Government Advertising and Contempt of Parliament

by Mathieu Proulx

On October 10, 1989, the Speaker of the Canadian House of Commons rendered a decision which received wide coverage across the country. It related to the way the federal government was advertising the new goods and services tax. The tax was only a proposed measure at the time of the advertising campaign as the legislation to put the tax into final form had not been adopted or even tabled before the House. The decision resulted in other legislatures also considering the issue of government advertising for legislation not yet adopted. This article looks at several decisions given by the Speaker of the Quebec National Assembly.

The Speaker of the House of Commons had been called on to rule on this matter following a question of privilege brought by the Leader of the Official Opposition, John Turner. The latter wanted to denounce an action which tended to diminish the role of Parliament and of its members. He asserted that the advertisement in question was so worded that it might lead the population to believe that Parliament had already agreed to all of these changes, thereby undermining the authority of the House in the eyes of the public. The Speaker then had to determine whether these assertions were at first impression of sufficient importance to set aside the regular business of the House so as to allow the House to examine and decide on the matter.

The Speaker first reviewed the facts surrounding this important issue. He referred to the text of the advertisement, which stated as follows "On January 1, 1991, Canada's Federal Sales tax system will change. Please save this notice. It explains the changes and the reasons for them".

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The Speaker first examined the issue of whether there had been a breach of privilege in as much as the advertisement in question prejudiced the proceedings of the House or of the committee. Next, he dealt with the assertion that the advertisement constituted contempt of Parliament.

On the first issue, it was decided that freedom of speech had not been affected since the very large number of opportunities for debate and amendment had not been reduced. As well, the Speaker did not find the performance of the duties of the House or of its members to have been obstructed. He pointed out that members do not work in a vacuum and are constantly subject to outside factors and pressures. Not having discovered any threats or bribes, the Speaker could not see what specific privilege had been breached.

> ***The Speaker mentioned that, if similar circumstances arose in the future, he would not be as generous, noting that we live in a parliamentary democracy and not one of an executive or administrative type.***

On the second issue and despite assurances given by the Minister of Justice that the Government had acted as

it did purely for informational purposes and had no intention of giving the impression that the measure would not be subject to debate in Parliament, the Speaker admitted to having certain doubts. However, as it is a practice of the House to accept the word of one of its members, some of his doubts were dispelled. For this reason, he considered it difficult to find there was a case of contempt.

In concluding, the Speaker stated that, in the interest of the parliamentary system of government, he had judged it preferable to make a clear statement in place of a debate or a vote which would risk being misinterpreted. He stated his wish that this message be considered in future by governments and departmental officials, as well as by advertisement agencies retained to inform the public.

The decision even received editorial coverage in *La Presse* newspaper on October 14, 1989, with the headline "The Commons are well defended." The decision reverberated as far as the Quebec National Assembly where there have been several decisions of the President concerning Government initiatives claimed to be based on unpassed legislation.

Four Decisions by the President of the National Assembly

On December 12, 1989 during introduction of Bill 14, *an Act to amend the Act respecting industrial accidents and occupational diseases*, the Opposition House Leader invited the President of the Assembly, by requesting an order, to rule on the content of brochures and information letters published by the Commission de la santé et de la sécurité du travail (hereafter referred to as the C.S.S.T.)

The new rate system for employer contributions, to come into force on January 1, 1990, was described in these documents. The Quebec Opposition House Leader referred several times in his argument to the decision rendered by the Speaker of the House of Commons. The President first underlined the unusual character of the request of the Opposition House Leader, who should have proceeded in accordance with the rules of procedure of the National Assembly by formally bringing a question of privilege. Nonetheless, in spite of this irregularity, given that it was asserted that the rights of members of the National Assembly had been ignored, the President decided to examine the issue he described as very important.

The President stated that he had read the C.S.S.T. brochures and information letters. The fact that a note was printed in the brochures stating that the new rate system would come into force subject to being adopted by the National Assembly showed that the agency was aware of the National Assembly's role in passing laws.

