

# PRIVILEGES AND POWERS OF THE NOVA SCOTIAN HOUSE OF ASSEMBLY

*By* J. MURRAY BECK

**L**IKE most colonial assemblies of the First British Empire the Nova Scotian House of Assembly sought to counter-balance the weakness of its position by demanding everything included in the nebulous term "parliamentary privilege." As early as 1759, it requested the customary rights of British representative bodies and was accorded "all such privileges as His Majesty's Instructions would permit." Undoubtedly it was seeking the privileges enjoyed by the House of Commons, while Governor Lawrence was granting those permitted by a document which was anything but conducive to an exalted viewpoint of the Assembly's position. For the moment the differences upon the abstract issue were not resolved since the Assembly was content to apply the procedure of the Commons to specific problems as they arose, but eventually, as befitted the senior Canadian representative body, it was to be the means of determining the scope of the privileges, immunities, and powers possessed by the provincial legislatures.

Part of the Assembly's early interest in privileges was in defending the rights of its members individually. It demanded, in particular, that they should be accorded complete freedom of speech and action when in session. Thus, at its first meeting in 1758, it arrested Archibald Hinshelwood, the Deputy Secretary of the Province, for using "very threatening and scandalous words against (the Assemblyman) William Pantree and the whole Assembly," a course of action described as "Dangerous to the Lives of the Members, and destructive to the liberties of the people." A little later it sought to remove the obstacles which barred a member from attending to his legislative duties. Here the primary difficulty was a financial one, for Assemblymen could be caught, and without disgrace, in the foils of the frequently invoked statute which prescribed imprisonment for debt. All went well until 1818 when the Assembly experienced difficulty in effecting the release of Jacob van Buskirk, the member for the County of Shelburne, who was held in custody under a writ of attachment issued by the Court of Vice-Admiralty. To prevent the ill from attaining epidemic proportions, it resolved that its members should be immune from arrest, except for treason, felony, or breach of the peace, during the actual sessions, "and for a convenient time after every prorogation . . . and before the time of the next appointed meeting, and that such convenient

time is, according to the usage of the Commons House of Parliament, forty days." Yet this remedy was by no means automatic, and occasionally the House still had to intervene to assist members who were held in custody or whose employment constituted an impediment to attendance.

The Assembly's major preoccupation, however, has been, not so much with the privileges of its individual members as with its collective privileges. These include the regulation of matters appertaining peculiarly to itself, including the determination of whether its members are validly elected. For almost fifty years no one challenged it in this regard. Then, in 1806, the authoritarian Governor John Wentworth dared to review the propriety of its vacating the seat of one Thomas Walker before he would issue a writ or election for the Township of Annapolis. The ensuing difference of opinion between the Nova Scotian law officers and the Council of Twelve brought into question for the first time the theoretical basis upon which privileges rested. Did the *lex et consuetudo Parliamenti* "which is part of the Common Law of England . . . necessarily extend to this province and (afford) the only safe rules to guide and direct its Legislature?" or was "the Law of Parliament . . . peculiar to the High Court of Parliament in England and . . . not transferred to or vested in the General Assembly of Nova Scotia, which owes its creation to the Royal Instructions and is regulated by the Laws of the Province"? If the former viewpoint, that of Attorney-General Richard John Uniacke, was correct, the constitutionality of the Assembly's action was undoubted, for "one of the strongest Maxims of the Law of Parliament is that whatever matter arises concerning either House ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere." But if the latter, the opinion of the Council were to prevail, the determining factor was the Nova Scotia act of 1789 for the better regulation of elections, and, in its opinion, that act would not "vindicate the Expulsion of a Member . . . qualified to hold a seat, agreeable to that Law at least until after Conviction of Bribery or corruption in due Course of Law."

The Assembly fully realized the clear-cut threat to its independence. Before it loomed the unpleasant alternative either of "submitting to the mortification of seeing some of its Seats filled by persons whose practices had been illegal and corrupt . . . or of declaring such Seats vacant, and thereby leav(ing) the County or Town without representation." Actually it had nothing to fear, for the English law officers unequivocally upheld its competency to "decide exclusively and without appeal on the

validity of the Election of one of its members." But although it was never to be similarly challenged, the question of whether the *lex et consuetudo Parliamenti* extended to colonial assemblies still remained unanswered.

