Parliament and the Police: The Saga of Bill C-79

by James R. Robertson and Margaret Young

It is widely accepted among members of the public and politicians themselves that politicians who break the law should not be treated differently from other Canadians or given special privileges. Yet, it is also undeniable that public figures such as politicians are particularly vulnerable and susceptible to innuendo and rumour, sometimes fomented by disgruntled former employees, political adversaries and others. The police are required to take such complaints seriously, but the consequences of a police investigation can be very damaging to people who are in the public eye. Even if no criminal charges are ever laid or the individual is ultimately exonerated, the mere fact that an investigation occurred can be extremely damaging to a political career. This article examines recent attempts to deal with the issue at the federal level.

Politicians at the federal level have been grappling with the issue of police investigations involving Members of Parliament. A number of Members believed that misunderstandings and lack of opportunities to explain or participate in the process had exacerbated the situation. The challenge they faced was how to achieve a balance between the legitimate expectations of the public for honest politicians and the pressures and particular circumstances of public life.

Bill C-79, an Act to amend the Parliament of Canada Act, was an attempt to come to terms with these issues. The Bill proved quite controversial, particularly its provisions relating to investigations involving parliamentarians. The background of the Bill, and its passage through Parliament, provides an interesting insight into modern political life.

During 1989 there appeared to be an increasing number of police investigations involving parliamentarians, including a rise in the number of search warrants being executed on Parliament Hill. A number of the matters being investigated related to the office budgets and services available for the carrying out of parliamentary functions and duties. These developments led to considerable concern on the part of Members of Parliament.

Matters reached a head on December 12, 1989, when the Commissioner of the Royal Canadian Mounted Police, Norman D. Inkster, appeared before the Standing Committee on Justice and the Solicitor General. Mr. Inkster stated that since 1985, the Force had investigated over 30 cases involving persons appointed or elected to Parliament, and that there were approximately 15 on-going investigations.

Mr. Inkster's comments received widespread media coverage, and occasioned much consternation among politicians. In an effort to defuse the situation, the three House Leaders proposed a motion, which was unanimously approved by the House of Commons on December 14, 1989. As the Hon. Doug Lewis said when he introduced the motion, it was "appropriate to review our current practices," and, in this regard, a special committee was established "to review the *Parliament of Canada Act* regarding the powers, duty and obligations of the members of the House in relation thereto and regarding the authority, responsibilities and jurisdiction of the Board of Internal Economy." The Board of Internal Economy is the statutory body responsible for the administration of internal affairs and the budgets of the House of Commons and its Members.

The Special Committee was chaired by the Hon. Marcel Danis, then the Deputy Speaker of the House of

James R. Robertson and Margaret Young are research officers in the Law and Government Division of the Research Branch, Library of Parliament.

Commons. The other Members of the Committee were Howard Crosby (Progressive Conservative), Dorothy Dobbie (Progressive Conservative), Jean-Robert Gauthier (Liberal, then Opposition House Leader), François Gérin (Progressive Conservative, later Bloc Québecois), Jim Hawkes (Progressive Conservative, Government Whip), Rod Murphy (New Democratic Party), and Marcel Prud'homme (Liberal).

Work of Special Committee

The Special Committee met frequently from December 1989 until May 1990, hearing from a number of witnesses. The wide scope of its mandate became clear to the Committee early on, and it tabled several reports on various issues.

On June 1, 1990, the Committee tabled its Fourth Report, which the House concurred with on the same day. The Report contained proposed amendments to the provisions of the *Parliament of Canada Act* dealing with the Board of Internal Economy. The draft bill attempted to clarify the jurisdiction of the Board to act on all matters respecting money, goods, services, and premises made available to Members of the House of Commons. Moreover, the Board was to be given the exclusive authority to determine the propriety of any use by Members of money, goods, services or premises made available for the carrying out of parliamentary functions. The Report further proposed to prohibit any criminal process respecting such matters unless the Board had first been consulted.

Subsequently, the government introduced Bill C-79, An Act to amend the Parliament of Canada Act, in the House of Commons on June 26, 1990. The Bill was modelled closely on the draft provisions contained in the Committee's Fourth Report. The Bill also contained parallel provisions dealing with the Senate, where the comparable body is the Standing Senate Committee on Internal Economy, Budgets and Administration.

Bill C-79 empowered the Board of Internal Economy of the House of Commons and the Standing Senate Committee on Internal Economy, Budgets and Administration to make by-laws, and gave them the exclusive authority to determine whether any past, present, or proposed use of funds, goods, services or premises made available to parliamentarians had been, was, or would be improper, having regard to their parliamentary duties. Members would be entitled to seek advice from the Board or Committee, and the Board or Committee could issue general opinions. The most contentious issue, however, involved the obligation placed on police authorities to seek opinions from the Board or Committee before proceeding with certain prescribed processes, such as search warrants and the laying of criminal charges. The Board or Committee, which was under no obligation to produce an opinion, would be allowed 30 days in which to respond, after which the police could proceed. The authorities would not be bound by any opinion received from the Board or Committee, but would be required to present it to any court, which would then have to consider it.

