courts are more likely to ensure that "due process" is observed.¹⁰⁷ The Ontario Law Reform Commission rejected the American model, however, recommending instead that the Legislature be more scrupulous in ensuring that a fair hearing is provided.¹⁰⁸ Certainly a legislative body could ensure a fair hearing, but the issue in light of paragraph 11(d) is whether it is an independent and impartial tribunal. However, a legislative body's right to conduct its own hearing could be justified on the basis, that its power to commit for contempt is analagous to that of a superior court. It is clear that a judge before whom a contempt takes place can also try the

¹⁰⁷ See Ontario Report, *supra*, note 81 at 47-48.

¹⁰⁸ *Ibid.* at 51.

contempt charge and the Ontario Court of Appeal has held that proceeding in this way is not a breach of paragraph 11(d).¹⁰⁹

Paragraph 11(h) provides that if charged with an offence a person shall “if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again”. This is the double jeopardy rule. It is unlikely that a legislative body would attempt to commit a person twice, although there are instances in the past. In 1875 two persons, Cotté and Duvernay, after being committed by the Quebec Assembly brought *habeas corpus* applications and were released by the court on the basis that the Quebec Assembly, following *Kielley v. Carson*,¹¹⁰ did not have jurisdiction to commit them. When Cotté and Duvernay were again arrested on the same Speaker’s warrant, the Court discharged them on the basis that they could not be arrested twice for the same cause.¹¹¹ Should a similar action arise now, a person could rely on paragraph 11(h) of the Charter.

Section 12 of the Charter guarantees “the right not to be subjected to any cruel and unusual treatment and punishment.” It is highly unlikely that a legislative body would resort to punishment other than imprisonment, but if it did then courts would have jurisdiction pursuant to section 12.

¹⁰⁹ *R. v. Cohn* (1984), 48 O.R. (2d) 65.

¹¹⁰ (1843), 4 Moore 63, 13 E.R. 225 (P.C.), discussed in Chapter 1 at note 40.

¹¹¹ (1875), 19 L.C.J. 210 (Que. Q.B.), discussed in Maingot, *supra*, note 4 at 173.

Thus, in exercising its power to commit for contempt or breach of privilege, a legislative body should ensure that Charter rights are protected, particularly the legal rights guaranteed by sections 7, 10, 11, and 12. Since a person's liberty is a stake a court would have jurisdiction, and it is difficult to argue that in determining the merits of a *habeas corpus* application that a court is unnecessarily interfering in internal proceedings. A legislative body's power to commit must be recognised, but a court would have authority to determine whether a person's Charter rights were infringed.

Conclusion

It may not have been the intention of those persons that drafted the Charter that it apply to the privileges, immunities and powers enjoyed by the Senate, the House of Commons and the provincial legislative assemblies, but on the basis of the language employed and the structure of the Constitution as a whole, strong arguments can be advanced that this is the result.

An examination of the nature of privilege suggests this may be the preferred result. The privileges enjoyed by legislative bodies, while necessary, are susceptible to abuse. In modern Canadian society one can count on the abuses being few. The commonsense and responsibility of persons elected to public office ensures that privileges are used for the intended purpose of efficient and effective government. Those who abuse their privileges must not only answer to their fellow legislators but ultimately to the people who elected them.

However, given the possibility for abuse, a check on the power may be necessary. The check is the Constitution, and in particular, the individual rights and freedoms guaranteed in the Charter which cannot be overridden except where justifiable in a free and democratic society. If the check is the Constitution, then the courts must necessarily play a role. This is not to say that the Constitution need not be adhered to by legislators, both procedurally and substantively, but with a system of government based on a written constitution the courts are the ultimate guardians.

When issues of privilege are involved this places the courts in a difficult position since they may be required to decide on the rights enjoyed and exercised by a coordinate branch of government. This is not a new problem, however, and, at least since the decision in *Stockdale v. Hansard*, it has been accepted that courts may rule on the extent of a privilege. What is new, if Canadian courts must ensure that the individual rights and freedoms guaranteed by the Charter are not unnecessarily interfered with by the exercise of a privilege, is the possibility that courts could unnecessarily become involved in matters of internal proceedings.

The solution to this is readily apparent in pre-Charter case law. While courts would determine the extent of a privilege they made it clear that internal proceedings were a matter to be left to the legislatures. Such a solution is still workable under the Charter. Courts could decline all jurisdiction when questions involving internal proceedings come before them, although a more effective approach may be the careful use of the limitation prescribed by section 1 of the Charter or the use of declarations as the most appropriate remedies. Plaintiffs need not be left without a remedy since a declaration is always available, and more intrusive remedies can be avoided.