Since 1806, most breaches of the privileges of the Assembly have resulted from scandalous or libellous reflections upon its members and disobedience to its orders, usually in combination with each other. These breaches are designated as contempt of the House, which is analogous to contempt of court in judicial proceedings. The first major incident occurred in 1829 when John Alexander Barry, the representative of the Township of Shelburne, allegedly inferred in the course of debate that a fellow member, Colonel Joseph Freeman of Queens County, had been engaged in smuggling. On his refusal to apologize, the House resolved to exclude him until he had complied with its order.

Instead of submitting, Barry forwarded his own petition and that of his constituents requesting the vacating of his seat, but these demands were rejected summarily by the Assembly's Committee of Privileges because they were inconsistent with the precedents and practice of Parliament. Barry was likewise denied the right to appear at the bar of the House to impeach Colonel Freeman and Colonel Dewolf of the Township of Liverpool for smuggling. So, for want of a better alternative, he resumed his seat without apologizing, and for this misdemeanour he was committed to the custody of the Sergeant at Arms. The latter, overwhelmed by his unprecedented responsibility, eventually led his prisoner to the Barry residence across the street from Province House and put him in the safe-keeping of Mrs. Barry on condition that he would be available for future eventualities.

There the matter might have ended if Barry had not published a letter in the *Recorder* describing the Assembly's Committee of Privileges as "*this privileged committee*" and accusing its members of having "*lent themselves to a most positive falsehood.*" This was the last straw. Barry was summoned to the bar of the House and ordered to suffer imprisonment pending its further determination. Yet even then the Assembly was not done with him for, as he was being escorted from Province House, he was separated from his captors and made his escape. Worse still, a number of members, on their way to dine at Government House the same night, were "hooted and hissed along the streets, pelted with snow, mud, stones and other missiles, and assailed by every opprobrious expression that could be vented by a heedless and unthinking rabble." Barry later surrendered, was expelled as "unworthy to continue a member," and was

ordered to be imprisoned in the common gaol for the remainder of the session. There he was joined by Frederick Major, the Elder, who had assisted in his escape. The Assembly further vindicated its wounded dignity by voting £500 for discovering, "prosecuting, and bringing to condign punishment, the Author, Parties, Aiders and Abettors, of and in the . . . Outrages" upon its members, but the Grand Jury of the County of Halifax doubted if they were premeditated, and blamed them upon "unruly mischievous boys, whose shouts collected a mob of the lowest description of characters."

Throughout these incidents the press was highly critical of the Assembly, partly for calling out the military to preserve order, but most of all for reprimanding the editors of the *Recorder* and *Free Press* who had afforded Barry the opportunity to defend himself. Joseph Howe warned that "if Editors are brought for offences to the Bar of the House, Legislators may depend upon this - that they will be brought, individually and collectively, to a bitter expiation before the bar of the public."

Barry celebrated his release with extensive research in the *Journals* of the House of Commons, and its outcome was a series of twenty-five letters in the *Recorder* which sought to demonstrate that British precedents would not justify his treatment at the hands of the Assembly. His case might have been stronger if he had argued that the Law of Parliament was inapplicable to colonial legislatures. The Assembly's Committee of Privilege contended otherwise and claimed for the House "the *sole* and *exclusive* power of punishing its own Members, either by Commitment, Suspension, Expulsion or otherwise," but a correspondent in the *Recorder* prophesied more accurately that although "the House of Commons has an extensive (judicial) jurisdiction (based on parliamentary usage), . . . unless *express charter* has given it to Colonial Assemblies, they have none."

After the Barry flurry there was only one breach of privilege of any consequence prior to 1867. It occurred in 1853 as a result of J. W. Johnston's opposition to the building of railways as public enterprises. For that the Conservative leader was confronted in the corridors of Province House by several hundred persons who "not only hooted and hissed him, but . . . attempted to kick him on the shins and . . . throw him down." This time the Assembly did no more than examine the Mayor of Halifax upon the adequacy of the civil power of the city to protect the people's representatives.

