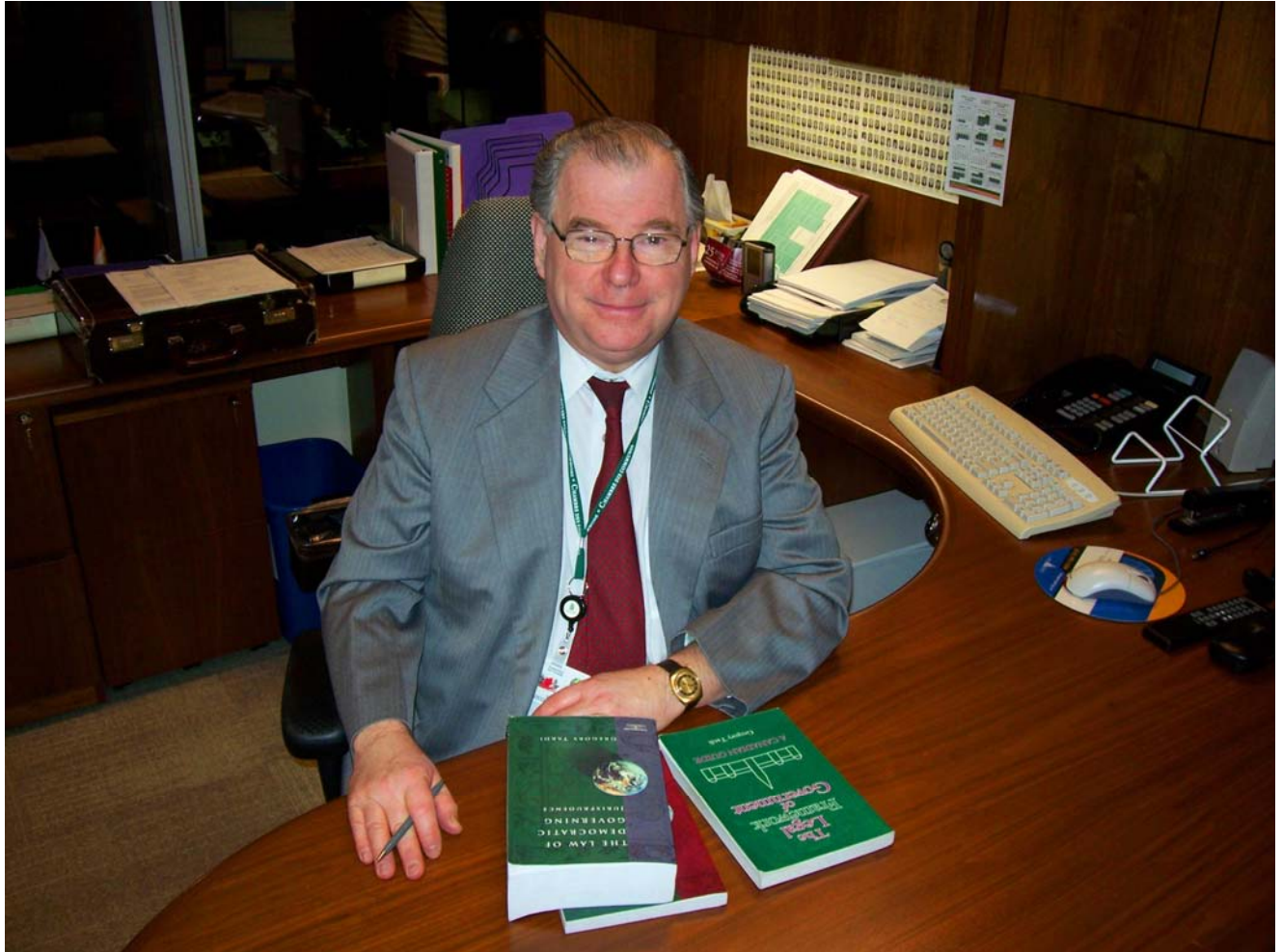


## Lawyering in the House of Laws

**By Gregory Tardi, B.A.(Hons.), B.C.L., LLB.**

Senior Parliamentary Counsel, Office of the Law Clerk  
House of Commons, Parliament of Canada

*The views expressed here are exclusively those of the author and are entirely non-partisan. This article was prepared as an academic paper, not on behalf of the House of Commons, its members or its administration.*