Bill C-79 was given second reading on June 28, 1990, and was referred to the Special Committee for review and consideration. The Chairman, by letter, solicited the views of all Members of the House on the Bill, and, in particular, on the clause relating to the requirement to obtain an opinion from the Board before commencing the enumerated legal processes. Of the relatively small number of Members who responded, opinions were fairly evenly divided. When the House resumed sitting in September 1990, the Committee held hearings with respect to the Bill, and clause-by-clause consideration. Several witnesses, including the Commissioner of the RCMP, appeared before the Committee to answer questions and give their views on the proposed legislation.

Significant amendments were made to Bill C-79 by the Special Committee, and at the report stage in the House of Commons, and others were made in the Senate. These changes were designed both to improve the Bill and to respond to criticisms and perceived weaknesses in the original Bill.

Bill C-79 as Passed

The primary purpose of Bill C-79 was two-fold: first, to create a formal procedure by which parliamentarians could receive guidance in relation to the use of the funds, goods, services or premises provided to them by Parliament; and, second, to enable law enforcement authorities to request opinions on the same matters, and, if such opinions have been obtained, to ensure that they are placed before a judge should certain legal processes be applied for. Only time will tell whether the Bill successfully achieves these objectives. While it is possible to describe the provisions of the Bill as passed, and the intent behind them, they have not been subjected to conclusive judicial scrutiny or interpretation, and this may well affect the application or operation of these provisions.

The effect of the Bill is to greatly strengthen the authority and control of the Board of Internal Economy over Members of the House of Commons and (although less so) the Standing Senate Committee on Internal Economy, Budgets and Administration over Senators in relation to the spending of their budgets and their use of

parliamentary facilities. The Bill establishes the central role of these two bodies in governing parliamentarians' use of funds, goods, services and premises provided to them by Parliament to carry out their functions. The House of Commons Board of Internal Economy had been reformed in 1985 as a result of the recommendations of the Special Committee on the Reform of the House of Commons (commonly known as the McGrath Committee). The changes included in Bill C-79 further enhance the authority and role of the Board. In the Senate, the Standing Committee on Internal Economy, Budgets and Administration is given similar powers, but because of its status as a committee of the Senate, rather than an autonomous statutory body, its role is somewhat different.

Both the Standing Senate Committee and the Board are given identical powers to make regulations or by-laws for governing various matters, including the use by Senators or Members, as the case may be, of funds, goods, services, and premises made available to them for carrying out their parliamentary functions, and the terms and conditions of the management of and accounting for the funds provided to them. Although the House of Commons previously had a set of administrative guidelines, contained in the Member's Manual of Allowances and Services, problems had become evident in both its structure and content, and its legal status was unclear. Regulations or by-laws have to be tabled within 30 days of being made. If the Senate or House is not sitting, deposit with the Clerk (by the Chairman of the Senate Committee or the Speaker of the House) constitutes tabling. (Previously, decisions of the Board of Internal Economy were only required to be tabled in the House at the beginning of a new session.) Regulations and by-laws are deemed not to be statutory instruments for the purposes of the *Statutory Instruments Act*. They are, therefore, not subject to the prior examination of the Department of Justice or to the registration and publication requirements of the Act, and, similarly, are not subject to parliamentary review by the Standing Joint Committee on Scrutiny of Regulations.

The Senate Committee and the Board of Internal Economy are both given "exclusive authority" to determine whether any past, present or proposed use of funds, goods, services or premises made available to Senators or Members of the House had been, was or would be proper, having regard to their parliamentary duties. Any parliamentarian and any peace officer investigating the use by a parliamentarian of funds, goods, services or premises may (but is not required to) apply to the appropriate body for such an opinion. The Committee or the Board can respond by interpreting an existing by-law or regulation, or, if none exists, by examining the issue afresh. Each can also issue general opinions regarding the proper use of funds, goods, services or premises in accordance with the intent and purpose of the regulations or by-laws. Even in the absence of a request, on its own initiative, the Board or Committee can provide a peace officer conducting an investigation with an opinion concerning the propriety of the use in question.

The Committee and the Board are given explicit authority to include in their opinions any comments that they consider relevant. They can also publish their opinions, in whole or in part, for the guidance of the Senators and Members; this is a practice that has been adopted by ethics committees in the United States Congress, and allows various precedents to be established, and opinions of general interest or applicability to become widely known. Bill C-79 provides that where opinions that had been specifically requested are to be published, measures must be taken so as to ensure that privacy is maintained. These privacy considerations would not apply, however, to opinions requested by a peace officer under certain circumstances.

