The Role of Members of the Quebec National Assembly

by Guy Tremblay

This article suggests that despite a significant evolution in society over recent decades the basic function of legislators remains largely the same. It then considers whether these functions are likely to change in the years ahead.

In 1965 Jean Charles Bonenfant wrote about the evolution of the legislator's role [1] and I believe that the role of members has remained essentially the same to the present.

Academics have broken down this role in various ways. For example, it has been said of members that they perform "five major distinct roles: these are to perform a representational, legislative, monitoring, advocacy and trusteeship role in the national public interest." [2] I will rather break these roles down into a more simple and classical version, which highlights three major functions: members are legislators, perform a government monitoring or watchdog function and defend the interests of their constituents. In the title of one of his columns, Mr Bonenfant used the terms legislative, monitoring and intermediary functions. The first two functions are performed collectively, in the National Assembly and on its committees; the third function is performed individually by each MNA. Each of these three functions has evolved markedly since the middle of the 20th century.

Overview of Evolution to Date

The National Assembly passes a great deal more legislation now than it did in the middle of the last century. Government regulations have likewise proliferated. State intervention has also increased in every facet of life in society. In other words, the collective or institutional dimension of the member's role has increased considerably. However, the basic legislative work as such, which is often highly technical, is carried out at the public administration and government levels. The member's role as a legislator has therefore remained limited and very slim. At the same time, the member's monitoring role, or to put it another way the member's role as the watchdog of the executive has developed and become stronger.

But in my view, the crucial change that has taken place in the institutional dimension of members' work relates to the conditions under which they perform their work. The reign of silence imposed on members by Maurice Duplessis is long gone, and from this standpoint at least, party discipline has lessened. Members have also gradually achieved more independence from the government. The periodic improvements made to the Standing Orders of the National Assembly have also made a significant contribution. Jean-Charles Bonenfant was the chief architect of the 1971 and 1972 reform, the spirit of which was to serve the legislative rather than the executive. At the time, changes to the rules on parliamentary committees and the role of the Speaker of the National Assembly contributed the most to this. For Mr Bonenfant, the salvation of parliamentarism rested with the parliamentary committees. He wrote with some satisfaction that,

> In recent years, both in Quebec City and in Ottawa, parliamentary committees have developed in a way that they never had in the past. There has been an increase in the number of these committees, they have been made more functional, they have been sitting during parliamentary recesses, and bills and budgetary matters

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have been the subject of considerable discussion in these committees.[3]

Mr Bonenfant also pointed out in 1973 that the new Standing Orders of the National Assembly gave the Speaker more discretion, more authority and consequently, more independence, which is very important; for example, the Speaker decisions in the National Assembly could no longer be appealed.

After that, the committee system and the Speaker's role continued to evolve similarly. The 1984 reform reduced the number of standing committees from 24 to 9, while increasing their powers and their autonomy. The allocation among the parties of the Chair and Vice-Chair positions on these committees, which is the most active role involving these duties and mandates that each committee can select on its own initiative, further increased the autonomy of the National Assembly. Likewise, the role of the Speaker of the National Assembly was further strengthened in 1999 by making the position one in which the incumbent was to be elected by secret ballot.

And what of the evolution of the role of members of the National Assembly in terms of their individual function, as an intermediary, or to use an expression Mr Bonenfant was fond of, "their usual role as a broker between voters and the government"? I believe that it has simply become consolidated. Given the relatively large number of seats in the National Assembly and the continued existence of less populous remote ridings, members can still act effectively as an intermediary between constituents and the machinery of government. The tools available to members have also been improved, though there may be variations based on the size of the electoral district, the funds available to run a riding office and hire staff, and to pay for travel and communications.

Future Evolution

What will happen to these basic functions in the future? There are many different factors that can change or even transform the role of members, and in some cases these are hypothetical. For example, the new voting system proposed by the Steering Committee on the Reform of Democratic Institutions, chaired by Claude Béland, will have a definite impact on all three facets of the role of members of the National Assembly.[4] First of all, the proportional regional representation under consideration would lead to some ridings having as many as 8 members. Because these members would be elected on the basis of candidates' lists, they would often have a better chance of being re-elected. This could mean that they might take less of an interest or receive less encouragement than they do now to perform their role as intermediaries, to take the individual grievances of their constituents seriously, particularly as there would be far more of them. To use another of Mr Bonenfant's favourite colourful expression, there is a risk that the members of the National Assembly would no longer be "the pressure group for people who do not have one".