The Parliament of Canada, a creature of the *Constitution Act, 1867*, s. 17, is the central institution Canada's political system. Inherently, as well as flowing from the constitutional characterization of Canada as having "a constitution similar in principle to that of the United Kingdom,"<sup>1</sup> this institution and the Houses it comprises are both political and legal in nature. Despite the fact that in our democracy, Parliament is the highest political deliberative body of the nation(s), the legal aspect of this institution should not be underestimated. The more recent constitutional text of 1982 reinforced the necessity of

---

<sup>1</sup> *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.), Preamble.

considering the legal nature of our institutions by affirming that “Canada is founded upon principles that recognize .....the rule of law.”<sup>2</sup> This point was further underscored by the Supreme Court of Canada in its Quebec secession reference decision, where it listed the rule of law as one of the fundamental elements of the Canadian constitutional regime.<sup>3</sup> Within the overall context of Parliament, this article will deal with the work of lawyers in the House of Commons, though the reader may wish to transpose some of the realities set out here to such work at the Senate.

An institution which is legal in nature, even if only in part, needs legal advisors. The House of Commons itself recognizes this in the bylaws of the Board of Internal Economy, where it defines the mandate and jurisdiction of its law clerk and parliamentary counsel.

#### **Law clerk and parliamentary counsel**

10. The law clerk and parliamentary counsel shall be responsible for providing legal counsel services to the Speaker, the Board, members, the clerk and the officials of the House of Commons Administration along with legal and legislative counsel services to members and Committees of the House of Commons and for performing such other functions as the clerk may assign.<sup>4</sup>

#### **Légiste et conseiller parlementaire**

10. Le légiste et conseiller parlementaire est responsable de fournir des services juridiques au Président, au Bureau, aux députés, au greffier et aux fonctionnaires supérieurs de l'Administration de la Chambre des communes, ainsi que des services juridiques et législatifs aux députés et aux comités de la Chambre des communes, et d'exercer les autres fonctions que lui assigne le greffier.

The nature of the work of the law clerk and of the parliamentary counsel who assist him (such as the author) is particular among varieties of legal practice in that it reflects the nature of the House of Commons itself. First, it takes place in a political environment. Moreover, it deals in large measure with clients who are political actors and therefore public figures constantly in the limelight. Its greatest interest is that it entails legal issues which are intrinsically linked to democratic governing and to the political life of the country.

Parliamentary counsel must thus be just as aware of the subject matter of current Canadian politics, of the latest news, of the ebb, flow and interplay among political parties and among those exercising public power, as their counterparts in commercial law, for example, need to be of evolving trends in business. Parliamentary counsel must also exercise a combination of discretion in respect of their advisory role. Ministers and MPs have political advisors. The role of House lawyers is to tender legal advice, which, by necessity, is related to, but distinct from, the political interests at stake. They must understand, and indeed, instinctively feel, the admittedly sometimes variable limits of the domain of law. This is all the more true in the sense that strict non-partisanship is a fundamental element of the professionalism of House officials. Counsel must be able and willing to advise MPs of the government, opposition, third parties and independents with equal tenor.

Discretion on the part of counsel is also very much valued by clients in political life. The public forum of the House of Commons is the domain of statesmen and women, parliamentarians and politicians. Only they, not their legal advisors, should be filmed, recorded, or quoted in the media.

The political nature of the subject matter, dealing with the competition for, use, and retention of public power, does not alter the substance of the legal analysis that parliamentary counsel engage in, or of the

---

<sup>2</sup> *Constitution Act, 1982*, (U.K.) 1982, c. 11, Schedule B, Preamble

<sup>3</sup> *Reference re Secession of Quebec* (1998) 161 D.L.R. (4th) 385 at 418 – 419, para. 72.

<sup>4</sup> Bylaws of the Board of Internal Economy, made pursuant to the *Parliament of Canada Act*, s. 52.5(1); Bylaw 201, s. 10.

legal advice that they are called upon to provide. Quite the contrary: the fact that the state, its institutions and those who exercise the levers of political power are bound by constitutional and legal norms, as others in society are, is one of the tenets of the rule of law. Practicing at the House of Commons does imply, though, knowledge of a particular specialization that relates to the roles of, and rules about, Parliament, the House of Commons and its members.

