

Police Intervention Involving Members of the National Assembly: The Importance of Respecting Parliamentary Privilege

On October 25, 2017, a Member of the National Assembly was arrested by Québec's anti-corruption unit (UPAC), whose police officers used a ruse to lure the Member away from the parliamentary precincts in order to arrest him. In the days following the arrest, the President of the National Assembly made a statement in the House on the matter and the Member (who had not been charged on any count whatsoever) addressed his colleagues using the "Personal Explanations" procedure. The Official Opposition House Leader then submitted several requests to the President for directives on parliamentarians' rights and privileges in the context of police work. In this article, the President recounts the facts surrounding this uncommon event and summarizes the main principles and conclusions of the directive he issued in this matter. The article is based on a speech he gave at the 35th Canadian Presiding Officers' Conference in Québec City in January 2018.

Jacques Chagnon

An unusual arrest received extensive media in fall 2017, when a Member of the National Assembly was arrested by Québec's anticorruption unit (UPAC). This article revisits the events as I addressed them, as a presiding officer wishing to ensure that the privileges of his institution and its members are protected and respected at all times and concerned about maintaining separation of the powers of the State.

I should point out that the investigation is ongoing and that legal proceedings are still underway, requiring certain information to remain confidential. Furthermore, as I write these lines, we do not know how this story ends, as no charges have yet been brought against the Member concerned or anyone else since the arrest occurred. Consequently, this article deals not with what is currently before the courts but with the principles of parliamentary law raised by these events. Clearly, despite these principles, which seek to ensure that Members are not prevented from performing their duties, parliamentarians are in no way above the law.



Jacques Chagnon

Jacques Chagnon is President of the National Assembly.

On October 25, 2017, it was business as usual at the National Assembly with parliamentary proceedings underway in the House and in several parliamentary committees. In fact, that morning, the Member, then Chair of the Committee on Institutions—whose areas of competence include justice and public security and which oversees the government departments and public bodies responsible for these matters, including UPAC and other police forces—, had chaired the Committee's clause-by-clause consideration of a bill. He was scheduled to chair that same Committee's afternoon proceedings.

At lunchtime, the Member received a text message from a police officer pretending to be an information source known to the Member and summoning him to an urgent meeting. The Member arranged for a substitute to chair the Committee so he could go to the designated meeting point, which was outside Québec City. On arriving, he was met by UPAC police officers, who arrested him.

News of the arrest was quickly reported by the media and hit the Québec political scene like a bombshell. No charges were brought against the Member, who was released late that evening. That day, the police also seized the Member's cellphone and various other electronic devices in his possession.

The next day, October 26, the newspapers headlined the story, recounting the previous day's events, giving information on the arrested Member—outlining his career in both politics and as a former Sûreté du Québec police officer—and questioning his integrity.

Late that afternoon, the Chair of the Government Caucus sent my office a letter informing me that the Member no longer belonged to the parliamentary group forming the Government, that he would henceforth sit as an independent Member and that, consequently, he had lost his position as Chair of the Committee on Institutions.

Interestingly, at the time of the Member's arrest, the Committee on Institutions which he chaired, had just finished its consultations on Bill 107, *An Act to increase the jurisdiction and independence of the Anti-Corruption Commissioner and the Bureau des enquêtes indépendantes and expand the power of the Director of Criminal and Penal Prosecutions to grant certain benefits to cooperating witnesses*. In fact, the Member had tabled the Committee's report, following these consultations, the day he was arrested.

Far from a routine piece of legislation, Bill 107 primarily amends primarily the *Anti-Corruption Act*,¹ proposing changes to the mission of the Anti-Corruption Commissioner, who heads UPAC, and the procedure for his or her appointment and dismissal.

On October 19, 2017, less than one week before the Member's arrest, the Anti-Corruption Commissioner had appeared before the Committee on Institutions, then chaired by the Member, to answer parliamentarians' questions.