Where individual rights ordinarily exercisable outside a legislative body are at issue the courts can take a more active role, although even here a

declaration may be sufficient since it is unlikely that a legislative body will ignore a judicial decision. Thus, should the privilege of freedom of speech, the contempt power, or even a legislative body's right to expel members, be abused the courts can ensure that individual rights and freedoms are protected.

There will always be an "uneasy truce" if one branch of government must make decisions regarding the rights and privileges enjoyed by another. However, the *Constitution Act, 1982* has transformed the Canadian system of government. Moreover, individual rights, particularly in light of the Charter, have taken on a new importance and the courts are called upon to ensure that they are protected. At the same time the privileges traditionally enjoyed by Canadian legislative bodies must be protected if Canadian legislatures are to function efficiently and effectively. A balance can nevertheless be found.

Addendum

Since this thesis was originally submitted in October 1992, the Supreme Court of Canada, in January 1993, handed down its decision in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*.¹ The Court, Cory J. dissenting, held that the restrictions imposed by the Nova Scotia House of Assembly on media access did not contravene the Charter. It is not this final conclusion that is of interest, however, but rather the reasoning in the separate opinions. The majority opinion, delivered by McLachlin J., L'Heureux-Dubé, Gonthier and Iacobucci JJ. concurring, and La Forest J. agreeing, but adding his own reasons, gives constitutional status to those inherent privileges historically recognized and necessary for the proper functioning of a legislative body. There are now two categories of privilege: those that are necessary and immune from judicial scrutiny under the Charter and those which are not. It is the concept of necessity, in particular, that will require elaboration in future case law. The lower courts may also require further guidance in defining privileges since the way in which a privilege is defined can determine whether the test of necessity is met. It is clear, however, that the Supreme Court of Canada intends to preserve, to the extent it is reasonably possible in the Charter era, the traditional deference accorded legislative bodies by the courts.

(a) **The Reasoning of the Court**

In her reasons on behalf of the majority McLachlin J. first rejected the argument that by virtue of the language of section 32, the Charter can never apply to the actions of a legislative assembly. While section 32 refers to "Parliament" and the "legislature" of each province, in McLachlin J.'s opinion the Charter as a whole did not support a narrow reading of section 32 such that these terms meant the legislative bodies and the Queen acting together. Nor was McLachlin J. persuaded that a purposive approach required curial deference to everything a legislative body did. Only Lamer C.J. disagreed on this point, holding that section 32 precluded the application of the Charter to actions taken by a legislative body. Lamer C.J.'s reasons provide an interesting review of the history of parliamentary privilege, but because of his conclusion regarding section 32, it was not necessary for him to determine whether privileges had constitutional status.

McLachlin J. went on to hold that certain privileges do have constitutional status, arriving at this conclusion by invoking the preamble of the *Constitution Act, 1867*, "historical tradition and the pragmatic principle that legislatures must be presumed to possess such constitutional powers as are necessary for their proper functioning."² McLachlin J. held that the list of Acts and orders

² *Ibid.* at 374-75.

which subsection 52(1) of the *Constitution Act, 1982* "includes" is not exhaustive.³

She then stated:

I would add only this: given the clear and stated intention of the founders of our country in the *Constitution Act, 1867* to establish a constitution similar to that of the United Kingdom, the Constitution may also include such privileges as have been historically recognized as necessary to the proper functioning of our legislative bodies.

She concluded:

[T]he written text of Canada's Constitution supports, rather than detracts from, the conclusion that our legislative bodies possess those historically recognized inherent constitutional powers as are necessary to their proper functioning.

McLachlin J. then considered the issue from an "historical perspective", noting that those privileges traditionally recognized as necessary had their origin in the common law. Early Canadian case law such as *Keilley v. Carson*⁴ and *Fielding v. Thomas*⁵ recognized the necessity of certain privileges for colonial legislatures. In McLachlin J.'s opinion these privileges therefore had a

³ Contrary to the opinion expressed by P.W.Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 1 - 7. The 2nd ed. is referred to at p. 8 of Chapter Two of the thesis.

⁴ (1841), 4 Moore 63, 13 E.R. 225 (P.C.).

⁵ [1896] A.C. 600 (P.C.).

constitutional status of Canada, as provided in the preamble of the *Constitution Act, 1867*, had a constitution modelled on that of the United Kingdom.

Finally, McLachlin J. invoked the "pragmatic approach: necessity", arguing that if a legislative body is to properly discharge its functions then it must possess certain necessary privileges, even though they may be unwritten constitutional powers. For a court to assume, pursuant to the Charter, the right to review all privileges would be, in McLachlin J.'s opinion, an extreme reallocation of the balance of power as between the legislative and judicial branches of government.