Bill C-79 also provides that, for the first time, members of the Board of Internal Economy are required to take an oath or affirmation of fidelity and secrecy. This was introduced not only because of the confidential nature of much of the Board's deliberations, but also to ensure that information received by the Board in connection with requests for opinions is not disclosed. Another amendment provides that members of the Senate Committee or of the Board of Internal Economy who participate in the exercise of the powers or carrying out of the functions of the Committee or Board cannot be held personally liable for its actions. Other amendments, principally of an administrative nature, are also included in the Bill.

Controversial Aspects

As noted above, the mandatory requirement imposed on the police proved very controversial. As introduced at first reading in the House, an applicant for specified criminal processes would have been *required* to request and obtain an opinion from either the Senate Committee or the Board of Internal Economy, which had 30 days in which to respond, before proceeding in relation to any offence against any Act of Parliament by a Member of Parliament based, in whole or in part, on the use of any parliamentary resources. The criminal processes were defined as wiretap authorizations, search warrants, seize or freeze orders relating to the proceeds of crime, and the laying of criminal charges. Thus, for example, before any search warrant could have been issued in relation to a

parliamentarian — whether the search was to be conducted within parliamentary precincts or elsewhere — the applicant would have needed to request such an opinion. Criminal processes that did not require action by a justice of the peace or a judge — such as investigations not involving search warrants — would not have been affected by the Bill. Similarly, normal procedures would still have applied if no parliamentary funds, goods, services or premises were involved in the alleged offence. (The permission of the Speaker to conduct a search on parliamentary precincts would still be required, as it derives from the Speaker's authority and duty to protect the privileges of Members.)

During the passage of Bill C-79, these provisions were changed extensively. The criminal processes, whose authorization is currently under the jurisdiction of either a justice of the peace or a provincial court judge, can now only be authorized by a provincial court judge when the matter concerns a parliamentarian. The mandatory aspect — "requiring" a peace officer to request an opinion — was deleted. Instead, the provision was made permissive, so that a peace officer is allowed to request an opinion, but is under no obligation to do so. The 30-day period for the Senate Committee or the Board to respond was deleted. Thus, if a peace officer requests an opinion but it is not forthcoming within a reasonable period of time, the officer may proceed nevertheless. On the other hand, a peace officer who receives an opinion, and then makes an application for a criminal process, is under an obligation to provide the opinion to the judge, who must consider it in determining whether to issue the process.

The modifications to the original Bill's mandatory provisions requiring a peace officer to seek an opinion were made as the result of strong opposition from police authorities, the media, and some parliamentarians. It was alleged that the proposed procedure in relation to the specified criminal processes would establish a regime for federal parliamentarians that was different from that for other Canadians. In particular, it was argued that a delay of up to 30 days before law enforcement authorities could apply for a search warrant could result in a parliamentarian's receiving advance warning of the search. The substitution of a provision that would permit — but not require — peace officers to request opinions should alleviate these concerns.

Some further amendments were also made to the provisions relating to opinions. First, the Committee and the Board were given the power to provide opinions on their own initiative to peace officers conducting an investigation into a parliamentarian's use of funds, goods, services or premises. Such an opinion has to be provided to the court, should one of the defined processes be applied for. The Bill was also clarified to provide explicitly that the Committee or Board could give to the law enforcement authorities opinions that had been previously requested by other Senators or Members.

Legal Aspects

It seems clear that in drafting Bill C-79, care was taken to establish that the Committee and the Board were rendering "opinions," rather than "decisions." Both the language used and the structure of the Bill reinforce this distinction. For example, the word "Opinions" is used as a heading, and the word is used throughout in describing the information that parliamentarians or peace officers might request. Most importantly, it is an "opinion" that judges are directed "to consider," and it is clear that they are not bound by it. If the determinations of the Committee or Board had been characterized as final or binding decisions, there would have been legal implications, since, in effect, the bodies would have operating similarly to courts of law, making decisions about guilt or innocence, and the rights of individuals. This could result in judicial review and the imposition of certain procedural protections.

Although the opinions of the Committee and of the Board are not intended to be binding on those outside Parliament, it appears that the position of these bodies with respect to Senators and Members has been significantly strengthened by Bill C-79 because the Committee and Board are granted "exclusive authority to determine whether any ... use ... is or was proper." The regulations made by the Committee (after approval by the full Senate) and the by-laws made by the Board of Internal Economy will have a binding effect on parliamentarians. Not many people would disagree with this. Whether the use of the words "exclusive authority" has more significance, and can be used as a defence by parliamentarians who are facing criminal charges, remains to be seen.

Conclusion

There are many issues relating to the *Parliament of Canada Act* that remain unresolved. The Act generally is outdated, and has not been revised for many years. Bill C-79 was a response to certain immediate problems, and an attempt to provide a system for resolving or dealing with certain issues. The impact of the Bill is still unknown, and only experience and practice will make clear whether it will be successful. Bill C-79 was the result of considerable time and energy on the part of many individuals; time will tell whether they achieved their purpose.