This unique context, coupled with the lack of charges against the Member, led me to reflect at length on these events. I had to ask myself the following questions: Did the police proceed appropriately, in light of the privileges and principles specific to our institution? Do Members—who, like any other citizen, are not immune before the law—enjoy a certain protection regarding the documents and electronic devices used in exercising their parliamentary duties? What would happen next, not only where the National Assembly was concerned but also regarding the Member who had been arrested?

My main concern at this point was to ensure that the National Assembly would not be undermined in its ability to debate the various issues in question and that the independence of the Members, who must be shielded from all forms of threat or pressure, would be protected.

Although I was unable to put my finger on it, something seemed amiss. I had an uneasy feeling and, above all, serious questions as to how our justice system works with regard to our duties as Members of the National Assembly. One thing was clear: my instincts as a Member and as President were telling me to act.

So, I decided to draft a statement to express my views on the subject. For once, circumstances demanded that I set aside my obligation to exercise reserve—I generally refrain from commenting on political news so that I can perform my duties as President with complete neutrality. However, in this case, the issue exceeded the realm of “current events”. It involved the very essence of a Parliament's purpose, namely to enable the Members to debate issues and perform their duties unimpeded. As the representative of the State's highest-ranking democratic institution, I had to react.

Consequently, at the beginning of the October 31, 2017 sitting, I read a statement before the Assembly. The following excerpt became the focal point: “Let charges be brought or public apologies be proffered: either accuse or excuse...”.



Speaker Jacques Chagnon reads a decision on whether police could arrest or search a member of the legislature in Quebec City on November 16, 2017.

In issuing this statement, I did not claim to put to rest the many questions raised by these unusual events. In fact, I knew that I had opened the door to the many questions on parliamentary law that I would inevitably be asked. However, I was firmly convinced that I had truly played my role as the protector of our institution and the Members and as the guardian of parliamentary privilege.

After my statement, the Member, who was in the House, chose to comment on his arrest in keeping with the “Personal Explanations” procedure provided for in our Standing Orders, saying that he had been the victim of a set-up designed to intimidate him. He added that a number of irregularities in the application of certain governance rules had been reported to members of the Committee on Institutions in past weeks and that the Committee had been about to hear the heads of public bodies to question them on the subject. He said he was well aware that elected officials are accountable to the public, but quickly added that those in high-ranking positions in Québec’s key institutions are also accountable for their actions. He concluded, saying that preventing the Members of the National Assembly from exercising the mandate conferred on them by the public constitutes an extremely serious attack on the democratic process—to be condemned in no uncertain

terms—and invited his National Assembly colleagues and Quebecers as a whole to remain vigilant in this regard.

The Official Opposition House Leader then submitted several requests to me for a directive on parliamentarians’ rights and privileges where police work is concerned.

Just over two weeks later, after my team of advisers and I had considered these requests at length—a task that required a great deal of research—and looked at the practices of other British-style parliaments, I addressed these requests in the November 16, 2017 sitting.

I should point out that I had not been asked to rule on a point of privilege or contempt but rather to clarify current Québec law as it applies to a number of aspects that had never before been addressed by our Assembly from this viewpoint. I had to look at the principles of separation of the powers of the State and of Members’ independence, as well as the need for police forces to take the implications of these principles into account in terms of how to proceed in a parliamentary context. In other words, I needed to examine the meaning of parliamentary privilege, for the Assembly and the Members, in the context of police work.

The following is an abridged version of the main findings and conclusions contained in the directive I issued to address each question asked by the Official Opposition House Leader.

“Was the President always notified by police authorities when a Member was arrested?”

Understandably, some assemblies have a practice requiring the House to be notified when a Member is arrested. The reasons for this practice are easy to imagine. It is normal, when a legislative assembly is sitting, that it be notified of the arrest and detention of one of the Members, given that this prevents the Member from taking part in parliamentary proceedings. This requirement is justified by the Assembly’s paramount right to the presence of its Members. The same logic underlies the exemption from jury duty, exemption from being subpoenaed as a witness and freedom from arrest in civil cases that Members enjoy, and that are codified in Québec law.