Resorting to the preamble of the *Constitution Act, 1867* in order to give a power constitutional status is unusual. Professor Hogg has warned against the "grave consequences" of additions to the thirty instruments listed in subsection 52(1) of the *Constitution Act, 1982*.⁶ However, McLachlin J.'s approach is not without precedent and the reasons of Lamer C.J. provide a justification for the approach. Lamer C.J. did not find it necessary to determine whether the privileges of provincial assemblies have constitutional status, but in arguing for the need to maintain the independence of the different branches of government, he referred to *Beauregard v. Canada* in which Dickson C.J. stated:⁷

⁶ *Supra*, note 3.

⁷ *Ibid.* at 354.

The preamble to the *Constitution Act, 1867* states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom". Since judicial independence has been for centuries an important principle of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the constitutional language of the preamble.⁸

McLachlin J. was prepared to go a step further, however, and find that the preamble constituted a source of power, conferring certain necessary privileges on Canadian legislative bodies.

Neither Cory J. nor Sopinka J. were prepared to give privileges constitutional status. Cory J. agreed with McLachlin J. that section 32 of the Charter should apply to the legislative assembly, but on the basis that "the Charter should be given a large and liberal interpretation".⁹ He focused on what is expected by the Canadian public, stating:

It seems to me that the operative part of the legislature is the House of Assembly. It is the belief and fond hope of Canadians that it is in the chamber of the legislative assembly that the policy and principles of the laws to be enacted are discussed and debated. ... To the ordinary and reasonable citizen it is the legislative assembly which is the essential element of the "legislature" and a fundamental and integral part of the "government" of a province.¹⁰

⁸ [1986] 2 S.C.R. 56 at 72.

⁹ *Supra*, note 1 at 403.

¹⁰ *Ibid.* at 401.

Cory J. was not prepared to hold that the privileges exercised by the House of Assembly had the same constitutional status as the Charter. In his opinion "courts may, when properly called upon, enquire as to whether a particular exercise of parliamentary privilege falls within the jurisdiction of the legislature."¹¹ He relied on a Supreme Court of Canada decision, *Reference Re Provincial Electoral Boundaries (Saskatchewan)*,¹² in which McLachlin J. had held that the exercise of a constitutionally entrenched power was subject to Charter scrutiny, but not the power itself. In her reasons in *New Brunswick Broadcasting*, McLachlin distinguished this previous decision, holding that "the issue [regarding privilege] is not the fruit of the constitutional tree (the exercise of a power), but the tree itself (the existence of the power)."¹³ In her opinion the Court was asked whether the privilege of excluding strangers existed and not whether the particular exercise of that privilege was right or wrong. Rather than *Reference Re Electoral Boundaries*, McLachlin J. relied on *Reference Re Roman Catholic Separate High Schools Funding*,¹⁴ which held that a power guaranteed elsewhere in the Constitution was not subject to the Charter.

¹¹ *Ibid.* at 404.

¹² [1991] 2 S.C.R. 158.

¹³ *Supra*, note 1 at 392.

¹⁴ [1987] 1 S.C.R. 1148, 77 N.R. 241.

In Sopinka J.'s opinion, section 32 of the Charter did not protect legislative bodies from review under the Charter. He focused on the words "within the authority of the legislature" in section 32 and noted that the exercise of privilege, "whether by legislation or by rules or practices of the legislative assembly, are matters 'within the authority of the legislature' and therefore subject to s. 32."¹⁵ Sopinka J. did not agree with McLachlin J. that privileges could be given constitutional status on the basis of the preamble since to do so would entrench them and any change would require an amendment of the Constitution of Canada under section 43 or section 38 of the *Constitution Act, 1982*, unlike the amendment of those provisions of a provincial constitution not so entrenched. Sopinka J. argued that *Reference Re Roman Catholic Separate High Schools Funding* "involved a section of the *Constitution Act, 1867* which specifically authorized legislation that could not be reconciled with s. 15 of the Charter."¹⁶ He seems to suggest that *Reference Re Roman Catholic Separate High Schools Funding* should be given a narrower application than that advocated by McLachlin J. If a constitutional power can be reconciled with the Charter, and it is argued in the thesis that privileges can, then judicial scrutiny under the Charter may be appropriate, but this was not the approach adopted by the majority in *New Brunswick Broadcasting*.

¹⁵ *Supra*, note 1 at 395.

¹⁶ *Ibid.* at 397.