But the regional proportional representation suggested in the Béland Report would mainly strengthen the position of members as legislators and as government watchdogs. Unlike the current electoral system, which has invariably led to majority governments in Quebec since 1867, proportional representation would frequently lead to minority or coalition governments. Parliamentarians would thus have a better chance of passing bills or amendments that the government would otherwise not have agreed to, and they would be in a better position to criticize the government and exert effective control over its action. If, instead of adopting the proportional representation advocated by the Béland Report, Quebec were to adopt a form of a hybrid voting system, the consequences would be felt less radically. However, I feel that the choice of a voting system ought not to depend on how it would affect the role of the members, but rather on its ability to reconcile democracy and government effectiveness. From this standpoint, the ideal would be to adopt a system that is as proportional as possible, and which would still make it possible to regularly give rise to homogeneous majority governments. The fact remains that the traditional system is not as bad as people say. It generates majority governments, keeps government effective and as Georges Burdeau has explained in his classic works, makes it possible to identify a "national will" and accurately reflects the choices expressed by the people, and in the matter under discussion, in the form of power that is "correctness through alternation".[5]

Apart from changing the voting system, other proposals made by the Béland Committee could have even more of an influence on the role of Quebec members of the National Assembly. I will only go over these briefly, because they do not appear to have the support of the current government. The proposals in question are the holding of elections on a fixed date, and a review of the possibility of having the Premier elected by direct universal suffrage, and the adoption of an American-style separation of powers. Doing this would certainly greatly strengthened the position of Quebec members, because they would become part of an institution that would be independent from the government. However, apart from the fact that doing so would be clearly unconstitutional, such a reform is undesirable because it would weaken Quebec too much. As a distinct society that is both vulnerable and isolated in North America, Quebec would be unwise

to imitate the constitutional system adopted by our neighbours to the South, for whom the best form of government is as little government as possible, as many writers on the subject have pointed out.

Leaving aside any hypothetical or virtual evolutionary factors, there is another factor already at work, one that is properly legal and that is destined to affect the evolution of the role of members of the National Assembly in the near future. This is section 3 of the *Canadian Charter of Rights and Freedoms*, and the way it has been interpreted by the courts. This section is very simple, and it reads as follows: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a Legislative Assembly and to be qualified for membership therein." The right to vote and to run for office is, like all of the other rights under the *Charter*, subject to limitations that the government must, in the event of a challenge, demonstrate to be reasonable. However, unlike most *Charter* rights, section 3 is not subject to a specific exemption that is renewable every five years under section 33.

In this connection, allow me a digression about the surprising use by the Supreme Court of this "notwithstanding clause", meaning section 33, which allows the federal Parliament or any provincial Parliament an exception from sections 2 and 7 to 15 (and which does not allow an exception to sections 3 to 6 nor to section 16 ff.). In cases where a right that is subject to the exception is under consideration, the Court sometimes allows a generous application against an Act by saying that if Parliament disagrees, it can always have recourse to the express exception.[6] Conversely, in the jurisprudence concerning section 3 (i.e. the right to vote and to run for office), the Court has justified the severity of the legislative options by underscoring the importance assigned by those who drafted the *Charter* to the right in question by the mere fact of having excepted it from the notwithstanding clause.[7] The fact that the *Canadian Charter* contains a provision that allows express derogation from certain rights has therefore served to reinforce judicial activism, both with respect to rights that can be excepted and rights that cannot. To this must be added another fact: apart from Quebec, only Saskatchewan has ever made use of the notwithstanding clause, and it did so once only, in 1986. The bottom line is that a provision intended to give the final word to elected representatives and limit government by the courts appears to have ended up doing the very opposite.

The fact nevertheless remains that in the *Canadian Charter*, the right to vote and to run for office has been given and will continue to receive a broad interpretation by the courts and the limits placed on this right by Parliament will be severely circumscribed. With respect to what concerns us here, the jurisprudence would promote small political parties and new political parties. Indeed, the benefits currently enjoyed by the dominant political parties under the electoral legislation will have to be extended to all parties, even marginal and regional parties. This is what becomes clear in a Supreme Court decision of last 27 June concerning the Communist Party of Canada (*Figueroa*). The Court unanimously held that certain provisions of the *Canada Elections Act* requiring that at least 50 candidates in 50 electoral districts be nominated to obtain registered party status were unconstitutional. Three of the benefits to registered parties were therefore declared unconstitutional under the *Canadian Charter* because they were not allowed to the other parties. These three benefits are the right of candidates to issue tax receipts for donations made outside the election period, to transfer unspent election funds to the party and to list their party affiliation on the ballot papers.