Although not exempt from the application of justice, Members enjoy a special status so that the necessary balance in state workings is ensured, witness this quote from author Joseph Maingot on the need to protect Members’ ability to take part in parliamentary proceedings:

No impediment should be placed on the Member in going about his parliamentary business, whether in the House, on his way to the House, or while on his way home. On the contrary, Members are “to have free and unimpeded access to the Parliament buildings”.²

That said, at the National Assembly, the practice of informing the House of a Member’s arrest as not consistent in the past. Sometimes, the President or Secretary General was notified of such arrests, and sometimes they were not. However, the Assembly clearly should be informed of the arrest of one of its Members, particularly if the arrest prevents the Member from participating in parliamentary proceedings. This is why I asked that, in future, police forces systematically inform the Chair in such cases.

“Have the legal authorities violated a Member’s privileges if they do not promptly lay charges following the Member’s arrest?”

It is not the President of the National Assembly’s place to set deadlines in such matters. I have enough respect for our police and judicial authorities not to tell

them how to do their job. However, as the guardian of the rights and privileges of the Assembly and the Members, I asked that police work be done in a manner that upholds Members’ rights, that it disrupt parliamentary proceedings as little as possible and that it raise no questions as to whether an arrest might be related to a Member’s parliamentary duties.

I also expressed concerns regarding the potential political consequences for a Member when too much goes by between an arrest and charges being laid. Given that the next Québec general election will be held in October 2018, a long time lapse before charges are brought against a Member whose integrity has been assailed could be harmful. In a political context where image and public perception are paramount, it is difficult to imagine that a Member against whom such charges are pending could participate in the democratic process without paying the political price. Such a situation would, in my view, be unjust and profoundly unfair.

“Is the President’s authorization needed to search Members’ cellphones and computers? Are these devices considered extensions of a Member’s National Assembly office and covered by the same parliamentary privilege?”

As President of the National Assembly, it is not my place to authorize police officers to conduct a search. That is the purview of the courts. Once this authorization has been given—if such searches take place on National Assembly premises—the President must decide whether or not to grant access to the parliamentary precincts. This arises from the fact that legislative assemblies are not accessible as a matter of course and that strangers can be expelled from them.

Although parliamentary privilege does not generally prevent the application of criminal or penal law within the Assembly’s precincts, it does not allow the police automatic access to the Assembly. Because police intervention could hinder the Assembly’s proceedings, police forces may not intervene in Parliament without the President’s prior authorization.

In this context, the President must cooperate in the proper administration of justice, to the extent that such administration respects parliamentary privilege and does not prevent or hinder the proper functioning of the Assembly or the exercise of the Members’ duties. Generally speaking, the President authorizes police forces to enter the Parliament Building to conduct their search when these principles are upheld.



Speaker Jacques Chagnon reads a decision on whether police could arrest or search a member of the legislature in Quebec City on November 16, 2017.

The President must, however, ensure that police officers have a valid search warrant and that only the documents covered by that warrant are seized. This same approach applies when the President receives a request or order from police authorities to disclose documents concerning a Member.

Moreover, when a search is carried out within the parliamentary precincts, the President's role does not stop at the doors of the Parliament Building but extends to protecting the Members' rights by ensuring that a representative of the President accompanies the police officers conducting the search at all times.

What about seizure of documents and material that are outside the parliamentary precincts, whether in a riding office, at a Member's home or elsewhere?

In this context, it is important to know that the fact the police officers seize a document or device does not necessarily mean it can be used as evidence. Certain documents and information accessible via electronic devices may be covered by parliamentary privilege. Consequently, similar to cases involving seizing documents located inside a law office or in the possession of someone else with a confidentiality privilege, a special procedure must be followed when a police investigation concerns documents or material belonging to a Member.