Sopinka J. also disagreed with Cory J. that the privilege at issue, the restriction of public access, particularly access by the media, was contrary to the Charter. In Sopinka J.'s opinion the restriction could be justified under section 1. He stated:

The present restriction is also rationally connected to this objective. Obviously, limiting the number and location of cameras promotes the objective of maintaining order and decorum. ... While I reject the submission that the exercise of this privilege is beyond the reach of judicial review, I cannot ignore that this is an area in which the Court should not dictate the precise method in which the Assembly should keep order in its own house. Finally, given the importance of preserving the decorum of the House of Assembly, the alleged intrusion on the freedom of the press is not out of proportion to this objective.¹⁷

Sopinka J. adopted one of the approaches advocated by the thesis as a means of balancing judicial scrutiny and the traditional deference given to legislative bodies by the courts. Section 1 of the Charter is one means by which the courts can avoid interfering with matters of internal proceedings, matters in respect of which a legislative body itself may be the better judge. Sopinka J.'s decision was not the majority decision, but his approach is likely to be significant in future case law. McLachlin J. only allowed constitutional status for privileges which have been historically recognized and are necessary for the proper functioning of legislative bodies. Those privileges which do not fall within this definition are subject to the Charter and if the courts are to avoid interfering with matters of internal

¹⁷ *Ibid.* at 398.

proceedings, Sopinka J.'s section 1 approach will be relevant, and possibly the other two approaches advocated by this thesis, declining jurisdiction and the use of declarations rather than more intrusive remedies.

(b) Determining Which Privileges Have Constitutional Status

The initial question is which privileges meet McLachlin J.'s test of being historically recognized and necessary. McLachlin J. adopted the basic test of "necessity". She quoted May, Dawson and Maingot¹⁸ in support of the basic proposition that necessity determines whether a claimed privilege does in fact exist. In adopting this test for purposes of determining whether a privilege has constitutional status, McLachlin J. added two qualifications, one historical and the other jurisdictional. While necessity remains the governing factor, a constitutionalized privilege must also be an "historically recognized inherent constitutional power". This aspect of the test reflects the colonial origins of Canadian legislative bodies. The Privy Council determined in cases like *Kielley v. Carson*¹⁹ and *Fielding v. Thomas*²⁰ that the privileges of colonial legislatures were not equivalent to those of the United Kingdom, since the latter had its origin as a

¹⁸ *Ibid.* at 379-81, referring to *Erskine May's Treatise on the Law, Privileges Proceedings and Usage of Parliament*, 21st ed., C.J. Boulton, ed. (London: Butterworths, 1989), R.M. Dawson, *The Government of Canada*, 5th ed., rev'd. N. Ward (Toronto: University of Toronto Press, 1970) and J. Maingot, *Parliamentary Privilege in Canada* (Toronto: Butterworths, 1982).

¹⁹ *Supra*, note 4.

²⁰ *Supra*, note 5.

court and also had a greater historical tradition.²¹ Colonial legislatures only possessed those privileges necessary for protection and the maintenance of order. Other privileges had to be conferred and this was usually done, as in section 18 of the *Constitution Act, 1867*, by a grant of power allowing the colonial legislature to claim further privileges. McLachlin J. appears to be using the historical element as a check on whether a privilege is necessary. If a privilege is not one which a colonial legislature would have possessed then in all likelihood it is not a necessary privilege.

McLachlin J.'s second qualification with respect to the test of necessity turns on the issue of jurisdiction. It is clear that in defining what is necessary the courts should intrude on the legislative sphere as little as possible.

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.²²

²¹ *Supra*, note 1 at 379 and 382. See K. Swinton "Challenging the Validity of an Act of Parliament: the Effect of Enrolment and Parliamentary Privilege" (1976) 14 Osgoode Hall L.J. 345 for a discussion of the British Parliament's origin as a court.

²² *Ibid.* at 383.

McLachlin specifically stated that "the test of necessity is a jurisdictional test."²³ It is clear that McLachlin intended that legislative bodies should remain master of their own procedure and that courts should be reluctant to interfere in what has been defined as internal proceedings:

In my view, a system of court review, quite apart from the constitutional question of what right the courts have to interfere in the internal process of another branch of government, would bring its own problems. The ruling of the Assembly would not be final. The Assembly would find itself caught up in legal proceedings and appeals about what is disruptive and not disruptive. This in itself might impair the proper functioning of the chamber.²⁴

A basic list of the privileges enjoyed by a legislative body would include those privileges enjoyed by individual members -- freedom of speech, freedom of arrest in civil process, exemption from jury service and the right not to be summoned as a witness when the legislature is in session -- and those privileges enjoyed by the legislative body as a whole -- the right to regulate its own internal affairs free from interference, the right to control its precincts, the right to discipline its own members, the right to regulate its own constitution, the right to institute inquiries and call witnesses, the right to control the publication of debates and proceedings and the power to punish for contempt. Turning to Maingot or May it

²³ *Ibid.*

²⁴ *Ibid.* at 387-88.

would appear that these privileges are necessary for the proper functioning of a legislative body. Maingot has stated:

The corporate collective privileges of the Senate and of the House of Commons are the power to punish for contempt (or its penal jurisdiction), the right to regulate its own constitution, the right to regulate its own members, the right to institute inquiries and call for witnesses (persons, papers, and records), and the right to settle its own code of procedure.