A majority of six judges gave an individualistic interpretation to section 3 of the *Canadian Charter* and expressly rejected the competing approach advocated by the three other judges and by the Ontario Court of Appeal, which took into account collective interests such as promoting cohesion through the major national parties or through an aggregation of political will. According to the majority, the right to vote and the right to run for office imply that every citizen has the right "to play a meaningful role in the electoral process" – and this right to participate includes a right to information. In the reasons given by these judges, the words "every citizen" appear frequently as a *leitmotiv*. In their view, the legislator cannot enhance the ability of some to participate at the expense of others, including marginal or regional parties. And the section 3 rights cannot be made subject to limits other than those that can be justified by evidence presented within the strict framework of section 1 of the *Charter*.

The Supreme Court's decision in *Figueroa* has an impact on those benefits that were not challenged in the case and which benefited the registered parties. These are the right to free broadcast time, the right to purchase reserved broadcast time and the right to partial reimbursement of election expenses upon receiving a certain percentage of the vote. In fact, as the provisions concerning the registration of parties that nominate at least 50 candidates were declared unconstitutional, all the consequences of such registration, had to be thrown out with them. The Court went on to say that no other threshold below the 50-candidate threshold was acceptable as a reason to deny the three benefits under discussion, whereas the judges in the minority accepted the obliga-

tion to nominate at least one and perhaps more candidates. Bill C-51, which was introduced in the House of Commons last month, in fact reduces the number of candidates that a party must nominate to qualify for registration to a single candidate, which in all likelihood will be accepted as a reasonable limit of the right under consideration. The decision of the Supreme Court will also necessitate an amendment to the Quebec requirement to nominate at least 20 candidates in order for an authorized party to qualify for benefits.

The individualistic interpretation of the right to participate in an electoral process under section 3 of the Canadian Charter is likely to be perpetuated and to become applied more broadly because it can be reinforced by other provisions of the Charter, including freedom of expression, freedom of association and the right to equality

It is worth recalling that the Quebec Superior Court itself ruled in favour of small parties and new parties in a case brought by Action Démocratique, which led to a revision of the *Quebec Election Act*. In 1999, it ruled that the right to eligibility included:

> "the right to run under identical conditions" and it declared unconstitutional a number of financial benefits to those parties that did best in the elections prior to the current ones, namely to receive pay from the government, for each polling station, of two candidates representatives, reimbursement of half the election expenses of these candidates and an advance on this reimbursement.[8]

It is difficult to see why the benefits allowed on the basis of the results of the current elections would also not violate this "right to run as a candidate under the same conditions". This point of view was granted in one of the two statements of unconstitutionality issued at trial in *Figueroa*, without being appealed: this involved the provision that half of the $1,000 deposit required from a candidate would only be repaid if that candidate obtained at least 15% of the votes.

It is therefore worth asking if the 1994 Quebec Appeal Court decision to the effect that the repayment provided in the *Canada Elections Act* of half the expenses of candidates who obtained at least 15% of the votes is consistent with the Canadian Charter.[9] (Henceforth, 60% of expenses will be repaid to candidates who received 10% of the votes).[10] Sections 457 and 457.1 of the *Quebec Election Act* agree to a similar reimbursement by the government to candidates who obtained at least 15% of the votes, as well as to political parties that receive at least 1% of the votes cast . And the Act provides for an advance on this reimbursement.

The financing of parties by the government, which is covered by sections 81 ff. of the *Quebec Election Act*, appears to be left vulnerable. According to these provisions, each authorized party is entitled annually to a fraction of an amount totalling approximately $2½ billion, proportionate to the percentage of votes received in the last elections – with no minimum threshold established. Analogous provisions were adopted at the federal level one week before the Supreme Court rendered its decision in *Figueroa*, but these were unfavourable to small parties and new parties: indeed, a basic number of votes in the previous general election is required to qualify for public financing, i.e. 2% throughout the country or 5% in electoral districts in which they endorsed a candidate.

The "competitive" nature of elections was noted in *Figueroa*, both by the minority and the majority Supreme Court justices. The jurisprudence will therefore tend to require the same electoral rules for everyone.

Concrete Consequences

There are concrete consequences, but I want to eliminate two of these at the outset.

First of all, the jurisprudence that supports marginal parties and new parties applies to the election process but not to House business, once the election process is over. However, this does not prevent the *Canadian Charter* from requiring the legislative assemblies to officially recognize all parties represented there. The *Charter* indeed applies to the legislative assemblies, but without removing from them the privileges they need to execute their tasks.[11] Now, section 3 of the *Charter* gives every citizen the right to "effective representation", meaning the right "to an effective representative" in the Legislative Assembly. However, I do not believe that the courts will meddle with the internal operations of the legislative assemblies to guarantee the right to an effective representative.