Confederation wrought no immediate changes in the Assembly's privileges. While the British North America Act per-

mitted the Canadian House of Commons to confer upon itself by statute the privileges, immunities and powers which the British House of Commons possessed in 1867, it made no explicit reference to the privileges of the provincial legislatures. The newly constituted ones proceeded, therefore, to follow the example of the Ontario House of Assembly which in 1868 conferred upon itself the privileges and powers of the Canadian House of Commons. But none of these acts was permitted to remain on the statute book because of John A. Macdonald's view that, if a provincial legislature could enact this type of provision at all, it might "confer upon itself and its members privileges in excess of those belonging to the House of Commons of England." To counter this objection, the Quebec Legislature then adopted another course - it constituted itself a Court of Record with power to try and punish specific offences which it declared to be breaches of its privileges. This time the Minister of Justice, although still dubious, declined to interfere on the ground that some such provisions were necessary to uphold the authority and dignity of a provincial assembly.

To the continuing legislatures like that of Nova Scotia the omission of any reference to privileges in the written constitution presented no problem because they had built up a body of rules and conventions which seemed entirely adequate. When the authority of the Nova Scotian Assembly had last been questioned in 1829, no one had ventured to test the scope of its powers in the courts. Since then the Judicial Committee of the Privy Council, after initially upholding the right of colonial assemblies to punish for contempt in *Beaumont v. Barrett* (1836), had reversed itself in such cases as *Kielley v. Carson* (1842) and *Doyle v. Falconer* (1866). Its later opinion was that the privileges of the British House of Commons, of which the right to punish for contempt was one, belonged to it "by virtue of the *lex et consuetudo Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom." Thus at long last the question which the leading Nova Scotian legalists had pondered and disagreed upon in 1806 was settled. Colonial assemblies did not possess inherently the right to adjudicate upon and inflict punishment for contempt - that being a judicial and not a legislative power - but only the self-preservative power of removing any immediate obstruction to their proceedings. At the time these pronouncements passed unnoticed in Nova Scotia. It required one *cause célèbre* which convulsed the political arena in the 1870's to indicate that the inherent privileges of a Canadian provincial legislature were in themselves inadequate, and

another in the 1890's to demonstrate that it might overcome this deficiency by statutory action.

The former incident involved the Conservative Assemblyman Douglas B. Woodworth, who delighted in ferreting out alleged instances of misconduct on the part of members of the government. He went too far in 1874, however, when he charged the Provincial Secretary W. B. Vail with making illegal alterations in the records of the Crown Lands Department. After a committee of the House found the accusation to be groundless, the Liberal members turned upon their tormentor for slandering one of their number. Woodworth declined to apologize for his alleged breach of the privileges of the House and was forcibly ejected for his contempt of its order.

The conduct of the Liberal majority during these events was by no means beyond question. It was certainly not in itself a breach of the privileges of the House for an Assemblyman to bring an unfounded charge against a member of the government, and it was decidedly unsatisfactory, as the Chief Justice of Canada pointed out later, to make the breach of privilege contingent upon a report of a committee of the House that the evidence would not support the charge. After all, freedom of speech was one of the most important of an Assemblyman's privileges because it afforded him the means to denounce and to expose abuses. Hence, if Woodworth had reasonable grounds for believing in the authenticity of his charge, it was both his right and his duty to bring it before the House for investigation.

Yet there are extenuating circumstances which make the Assembly's action at least understandable. The long-suffering Liberal members had come to feel that drastic action was required to prevent Woodworth from converting the House into a bear garden. Some of them even spoke of adopting a proviso which would preclude "the entrance of such characters into Parliament." "Society," they said, "establishes safeguards (to prevent it) from being polluted by such, why should not Legislatures?" The Conservatives, in their turn, laughed scornfully at the "vile epithet-hurling" anti-Confederates being "transmogrified . . . (into) sensitive, delicate little animals, who have to be wrapped up like poodle dogs to keep them from being injured by exposure." As for Woodworth, he pictured himself being "hunted down as a partridge upon the mountains" by a "solid phalanx of frowning enemies," and took legal action against his "persecutors." Ultimately he was successful, for the Supreme Court of Canada in *Landers vs. Woodworth* (1878) conformed to the previous opinions of the Judicial Committee and

ruled that he could not legally be removed unless his conduct had caused an immediate obstruction to the deliberations of the Assembly. This necessitated a judgment in his favour, for the House could hardly maintain, after a lapse of two weeks, that the charges against Vail constituted such an obstruction.