We must remember that the President's responsibility, in such cases, is to ensure that the information contained in the documents or devices seized from a Member remains confidential. In such situations, the documents or material seized must be sealed to avoid violating the Member's privileges. A protocol must then be implemented to ensure that documents covered by privilege are separated from those that are not; only the latter may be used by police authorities. In addition, as the guardian of the Members' rights, the President of the Assembly or a person representing the President must be able to actively participate in this operation. For good reason, there is no exhaustive list of documents covered by parliamentary privilege. It is essential there be no overly rigid definition – unable to evolve over time and preventing the necessary case-by-case analysis – of what they constitute.

To my mind, the way UPAC chose to inform the National Assembly of how it intended to analyze the documents it had seized, that is, via the media, showed limited knowledge of our institutions and of Parliament, in particular.

A parallel can be drawn between this case and one in the United Kingdom dating from 2008. The following is how a high-ranking police officer described the highly sensitive nature of and potentially complex

issues involved in the arrest of a parliamentarian suspected of disclosing confidential information to the media:

It was my judgment that we should in this case exceptionally delay taking action, so that we could take full legal advice from the Metropolitan Police Directorate of Legal Services, and indeed consult the Parliamentary authorities at an early stage, and indeed take further advice from Crown prosecutors.³

As explained by the House of Commons committee asked to shed light on the matter, the view taken by the police in this particular case “was that the risk of losing evidence was outweighed by the need to ensure the legality of any action and to liaise with, and seek guidance from, the parliamentary authorities.”⁴ It seems to me that such wisdom should have guided UPAC in its approach.

“Does the fact that a police force misleads a Member, causing him to be unable to fulfill his parliamentary duties, constitute a breach of the parliamentary privilege applicable to him? Does tricking or misleading a Member to get him out of the parliamentary precincts in order to serve him legal papers constitute contempt of Parliament?”

The day of the Member’s arrest, the Committee on Institutions, which he chaired, was scheduled to meet all day. The Member’s arrest prevented him from returning to Parliament in the afternoon to chair the Committee’s deliberations.

Under the principles mentioned earlier, the police officers clearly could not have arrested the Member during a sitting of the Assembly or a meeting of the Committee he was chairing. To do so, they would have had to obtain my prior authorization.

Using a ploy to get a Member to leave the parliamentary precincts in order to arrest him, as reported, is disturbing at the very least, and virtually amounted to indirectly doing what the police were unable to do directly.

The question we were within our rights to ask, in the case at hand: “Was the procedure employed by UPAC, namely using a ruse to get a Member to leave parliamentary proceedings, really necessary? Moreover, should UPAC not have consulted the parliamentary authorities before arresting the Member, if only to inquire about the specifics to be

respected in relation to his status as a Member of the National Assembly? Although these questions remain unanswered, in my opinion, the methods UPAC used in this case showed a blatant lack of consideration for the Assembly and its Members.

The manner in which UPAC acted may be sufficient to raise doubts about whether the fragile balance that must exist in relations between the various branches of the State was respected. If it was deemed so urgent to arrest a Committee Chair in mid-meeting, why proceed this way? Why was the Member lured outside the parliamentary precincts using a ploy? If the situation was as urgent as UPAC claimed, in order to justify its actions, why did the arrest and seizure not take place at the National Assembly? Was it to avoid having to submit a search warrant to me to allow me to analyze whether it complied with the applicable rules? With regard to these questions, I can only confirm that doubts remain.

“Is electronic surveillance of a Member outside the parliamentary precincts considered a form of harassment, obstruction, harm or intimidation of the Member? What special measures must police forces take in such circumstances to respect the separation of powers between the executive and legislative branches?”

Electronic surveillance, or wiretapping, of a Member of the National Assembly carried out illegally, excessively or to exert undue pressure on the Member would clearly constitute a violation of parliamentary privilege.