Generally speaking, it will be seen that the powers, rights, immunities, and privileges of both the elected assembly and its members exist to enable the members to attend the assembly without disturbance, to enable the assembly to perform its functions, and to guard the functions of Parliament undisturbed.²⁵

Both May and Maingot recognized that the privileges enjoyed by colonial legislatures were not equivalent to those of the British House of Commons and House of Lords.²⁶ However, neither the authors of May's treatise, focusing on the British Parliament, nor Maingot, writing before the adoption of the *Constitution Act, 1982*, distinguished between privileges which would have a constitutional status in a colonial instrument such as the *Constitution Act, 1867*, and those that would not have such a status. Section 18 of the *Constitution Act, 1867*, gave the Senate and the House of Commons the right to enact those privileges enjoyed by the British House of Commons in 1867.²⁷ Lord Halsbury L.C.'s decision in *Fielding v.*

²⁵ *Supra*, note 18 at 15.

²⁶ Maingot, *supra*, note 18 at 3 and May, *supra*, note 18 at 69-70.

²⁷ Discussed in the thesis, Chapter One, p. 11.

*Thomas*²⁸ recognized that the provincial assemblies had the same power pursuant to the *Colonial Laws Validity Act, 1866*²⁹ and the power of the provincial legislatures to make laws respecting the provincial constitutions. Thus, the privileges that Canadian legislative bodies did not possess by virtue of their status as colonial legislatures they could confer upon themselves by legislation. All Canadian legislative bodies have done so and until the enactment of the Charter the privileges of these bodies could be interpreted in the same manner as those of the British House of Commons. While the privileges differed in origin, Canadian courts could adopt an approach similar to that of the British courts when faced with questions of privilege. They could inquire into the scope of a privilege, but they could not inquire into its exercise or interfere with internal proceedings. Privileges were not subject to an overriding constitutional instrument like the Charter.

Now, in light the majority decision in *New Brunswick Broadcasting*, those privileges historically recognized and necessary are immune from Charter review. Those which are not are subject to the Charter. Presumably not all of the privileges set out above and viewed by Maingot and May as necessary meet the test. McLachlin J.'s reasons refer to four privileges that may qualify, although their status is not specifically discussed:

²⁸ *Supra*, note 5.

²⁹ (U.K.), 28 & 29 Vict., c. 63.

Among the specific privileges which arose in the United Kingdom are the following:

- (a) freedom of speech, including immunity from civil proceedings with respect to any matter arising from the carrying out of the duties of a member of the House;
- (b) exclusive control over the House's own proceedings;
- (c) ejection of strangers from the House and its precincts; and
- (d) control of publication of debates and proceedings in the House.³⁰

It is not entirely clear what should be excluded from the list. However, in light of McLachlin J.'s reference to *Kielley v. Carson*³¹ and *Landers v. Woodworth*³² it would appear that the contempt power, or at least certain aspects of it, are subject of the Charter. In *Kielley v. Carson*³³ the Privy Council determined that the House of Assembly of the Island of Newfoundland could not punish for a contempt committed outside the House. In *Landers v. Woodworth*³⁴ the Supreme Court of Canada followed *Doyle v. Falconer*,³⁵ another Privy Council decision

³⁰ *Supra*, note 1 at 385.

³¹ *Supra*, note 4.

³² (1878), 2 S.C.R. 159.

³³ *Supra*, note 4.

³⁴ *Supra*, note 32.

³⁵ (1866), L.R. 1 P.C 328.

which went one step further than *Kielley v. Carson*, and held that the House of Assembly of Dominica did not have the power to punish for a contempt committed in the face of the House. The Assembly only had the power to use "that degree of force which might be necessary to remove the person offending from the place of meeting, and to keep him excluded."³⁶

By virtue of legislation all Canadian legislative bodies have the power to punish for contempts committed both outside and in the face of the legislative body. Maingot has called the right to commit for contempt "the keystone of parliamentary privilege".³⁷ Without the power to punish or enforce their jurisdiction, legislative bodies would not be able to protect their powers and privileges. In exercising the contempt power, however, Canadian legislative bodies should now recognize Charter rights, since, at least from an historical perspective, aspects of the contempt power are not "necessary". As discussed in Chapter 3, Part 2 of the thesis,³⁸ the legal rights in sections 7 to 14 of the Charter could be relevant. For example, if a person is to be arrested and brought before a legislative body, the rights guaranteed by section 10 of the Charter, the right to be informed of the reasons, the right to instruct counsel and the right to have the validity of the detention determined by *habeas corpus*, are significant.