Even before this decision, however, the Legislature had sought to establish its powers beyond doubt. One of its best legal minds, Hiram Blanchard, had always questioned the legality of ejecting Woodworth, and when the latter was awarded damages of \$500 in the Supreme Court of Nova Scotia, the members of the government commenced to have their own doubts. So in 1876 they called upon the Legislature to abandon its reliance upon its self-preservative inherent powers for a complete statutory guarantee of its privileges, powers, and immunities. The resulting act contained not only the provisions of the disallowed Ontario act of 1868 which provided privileges analogous to those of the Canadian House of Commons, but also those of the Quebec Act of 1870 which created each branch of the Legislature a Court of Record competent to try and punish a comprehensive list of offences described as breaches of privilege. These powers were so extensive that the Minister of Justice feared their "application to the subject in general would be to put (him) at the mercy of either House, no matter what might be the nature of the rule, order or resolution which it passed;" but the Legislature declined to make any alterations, and for some unexplained reason Ottawa refrained from disallowance.

The fears for the ordinary liberties of the subject were, in fact, justified in the Thomas case. In 1892 Mayor David Thomas petitioned the Legislature to repeal legislation which affected the town of Truro. To his petition he attached the articles of complaint of the Town Council and Corporation which alleged that the senior member for Colchester County, either by himself or with others, had wilfully, wrongfully, and in contempt of the Council and Corporation, promoted, introduced, and passed laws and statutes which deprived them of \$475 per annum. For a civic official to furnish the Legislature with *prima facie* evidence that an Assemblyman has surreptitiously used his position to obtain legislation beneficial to himself and detrimental to a town corporation appears at most to be a technical offence no matter how strongly the documents are worded. Nevertheless the ranks of the Liberal majority closed to defend a Liberal representative against a Tory mayor. Without investigating the charges against the Assemblyman, it adjudged Mayor Thomas guilty of publishing a libel against one of its members and thereby committing a



breach of its privileges. Upon his refusal to accept a reprimand for this offence, the Assembly declared him to be in contempt and ordered him to suffer imprisonment for forty-eight hours in the common gaol at Halifax.

Because of the deficiencies in the warrant which committed him, Thomas gained his release five hours early on a writ of *habeas corpus*, and then, with the encouragement of Conservative politicians and lawyers, he sought his revenge by instituting a suit for damages of \$50,000 against the Liberal members who had voted for his arrest. The courts were required, therefore, to determine the validity of the statute of 1876 upon which the Assembly relied to justify itself. In *Fielding v. Thomas* (1896) the Judicial Committee of the Privy Council held that legislation to ensure the independence of a provincial legislature from outside interference or to protect its members from insult in the discharge of their duties must be regarded as part of the constitutional law of the province. Hence the act of 1876 could be supported either under section 5 of the Colonial Laws Validity Act of 1865 which gave the colonial Assemblies power to make laws respecting their constitution, powers, and procedure, or under section 92 of the British North America Act which empowered the provincial legislatures to amend their constitutions.

This opinion was a bitter blow to Thomas in more ways than one. When the case was being heard by a judge and jury of the Supreme Court of Nova Scotia, the latter was asked to affix damages in case the act of 1876 was eventually declared to be *ultra vires*. At the time Attorney-General J. W. Longley pleaded for a purely nominal sum on the ground that

before these proceedings (Mr. Thomas) was unknown. Now he glories in a fame which he hopes is more than provincial. Was he not the central figure in a glorious torchlight procession attended by his enthusiastic admirers in Truro? . . . Was he not the recipient of a flattering address couched in gushing terms . . . Mr. Thomas' children and grand-children and great-grand-children . . . would not part with the privilege of referring to these glorious incidents in the life of a distinguished ancestor for ten times the damages claimed in this case . . . if there was to be a balancing of accounts in this case Mr. Thomas would be the debtor of members of the legislature.

Now Thomas would not enjoy even the pittance of \$200 which the jury had awarded him; instead he found himself taxed with court costs of \$2500. But when he came as a suppliant to the



Assembly in 1897 on the ground that the judicial proceedings had served to establish the extent of its privileges, he secured no relief from the men whom he had sued. It was a heavy price to pay for the memories of a faded glory. In another way the episode was even more unsatisfactory because it raised the suspicion that the privileges of Assemblymen might be used to stifle deserved criticism of their conduct.