Secondly, contrary to what has been suggested in some quarters, my view is that the idea that the Canadian Charter can render unconstitutional the current voting system ought to be excluded. The majority justices wrote in the case dealing with the Communist Party of Canada that the *Charter* is entirely neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised. This suggests that the purpose of s. 3 is not to protect the values or objectives that might be embedded in our current electoral system, but, rather, to protect the right of each citizen to play a meaningful role in the electoral process, whatever that process might be.

The fact remains that even though the majority electoral system has not changed, Quebec (like the other provinces and the federal government) is destined to see more parties nominate candidates with a good chance of

being elected and to see more members representing third parties in the National Assembly. The majority voting system that has been used in Quebec since 1867 has worked in favour of bipartism. But it has not prevented third parties from winning occasionally, or even replacing a traditional party, like the Conservative Party and the Union Nationale. This gives us every reason to believe that increased diversification in the partisan composition of the National Assembly (and the other legislative assemblies in Canada) should result from the mandatory equalization of the ground rules applicable both during election campaigns and outside of campaigns. This type of diversification would lead to an evolution in the role of members of the National Assembly. While it may from time to time generate minority governments or governments that have smaller majorities, it will strengthen the position of members as legislators and as government watchdogs, as we saw in connection with the voting system. On the other hand, an increase in the number of parties in the National Assembly would have an impact on the workload of members and on party discipline.

When two parties are represented by a large number of members, they can spread responsibilities, files and functions among their members. This is more difficult for parties that have few members. They must give up the idea of intervening in certain areas or taking part in the proceedings of certain committees. A proliferation of opposition parties nevertheless has an impact on the ability of the official opposition to fully assume all of its tasks. The current situation at the House of Commons in Ottawa is a good illustration of the problem posed by multipartism in handling the workload. I will give as an example the work done for six months in 2001 by the Standing Committee on Health in connection with the draft bill on assisted human reproduction that the federal government had introduced in the House. (This draft bill later became a bill, but it has still not been passed by the federal Parliament). The Parliamentary Committee in question prepared a report that reflected the position of the Liberal Party in power. The report also included the minority report of the Canadian Alliance, which was the official Opposition. Then, the Committee report included the dissenting opinion of the Bloc québécois, in addition to the dissenting opinion of the New Democratic Party, along with the dissenting opinion of MP André Bachand, the spokesperson of the Progressive-Conservative Party. It is clear that this form of escalation, multiplied by the number of issues to deal with, would considerably increase the burden on members from the various opposition parties. Even where the parties are able to cooperate, the work required to achieve consensus would increase. Such a situation is likely to reduce the effectiveness of the various collective roles to be performed by members, namely their work as legislators and as government watchdogs.

Party discipline, which is already being disputed by some people, is likely to become more flexible if there is an increase in the number of parties with representation in the National Assembly. Here again, various events that have occurred in the House of Commons in recent years would tend to confirm this. The model of necessary cohesion in two armies facing one another becomes less relevant in a multiparty system. In addition, the members of a party that has little chance of taking power in the short term can march in less tightly serried ranks. Nevertheless, party discipline, if it is followed and imposed with circumspection, can be an advantage or a benefit. It becomes really no different than the normal feelings of loyalty between members of any social institution towards the decisions and strategies it adopts.

It is therefore in their legislative and government watchdog role that members will mainly have to adjust to new conditions and evolve. Members of opposition parties in particular may find themselves overworked and become less effective. Even independently of the factors that may lead to an increase in the number of parties in the National Assembly, the tools made available to members need to be improved. Indeed, the predominance of the executive in our parliamentary system, which is a sign both of its effectiveness and its democratic nature, is often perceived when viewed through the other end of the opera glasses, as a "devaluation" of the legislative function.[12] All measures that can contribute to correcting this perception, which, it must be admitted, has some basis in reality, will be welcome. In addition to continuing to increasing the budgets and staff made available to parties and MPs, there will be a need to encourage the introduction and discussion of members' bills. Furthermore, the parliamentary committees need to be empowered under an official act to initiate a procedure to cancel all or part of a statutory instrument, as was recently introduced in Ottawa.[13] The number of officials who, like the Auditor General, are employed by the National Assembly and are accountable to the National Assembly, could also be increased. And the parliamentary committees concerned should systematically review their reports. Experience has shown that such people are not afraid of criticizing the government, and the Supreme Court has clearly pointed to the fact that it would be useful for them to table their reports, even in a national assembly that is dominated by the government party[14]: by criticizing the government in his report, the officer of Parliament draws issues to the attention of the

public; the opposition in Parliament is then free to make it a subject of debate; criticism of the government "may have an impact on how public opinion evaluates the performance of the government"; the tabling of a report in the chamber therefore plays "an important role" by strengthening parliamentary control over the executive branch.