³⁶ *Ibid.* at 340.

³⁷ Maingot, *supra*, note 18 at 164.

³⁸ Chapter 3 of the thesis at pp. 58 to 65.

It would also appear that certain aspects of the right to call witnesses might also be excluded from the protected list. The calling of witnesses in relation to the legislative function can be justified both historically and as a matter of necessity. Without such a power a legislative body would not have sufficient information to properly legislate. Considering the issue in the American context the American Supreme Court held in *McGrain v. Dougherty*:

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures.³⁹

However, the summoning of witnesses for other than true legislative purposes may invite judicial scrutiny under the Charter. Maingot noted:

This right has extraordinary implications. It was invoked with impunity in 1689 when the judges in *Jay v. Topham* were taken into custody for failing to uphold the plea of the Sergeant-at-Arms that the court had no jurisdiction in the matter, and it enabled the House of Commons of Canada recently to require the attendance of a lawyer in order to question him about words spoken elsewhere in a judicial setting.⁴⁰

³⁹ 273 U.S. 135 at 161 (1927).

⁴⁰ *Supra*, note 18 at 162.

Moreover, witnesses appearing before legislative committees may be entitled to invoke the legal rights guaranteed by sections 7 to 14 of the Charter. Arguably, the right to question witnesses absent procedural safeguards is not justified on the basis of necessity, although it is historically recognized.⁴¹ Applying necessity as a jurisdictional test it is arguable that the dignity and efficiency of a legislative body can still be upheld if procedural safeguards are required by the courts pursuant to the Charter. However, as noted in Chapter Three, Part 2 of the thesis, the Charter protections would be relatively limited in a legislative setting. For example, the right to consult counsel under paragraph 10(b) of the Charter is only guaranteed on arrest or detention.

Further case law will clarify just which of the privileges set out in Maingot and May actually meet McLachlin J.'s test of necessity. What must be kept in mind is that what has until now been considered necessary may not meet the test. The test requires both an historical perspective and a careful focus on the question of jurisdiction.

(c) The Problem of Legislated Privileges

An interesting question is whether those privileges historically recognized and necessary and therefore within the preamble of the *Constitution Act, 1867*, but in respect of which legislation has been passed, are subject to Charter scrutiny. Few Canadian jurisdictions have specific legislation on privileges.

⁴¹ See Maingot, *supra*, note 18 at 163 and May, *supra*, note 18 at 680.

Instead, the legislation only goes so far as to claim for a legislative body those privileges enjoyed by the British House of Commons, or in some jurisdictions, the Canadian Senate and House of Commons. However, section 37 of the Ontario *Legislative Assembly Act*⁴² specifically sets out the privilege of freedom of speech. Since this privilege is legislated it would appear, like all other legislation, that it is subject to Charter review. This problem is reflected in Sopinka J.'s concern that all privileges should be subject to the Charter since section 32 refers to matters "within the authority of the legislature". In light of McLachlin J.'s reasons, however, it would appear that those privileges in respect of which legislation exists have a double nature. They have both a constitutional status pursuant to the preamble and a status pursuant to ordinary legislation. The former overrides the latter, however, and therefore these privileges should be immune from scrutiny under the Charter. This conclusion finds support in Lamer C.J.'s reasons:

The legislation that the provinces have enacted with respect to privileges will be reviewable under the *Charter* as is all other legislation. However, it does not follow that the exercise by members of the House of Assembly of their inherent privileges, which are not dependent on statute for their existence, is subject to *Charter* review.⁴³

Interestingly, a similar approach would allow the privileges of the Senate and House of Commons to be reconciled with those of the provincial

⁴² R.S.O. 1990, c. L.10.

⁴³ *Supra*, note 1 at 364.

assemblies. The privileges of the Senate and House of Commons would appear to be constitutionalized by virtue of section 18 of the *Constitution Act, 1867*. However, there is now a basis upon which future courts could hold that section 18 is only a grant of legislative power. Lamer C.J. stated:

[A]s I read s. 18, it does not entrench the parliamentary privileges of the House of Commons; rather, it entrenches the power of Parliament to legislate those privileges for itself in the same way that s. 45 of the *Constitution Act, 1982* entrenches the power of the provincial legislatures to legislate their own privileges by way of amendments to their constitutions.⁴⁴

Pursuant to McLachlin J.'s reasoning the Senate and House of Commons, by virtue of the fact that they are legislative bodies, would possess, pursuant to the preamble, those privileges historically recognized and necessary for their proper function. Privileges enacted pursuant to section 18 of the *Constitution Act, 1867* would have the same status as the privileges enacted by provincial legislatures under their power to legislate in respect of the provincial constitutions. Thus, it would appear that the privileges of all Canadian legislative bodies can be viewed as being on the same constitutional footing.