The highlight of a House of Commons practice is dealing with, and developing, the law of parliamentary privilege. This is a branch of constitutional law based in large measure on historical English sources, judicial precedent from the U.K. and Canada, as well as rulings by the Speaker of the House of Commons. Parliamentary privilege is part of the constitution and, as part of the common law, is part of the legal fabric of Canada. It constitutes a set of principles and rules that enable the House of Commons, as part of the legislative branch of government, to function within its sphere, independently of interference by either the executive or the judiciary.

In a democracy, parliamentary privilege is necessary to enable a parliamentary body to fulfill its functions. The application of parliamentary privilege as a distinct system of constitutional rules guiding the work of the House of Commons and of its members does not imply that the Commons is a law-free zone. The Supreme Court of Canada clearly stated this in its most recent major pronouncement on this part of our constitutional law.<sup>5</sup> In the Supreme Court's most recent view, the essence of parliamentary privilege is that in respect of its core functions, such as the legislative process in particular, the House of Commons is inherently able to determine its own rules and to decide what part of the general law shall be applicable to it. Were it otherwise, the independence and effectiveness of the House would be compromised.

In a democracy, the essence of politics is speech on matters of concern to the citizenry, to the electorate and to those engaged in public office. Such speech is first designed as the means to a political end: it is intended to place issues in the public forum, to formulate political positions, to confront alternative solutions to the problems of society, to convince citizens and their civil society organizations, as well as to garner electoral success. By extension of these goals, political speech can also be considered an end in itself. Perhaps the most significant of the parliamentary privileges referred to above is that political speech within the House of Commons and in other parliamentary contexts such as committees is protected from litigation. The debate of public ideas in other forums, however, generates equal fervor and passion, thus giving rise to the use of the general rules of defamation law in defense of politicians' honor, dignity and reputation.

Defamation actions, including demands for retraction of words uttered and/or apology for statements made, and either refusals to back down or accommodation of demands, are bread-and-butter matters for parliamentary counsel. In such cases, counsel focus on the legal arguments, strategies and pleadings; this is the resolution of political conflicts by means of legality. It is only realistic to note that for clients in the public domain, whether they become involved as plaintiff or defendant, the scope can be broader. There are instances when a lawsuit can be held to be the continuation of political action by legal means.

This is but an example; outside the Commons chambers, legal norms and rules other than parliamentary privilege might apply. Currently, we see many instances of situations which are generally portrayed as being political in nature, but which necessarily include legal aspects and in which parliamentary counsel may be asked to offer advice. The most prominent of these involves divergent interpretations of, the consequential litigation flowing from, and the reform of federal election legislation. Notably, it was in this context that Conservative House Leader Peter Van Loan made a point of affirming, in response to a question that "we continue to practice politics legally and we will continue to do that in the future."<sup>6</sup> In

---

<sup>5</sup> *Canada (House of Commons) v. Vaid* 2005 SCC 30.

<sup>6</sup> Hansard, Oct. 23, 2007, p. 274. It is worthy to note that the emphasis on the legality of the government's practices in the field of politics is constant, whichever political party is in office. Thus, Van Loan followed up the Question Period response quoted here by stating in the House, on the very

fact, assisting parliamentarians in doing parliamentary politics legally is the essence of the work of parliamentary counsel.

Many lawyers have public institutions as their clients/employers. The question of whether being parliamentary counsel is particular in some manner is worth addressing. Lawyering at the House of Commons is a window both on democratic governing and in particular on the law of democratic governing. Parliamentary counsel are constantly exposed to the ideas, issues and trends of public and political life. They witness first-hand the conflicts which forge those ideas, alternatively into policies, legislation or political solutions. They necessarily have access to and opportunity for exchange of ideas on legal matters with the representatives of the people. The genius of this work is both the sense and the reality of participation in the country's public life, with the perspective of legality as parliamentary counsels' specific contribution, exercised out of the limelight. On one level, no area of legal practice is more interdisciplinary or affording of a more comprehensive view on Canadian public life. Certainly, no practice could be more interesting, intense or instructive.

---

following day, that: "Mr. Speaker, our answers have been clear on this. We follow the law. Our practices in election financing follow the law." (Hansard, Oct. 24, 2007, p. 319.)