Another way of enhancing the role of members is to make it clear that an adverse vote in the National Assembly does not constitute a motion of non-confidence in the government, unless the non-confidence motion was explicitly formulated as such beforehand. A measure of this kind has been suggested on a number of occasions in recent years. As Professor Jacques-Yvan Morin wrote:

> specifying the conditions under which a failure to reach the requisite number of votes in the House would lead to the fall of the government would make it possible to increase the number of opportunities for members to be free to vote in accordance with their conscience or their individual opinion.[15]

Such a measure would in fact release members from their concerns about the survival of the government (and their own survival) in the course of the day-to-day business of the National Assembly.

It definitely seems to me that the application of the *Canadian Charter of Rights* will tend in the medium term to strengthen a multiparty system in the National Assembly. Future reforms of the voting system and the parliamentary system should take this new finding into consideration to avoid unduly weakening the ability of both the legislature and the executive branch to act. The ultimate objective of the rules under which Quebec is organized and operates is neither to assure the perfect expression of the people's will, nor, on the contrary, to protect the omnipotence of the representative agencies, whether at the executive or legislative level. As it has been said about our parliamentary system, what we ought to be seeking is "a democracy that does not kill democracy", meaning that we must succeed in reconciling collective sovereignty with the effectiveness of the State.

Notes

1. Jean-Charles Bonenfant, "L'évolution de la fonction parlementaire", September 16, 1965, in *Derrière les faits: les institutions*, Columns which appeared in *L'Action*, from 1962 to 1973, Quebec City, 1976 (hereinafter referred to as *Chroniques*).
2. Jacques Bourgault, "Les rapports entre parlementaires et fonctionnaires" in Manon Tremblay *et al.* (ed.), *Le parlementarisme canadien*, Quebec City, P.U.L., 2000, 313, p. 315.
3. Jean-Charles Bonenfant, "Innovation dans le droit parlementaire", (1970) 11 *Cahiers de Droit* 533. See also "Le pouvoir des commissions législatives", 24 September 1970 and "Les commissions parlementaires", December 4, 1971, in *Chroniques*.
4. See the report of the Steering Committee on the Reform of Democratic Institutions entitled *La participation citoyenne au cœur des institutions démocratiques québécoises*, Quebec City, Government of Quebec, March 2003, pp. 31-35.
5. Georges Burdeau, *Traité de science politique*, tome V, *Les régimes politiques*, 3rd edition, Paris, L.G.D.J., 1985, pp. 277-287
6. *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, 498; *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493, 565-566 and 578. See also *EGALE Canada Inc.* v. *Canada (Attorney General)*, [2003] B.C.J. No. 994 (B.C. Court of Appeal), par. 157.
7. *Sauvé v. Canada* (Chief Electoral Officer), 2002 SCC 68, par. 11 and 14; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, par. 60.
8. *Hébert* v. *P.G. Québec*, [1999] R.J.Q. 267 (C.S.).
9. *Canada (Attorney General) v. Barrette*, [1994] Q.L.R. 671 (A.C.).
10. S.C. 2003, c. 19, s. 48(1) and s. 49(2.1), to replace sections 464(1)(b) and 465(2)(a) and (b) of the *Canada Elections Act*. Registered parties are also entitled to a reimbursement of half their election expenses if their candidates obtained at least 2% of the valid votes or at least 5% of the votes in which votes cast in the electoral districts in which the registered party endorsed a candidate (s. 435).
11. New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the Legislative Assembly), [1993] 1 S.C.R. 319, House of Commons et al. v. Vaid et al., (2002) 296 N.R. 305 (F.C.A.).
12. See for example Benoît Pelletier (ed.), *Un projet pour le Québec. Affirmation, autonomie et leadership*, Final report of the Special Committee of the Liberal Party of Quebec on the political and constitutional future of Quebec society, October 2001, pp. 122-123 and 154.
13. *Act to Amend the Statutory Instruments Act (Disallowance Procedure for Statutory Instruments)*, S.C. 2003, c. 18. This Act stemmed from a private member's bill and not a government bill. In 1986, a disallowance procedure for statutory instruments had been established under section 123 of the Standing Orders of the House of Commons: (2002) 25 *Canadian Parliamentary Review*, pp. 18-19 (Peter Bernhardt).
14. *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, p.104.
15. Jacques-Yvan Morin, "Une Constitution dans un Québec souverain ou autonome", *Le Devoir*, April 25, 2000, p. A7.