(d) **Defining Privileges**

A further issue, closely related to the problem of applying McLachlin J.'s test of necessity, concerns the proper definition of existing privileges. While

⁴⁴ *Ibid.* at 355.

McLachlin J.'s reasons suggest that privileges such as freedom of speech, exclusive control of proceedings, ejection of strangers and control of publications have constitutional status and are therefore immune from judicial scrutiny, an important question is whether these privileges as enumerated by McLachlin J. are properly defined. It must be kept in mind that the consequence of finding that a defined privilege has constitutional status is to recognize it as a constitutional power, precluding the courts from inquiring into the exercise of that power. After discussing *Stockdale v. Hansard*,⁴⁵ McLachlin J. stated:

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.⁴⁶

The problem is that privileges can be defined both broadly and narrowly. *Stockdale v. Hansard* provides an example. Defined broadly the privilege at issue in the case was the power of the House to control the publication of its debates and proceedings. However, Denman C.J. determined that the privilege at issue was whether the House had the power to publish with impunity. Likewise, in *New Brunswick Broadcasting* the broader privilege at issue was the right of the

⁴⁵ (1839), 9 Ad. & E. 1, 112 E.R. 1112 (Q.B.).

⁴⁶ *Supra*, note 1 at 384-85.

Assembly to control its precincts, but the issue was in fact much narrower: the right to exclude strangers when the Assembly deems them to be disruptive of its efficacious operation.⁴⁷ McLachlin J. left open the question whether a legislative body could exclude all members of the public or certain groups, implying that the power to exclude strangers might not be the privilege at issue in such a case, but rather a narrower definition of that privilege.

Thus, the way in which it defines a privilege gives a court a great deal of latitude in determining whether a particular privilege has constitutional status. McLachlin J.'s distinction between a power and the exercise of a power may be somewhat irrelevant. If a privilege is defined narrowly, what would otherwise be the exercise of a privilege, can be viewed as a privilege itself. Excluding strangers when they are disruptive is, arguably, an exercise of the broader privilege of excluding strangers. It appears that McLachlin J. is advocating the narrower definition as the actual privilege. Further guidance from the Supreme Court of Canada may be necessary if the lower courts are going to properly define privileges, more specifically, the actual powers possessed by legislative bodies, as opposed to the exercise of those powers.

While McLachlin J. recognized the constitutional status of certain privileges, thus shielding them from judicial scrutiny under the Charter, it would appear that courts have sufficient latitude in defining those privileges and applying

⁴⁷ *Ibid.* at 388.

the test of necessity so as to avoid protecting privileges that might otherwise result in the abuse of Charter rights and are clearly contrary to the late twentieth century concept of individual rights. The issue comes down to one of jurisdiction or a question of balancing the traditional deference afforded legislative bodies with the need to protect Charter rights. In the end McLachlin's test of necessity may be no different than Sopinka J.'s application of section 1 of the Charter. Underlying both is the need to preserve the balance as between the judiciary and legislative bodies.

Cory J. raised the prospect that in exercising its jurisdiction to punish a member for contempt a legislative body could sentence that member to life imprisonment without parole.⁴⁸ In Cory J.'s opinion such an action "would fall outside the constitutional scope of parliamentary privilege and the provisions of s. 12 of the *Charter* applying to cruel and unusual punishment would come into play."⁴⁹ Cory J. used this illustration to support his argument that privileges should be given constitutional status.

However, if McLachlin J.'s test of necessity is applied to Cory J.'s illustration, Cory J.'s conclusion should still follow. The privilege could be defined broadly as the power to punish for contempt in the face of the assembly, but a court

⁴⁸ Cory J.'s suggestion of life imprisonment goes somewhat too far. A person may only be committed until prorogation, although the committal could be renewed in the next session. The courts could discharge a person by *habeas corpus* after a prorogation or dissolution. See Maingot, *supra*, note 18 at 176.

⁴⁹ *Supra*, note 1 at 401.

is more likely to define the privilege narrowly as the power to imprison for contempt in the face of the assembly, concluding that while the power may be historically recognized it is not a necessary power. Such a holding could be justified on a jurisdictional basis since a court would not be interfering in internal proceedings.

A similar approach may be justified should a legislative body exclude a member solely on the basis of race or sex. The privilege could be defined broadly as the power to expel members, but the privilege could also be defined more narrowly as the power to expel for inappropriate behaviour in the legislative chamber. Thus, the protection afforded all citizens by sections 2 and 15 of the Charter could not be ignored by a legislative body attempting to discipline its own members.

