

sage to a stunned group of federalist liberals in his brief to the Bélanger-Campeau commission, light-years ago, in December 1990. He argued that to save the federal system, we would have to start anew.

Clark and Mulroney valiantly tried to repair the ship, but what we need is a new boat. Is there still time? What about the aspiring Tory captains? I shall turn to these questions in a future article. I wish to conclude this one with a matter that must be cleared once and for all.

It is often proclaimed in the English-Canadian media that Lucien Bouchard was a traitor to Mulroney, that he was ungrateful to the man

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who had opened all kinds of political doors for him. First, it must be recalled that Bouchard and his friends provided Mulroney with a platform, and with key allies, at a crucial time. It was Bouchard who wrote the Sept-Îles speech in 1984, when Mulroney pledged that Quebec would be brought back into the Canadian constitutional family, "dans l'honneur et l'enthousiasme." This was the spirit of René Lévesque's "beau risque" with the Tories. This platform brought Mulroney the broad Quebec nationalist-federalist vote.

Bouchard stayed with Mulroney until May 1990. Bouchard abandoned his friend on a matter of principle. He had become convinced, largely through the Charest report

affair, that Mulroney had been recaptured by the Canadian nationalists intellectually closer to Trudeau than to the alliance of MacDonald and Cartier. Bouchard left Mulroney politically, after the latter had abandoned the former intellectually.

It can reasonably be argued that Mulroney had no other choice during the last months of the Meech Lake saga, that as the prime minister of Canada he had to make compromises likely to bring onside New Brunswick, Manitoba, and Newfoundland. However, it can also be argued that what these provinces wanted was the predominance of the 1982 political culture over its 1867 counterpart. They wanted Canada to be a nation first and foremost, rather than a federation. The Report of the Manitoba Task Force is particularly instructive on this score. Meech Lake would have refashioned a fragile equilibrium between 1982 and 1867. When Mulroney altered the equilibrium in May 1990, Bouchard made his move. Not before.

The departure of Clark and Mulroney is received with a certain sadness in Quebec. These were honourable men who attempted to construct a generous definition of the Canadian federal community. The famous motto "My Canada includes Quebec" would never have been claimed by them in a way similar to the infamous motto we hear these days, "My Serbia includes Bosnia." Clark and Mulroney used all the tricks in their political struggles, but they were on the side of civility. Can this be said about all political leaders and opinion makers in contemporary Canada? Readers should ponder the question and answer for themselves.

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## LEGAL REPORT

### CAMERAS IN THE LEGISLATURE: STRANGERS OR WATCHDOGS?

by Jamie Cameron

In *Donahoe v. CBC*, the Supreme Court of Canada held that the *Charter of Rights and Freedoms* does not protect the CBC's right to televise proceedings in a provincial legislature. Given a jurisprudence that is reluctant to acknowledge a distinctive role for the press, the court's unwillingness to endorse a right of television access under s. 2(b) of the Charter was less of a surprise than the conclusion that parliamentary privileges, including the right to eject strangers, are immune from the Charter. Citing "curial deference," the court held that our representatives are not legally accountable when exercising those privileges.

#### CAMERAS IN THE LEGISLATURE

Arthur Donahoe, speaker of the Nova Scotia House of Assembly, refused the CBC's request to film its proceedings from the public gallery. In Nova Scotia, the Trial Court and Appeal Divisions both found that s. 2(b) prohibited the speaker from denying television access to the legislature's public proceedings.

The Supreme Court of Canada allowed the appeal and dismissed the CBC's claim. Of the eight judges who decided the case, only two found that the Charter applies. Although Sopinka J. upheld the speaker's restrictions under s. 1, Cory J. alone would have protected a right to televise legislative proceedings under s. 2(b)'s guarantee of press freedom.

## THE CHARTER AND THE LEGISLATURES

Most worrying about *Donahoe* are the contortions of reasoning the court contrived to grant parliamentary privileges near absolute immunity from the Charter. The chief justice's interpretation of s. 32 is symptomatic.

Lamer C.J. contended that, under s. 32, the Charter applies to the "legislature" of each province but not to a legislative assembly. In his view, because the lieutenant governor's signature is necessary to bring legislation into law, "the legislature" under s. 32 of the Charter must be defined as the assembly together with the lieutenant governor. By acting on its own in these circumstances, the legislature was not bound by the Charter.

Describing the chief justice's interpretation of s. 32 as "technical," McLachlin J. offered alternative reasons for her conclusion that parliamentary privileges are absolutely immune from the Charter. She held that rights that enjoy "constitutional status" cannot be abrogated by the Charter. A history of curial deference, originating in British tradition and imported to Canada, convinced her that parliamentary privileges have constitutional status under our constitution and must, of necessity, be absolutely and unconditionally immune from review.

As Sopinka J.'s reasons demonstrate, it was possible to balance the interests at stake and uphold the speaker's decision. However, six of eight judges preferred to foreclose the Charter claim and yet to hint, ambiguously, that parliament's immunity could be less absolute in other circumstances.

## PRIVILEGE, CURIAL DEFERENCE AND THE CHARTER

Supreme Court of Canada precedent had restricted the Charter's application prior to *Donahoe*. In the

mandatory retirement cases, for example, the court held that the employment relationships of public institutions like universities and hospitals are not subject to the Charter.

Even so, those cases are not quite the same as *Donahoe*; each concerned an attempt to extend the Charter's scope beyond the institutions of parliamentary government, as traditionally defined. In rejecting the attempt to extend the Charter to such "public" actors and institutions, the court has emphasized that the purpose of the Charter is to protect citizens against any unjustified violation of their rights by government. According to doctrine, the Charter

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does not bind non-governmental actors, but does apply to "the apparatus of government."

From a purely doctrinal perspective, the result in *Donahoe* is puzzling. As Cory J. observed in his dissenting opinion, "[t]o the ordinary and reasonable citizen," it is the legislative assembly that is the "essential element of the 'legislature' and a fundamental and integral part of the 'government' of a province." Yet *Donahoe* found that our representative institutions are free to continue exercising privileges that predate the Charter, with impunity.

*Donahoe* is significant, not so much because the CBC was excluded from the legislative assembly, or even because the Supreme Court of Canada expressed deference to "parliamentary privilege." It is signifi-

cant, in broader terms, for what it says about the court's conception of its responsibilities in interpreting and enforcing the Charter.

Some have theorized that the Supreme Court of Canada has become increasingly "conservative" as Prime Minister Mulroney's influence has been felt in the appointment process. In that regard, *Operation Dismantle*, decided earlier and by a court that was differently constituted, may be instructive.

There, the Supreme Court of Canada held that Cabinet decisions are subject to Charter review. As the executive branch of government, the Cabinet acts under the authority of legislation, but also pursuant to the royal prerogative. Although the claim in *Operation Dismantle* failed, it was not because of curial deference. In commenting on the prerogative, Wilson J. stated that it was not only appropriate for the judiciary to determine whether Cabinet had violated the rights of citizens, but its obligation to do so under the Charter.

In the United States, it is the separation of powers, not curial deference, that restrains judicial review of the executive and legislative branches. However, despite the constraints of separation theory, the U.S. Supreme Court held, in *Powell v. McCormack*, that Congress acted unconstitutionally in expelling one of its duly elected members from the House of Representatives. In reaching that conclusion, the American court held that the judiciary could not use the separation of powers to avoid its responsibility to interpret the constitution.

Which, by invoking curial deference and technical interpretations of s. 32, is exactly what the Supreme Court of Canada has done in *Donahoe*.

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