In other specific cases, for example, when a court authorizes an electronic surveillance procedure, the communications likely to be recorded during wiretapping would no doubt include many important elements unrelated to the subject of the investigation but pertaining to the Member’s duties. This aspect, which addresses the very essence of the independence of Members’ work, is most troubling.

This ties in with the notion of confidentiality surrounding the documents used by Members in performing their duties and the sources of information that enable them to play their parliamentary oversight role effectively. We want to avoid a situation where, for instance, citizens might refrain from contacting a Member for fear that the confidentiality of what they might tell him or her could not be guaranteed.

Moreover, where electronic surveillance is concerned, a directive from the Attorney General of Québec states that a specific request is required in the case of categories of offices that hold certain privileges (lawyers, judges, senators, Members of Parliament of the House of Commons of Canada and Members of the National Assembly).

In this regard, a parallel can be drawn with the events of November 2016, when we, in Québec, learned that law enforcement officers had placed certain journalists under electronic surveillance. At the time, the Assembly held an urgent debate on the subject, during which all parliamentarians who took the floor expressed concern over the potentially negative effects of such surveillance on democratic life. In my opinion, the confidentiality of Members' communications must enjoy a level of protection that is at least as high as the level we recommended for journalists.

This was the content of my November 16, 2017 directive. As for the aftermath, I must point out that steps had been taken from the very outset to establish lines of communication with UPAC and then with the Director of Criminal and Penal Prosecutions' attorneys.

Negotiations also took place to implement an examination protocol to separate documents that are covered by parliamentary privilege from those that are not. In the unique context in which UPAC arrested the Chair of the parliamentary committee responsible for examining a bill that directly concerns UPAC, this procedure will seek, among other things, to ensure protection of the information related to exercise of the Member's parliamentary duties. The Member, himself returned to the ranks of the parliamentary group forming the Government on November 21, 2017 and now chairs a different parliamentary committee.

Regardless of how this story ends, it will continue to fuel discussions among aficionados of politics and parliamentary privilege for a long time to come. One thing is certain, this case illustrates the complexity of the questions to be asked with respect to interactions between police forces and the work of parliamentarians. The increasing use of technology and, consequently, the new questions that arise, make the situation even more complex. Seizing mobile devices (smart phones, tablets, etc.) henceforth provides access to a wealth of information and documents stored in cyberspace

that would previously have been found physically in a Member's briefcase or filing cabinet. This new state of affairs impacts the oversight traditionally exercised by the President when a search was carried out in the parliamentary precincts. The issue is important, because the President's analysis of the warrant in such a context always sought to ensure that only the items covered by the warrant could be seized so as to avoid situations tantamount to "fishing for information". Clearly, parliaments are not the only institutions dealing with the reality of new technologies, and the question of the access these tools offer is very topical. These new technologies must not permit greater access than what was previously allowed. It will be extremely interesting to see how the courts will try to limit abuse in the future.

These events will also have made it possible to raise police forces' awareness of the issues related to arresting a Member of the National Assembly and seizing materials belonging to him or her. Let us hope that my call for the need to take the specifics inherent in elected officials' role in our society into consideration will have been heard.

In concluding, it is important to reiterate that, throughout this situation, the Chair has been committed to ensuring the sound administration of justice. My directive must not be interpreted otherwise. Its purpose is not to put parliamentarians above the law, since Members of the National Assembly enjoy no immunity with regard to penal or criminal offences they may commit as citizens. However, it was essential to clearly reassert a fundamental principle on which our political system is based, namely that for our legislative assembly to operate effectively and for the Members to be able to fully play the role entrusted to them by the citizenry, it is imperative that parliamentary privilege be protected.

Notes

- 1 CQLR, c. L-6.1.
- 2 Joseph Maingot, *Parliamentary Privilege in Canada*, 2nd ed., Montréal, McGill-Queen's University Press, 1997, p. 183.
- 3 House of Commons Committee on Issue of Privilege, *Police Searches on the Parliamentary Estate: First Report*, London, Parliament of the United Kingdom, 2010, par. 67.
- 4 Ibid.