McLachlin J.'s example, discussed above, of a legislative body excluding all members of the public pursuant to its power to exclude strangers could also be approached in a similar manner. A narrow definition of the privilege leaves open the possibility of a complete ban being contrary to the Charter. Arguably, a complete ban is not justified on the basis of necessity and such a ruling need not be viewed as an interference with internal proceedings on the part of a court. Should *Southam Inc. and Rusnell v. A. G. Canada*⁵⁰ proceed in the Ontario Court (General Division), the Court may confront this issue, since the case concerns the right of the Senate to hold *in camera* hearings.

⁵⁰ (1990), 114 N.R. 255 (F.C.A.).

Chapter 3, Part 2 of the thesis canvasses various privileges, considering how they may infringe Charter rights and arguing that even if all privileges are subject to the Charter the traditional deference to internal proceedings should still be preserved. In light of the majority ruling in *New Brunswick Broadcasting* it is clear that certain privileges now enjoy constitutional status, but McLachlin J.'s test of necessity leaves open the possibility that the more troublesome privileges, those that could infringe Charter rights, can be circumscribed so that they are subject to judicial scrutiny.

(e) The Appropriate Remedy

What *New Brunswick Broadcasting* does not address is the appropriate remedy should a court find that a Charter right is infringed. It is very likely that future case law will determine that some privileges do not have a constitutional status under the preamble. Only Cory J., finding that the ban on media access was contrary to the Charter, had reason to address the issue of an appropriate remedy, but a compromise had been reached after the case was heard by the Court of Appeal so that the media were provided with television footage from an electronic Hansard.⁵¹ Thus, Cory J. concluded:

I would repeat that a balance must be kept between efficient and dignified operation of the legislative assembly and the right of freedom of expression. It seems

⁵¹ Explained in Lamer C.J.'s reasons, *supra*, note 1 at 333.

that the regulation which is now in force with agreement of all parties with regard to the television cameras, limiting their number and position, is eminently fair and suitable and would be justifiable under s. 1 of the *Charter*.⁵²

Any remedy proposed in future should seek to balance the rights of legislative bodies with the individual rights guaranteed under the Charter. As argued in Chapter Three, Part 1 of the thesis, remedies other than declarations may unnecessarily interfere with internal proceedings or, in Cory J.'s word, the "dignified operation of the legislative assembly". However, Lord Ellenborough C.J.'s "extravagant case"⁵³ may arise at which time a more intrusive remedy may be necessary.

(f) **Conclusion**

In *New Brunswick Broadcasting* the Supreme Court of Canada has clarified the constitutional status of parliamentary privilege in Canada. Those privileges which can be classed as historically recognized constitutional powers necessary for the proper functioning of a legislative body have constitutional status pursuant to the preamble of the *Constitution Act, 1867* and are therefore immune from judicial review under the Charter. Those privileges that fall outside this definition do not have constitutional status and may therefore infringe a Charter right unless justified under section 1.

⁵² *Ibid.* at 413-14.

⁵³ Chapter 3 of the thesis at p. 18.

However, the majority decision, while it provides guidance in determining what privileges will meet the test of necessity, leaves some questions unanswered that will have to be addressed in future case law. It is not entirely clear whether privileges are to be defined broadly or narrowly, although the latter appears to be the approach advocated by McLachlin J.'s reasons. The proper application of section 1 is still not fully defined, although this issue is addressed in Sopinka J.'s judgment. Finally, the appropriate remedy should there be a breach of a Charter right is not addressed in *New Brunswick Broadcasting*.

However, each of the five separate opinions delivered in *New Brunswick Broadcasting* clearly intended to preserve the traditional deference afforded legislative bodies by the courts. The right of legislative bodies to control their own proceedings and ensure that they function properly and efficiently must be balanced against the power a court may have to interfere so as to protect individual rights.

Sopinka J.'s approach, allowing that all privileges are subject to the Charter, but may be justified under section 1, is arguably, the simpler and more straightforward approach. The majority decision has created two classes of privilege. However, while the majority's test of necessity leaves questions unanswered, as a matter of practicality, it reaches the same result. In all likelihood, those privileges that meet the test of necessity are the ones that could also be justified under section 1

as demonstrably justifiable in a free and democratic society. Those privileges that do not meet the test of necessity are subject to the Charter. They might still be preserved under section 1, but a court is given an opportunity to properly protect the individual rights at issue. In the end, however, it is the balance as between judicial scrutiny and the traditional rights of the legislative bodies that the Supreme Court of Canada intends to preserve.