By the test of time the all-embracing act of 1876 has been proved entirely sufficient for the Assembly's needs. Only once has the possibility arisen that it might be defective. That occurred at the turn of the century when "some poor woman who thought that she had a grievance" and was talking rather loudly in the corridors of Province House brought a civil suit against the Chief Messenger who had expelled her. Her action failed because the Supreme Court of Canada in *Payson v. Hubert* (1904-5) held that public access to the House of Assembly and its precincts was a privilege which might be revoked whenever necessary in the interest of order or decorum. Thus an amendment to the act of 1876 which had been passed in 1903 especially to protect the officers of the Legislature in such instances proved to be unnecessary.

Just as in the Woodworth and Thomas cases, privilege became inseparably connected with the political struggle in 1914. Then the Assembly had to decide if a newspaper's publications had passed beyond tolerable limits. The *Herald* and the *Evening Mail* were, on this occasion, opposing a bill which permitted the Robert interests of Montreal to use the assets of the Halifax Electric Tramway Company to finance a hydro-electric venture on the Gaspereau River. As part of their crusade to forestall what they described as the bartering and plundering of a public franchise, the *Mail* published a letter which alleged that, if the controversial bill came law, the electorate could only conclude that "some of the gentlemen sent to the House of Assembly to protect (their) interests, were unable to resist the temptation, and were bought, body and breeches." At this point the Liberal majority in the Assembly decided it was high time to call a halt to "the campaign of slander," and an investigating committee of the House sought from W. R. McCurdy, the news editor of the *Herald*, the source of the letter. When he refused to divulge it on the ground that it would be "a violation of the ethics of journalism and a grave breach of the time-honoured traditions of the press the world over," he was adjudged guilty of contempt of the House and committed to the common gaol for forty-eight hours.

The *Herald*, which had previously attempted to rouse the municipal corporations, the trade unions, and the Conservative party against the proposed power legislation, now sought editorial support from the press of Canada in defence of the freedom of newspapermen. At the same time it regaled its own readers with the mournful ditty "Jailin' Poor McCurdy."

"What is the Speaker ringing for?" asked members, half afraid.

"To call you in, to call you in," the sleepy page-boy said.

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"For they're jailin' poor McCurdy, by the light o'mornin' star.

"They've sent the good, old sergeant out and marched him to the bar.

"'E refused to break a faithful trust; they've slung their pot o'tar -

"Now they're jailin' poor McCurdy as a warnin'."

"Who was it heaved that heavy sigh?" asked members, half afraid.

"The shade of Howe, the shade of Howe," the sleepy page-boy said.

"For they're jailin' poor McCurdy, an' Joe doesn't like the sight.

"They both stood for a principle - an' thought that Right was Might -

"But both misplaced a confidence this fateful April night -

"So they're jailin' poor McCurdy as a warnin'."

This time, however, "poor McCurdy" and his defenders knew better than to challenge the legality of his imprisonment in the courts.

While no clear-cut principles for guiding the Assembly's course of action can be deduced from any of these incidents, it seems obvious that unless the breach of its privileges is clearly intolerable it should refrain from exerting its authority in those cases in which its action is likely to be interpreted as just another excursion into partisan politics.

The converse of an outsider libelling or slandering an Assemblyman is an Assemblyman making scandalous attacks on private citizens. The difference is that the Assemblyman, because of his privileged position, operates under far fewer inhibitions. For that reason the *Acadian Recorder* once described a

representative guilty of this abuse as being "several degrees lower than the goat which railed at the wolf from the top of the house. Such things might be pardonable in a goat, but they are simply contemptible in a man." Members of the government in particular have little to fear from the only body which can effectively discipline them, the House itself. One Premier, when taxed with using immoderate language against a newspaper editor who had been subjecting him to criticism, simply replied: "Why can't (his friends) and he take their medicine the same as I have to do 365 days of the year?" Once again clear-cut principles cannot be laid down, and the public must continue to rely upon the good sense of the House of Assembly itself to prevent the freedom of speech and debate which its members enjoy from degenerating into an unwarranted abuse of that high privilege.