The President of the National Assembly added that several distinctions could be made between the facts submitted to the Speaker of the House of Commons and the situation he was being asked to examine. In particular, he noted that the information in question in the C.S.S.T. brochures had not been made public in newspapers but was limited to a narrow audience with a common interest, (the rate system in the health and work safety field). He also mentioned that the documents of the C.S.S.T. were the fruit of lengthy consultations on an assessment method and that the essential character of the documents was to inform the people concerned and not to influence the conduct of members of the National Assembly. The President underlined that all the members remained free to propose amendments they desired to the bill. To strongly emphasize his conviction, the President concluded with the following assertion:

> "At no time is the legislator required to take account of acts carried out by the Public Administration so as to determine the content of laws. It is up to the Administration to adapt to the consequences of a statute and not for the legislator to set its conduct based on that of the Administration." (Translation)

On these grounds, the President could not conclude that a *prima facie* breach of privilege or contempt of the National Assembly had occurred.

A second case was brought be the Opposition House Leader on April 25, 1990. Publicity was not at issue in the circumstances but the difficultly to be resolved was identical to that of the previous case.

The Opposition House Leader sent a notice addressed to the President in which he raised a question of privilege. According to the facts adduced, the Minister for Forests had committed contempt of the National Assembly by acting on the authority of Bill 44, as yet unpassed legislation under consideration before the National Assembly, to announce the creation of the Société sur la protection des forêts and name the person who would be chairing the board of directors. As well, it was claimed that advertisements appearing in the daily newspapers on the weekend to fill the position of chief executive officer constituted contempt of the House.

The President summarized the theoretical issue brought by the Opposition House Leader as follows: "Does a minister commit contempt of the House when he acts on the authority of as yet unpassed legislative provisions?"

After quoting the definition of contempt in Erskine May's treatise, the President stated that it seemed founded to affirm that any minister who knowingly used legislative provisions still under consideration before the National Assembly could be accused of contempt. In such circumstances, the President might *prima facie* come to such a conclusion.

He added that such a conclusion would have to be based on evidence clearly showing that the Minister unquestionably acted as if the bill had force of law. In the case submitted to him, the President was not convinced that the Minister, in making the disputed announcement, had acted on the authority of Bill 44. On the contrary, examination by the President of the documents attached to the notice of the Opposition House Leader made it clear that the corporation in question was a private, non profit corporation created by letters patent issued before the tabling in the House of Bill 44. The appointment of the Chairman of the Board of Directors and the recruiting of the chief executive officer were wholly the corporation's responsibility. The President concluded that in the circumstances the Minister had not committed any act which could be considered *prima facie* contempt since the disputed behaviour had in no way affected parliamentary proceedings relating to Bill 44.

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The third case, strangely enough, relates to the Governments's advertisement regarding the proposed new sales tax, generally known as the T.V.Q. For the President of the National Assembly, it was a situation quite similar to that ruled on by his counterpart in the House of Commons. Any dissimilarity consisted in the fact that the advertisement was addressed to the numerous Government agents responsible for collecting the new tax. The Opposition House Leader, who brought up the matter, to support his contentions referred, as he should, to the decision of the Speaker of the House of Commons. This case was raised on December 10, 1990, with the President rendering his decision four days later.

The Opposition House Leader, on a question of privilege, asserted that the Quebec Minister of Revenue as well as Revenue Quebec had committed contempt of the National Assembly by publishing advertisements concerning the new tax to come into force on January 1, 1991. The Leader claimed that by taking for granted the intentions of the National Assembly, the Minister and his Department had acted with indifference and shown a grave lack of respect for the National Assembly. Thus, they had contributed to bringing ridicule upon and diminishing the authority of the Assembly and its members.

The President first set out to distinguish a breach of a specific privilege from contempt of the Assembly.

After this, he stated that the advertisement was clearly above all informational and that there was nothing reprehensible in the Government or Administration wanting to inform the public. Indeed, it was their responsibility to do so. As the Government wished to inform the public of coming changes in the fiscal area, it could not be a case at first sight of deliberate contempt, especially since the advertisement in question related to a fiscal matter.

He then gave the following warning:

> "The members of this Assembly must understand, and here I require especially the attention of members of the Cabinet, that any advertisement seeking to reach citizens and relating to as yet unpassed legislative provisions must show respect for and deference to the role of the institution of the National Assembly and of its members. An advertisement or an information campaign must not leave the public with the impression that a proposed measure is a *fait accompli* and that the Assembly has no role to play. Such would contribute to undermining the authority and the central role of this institution in the view of citizens. The only reservation applying to this principle relates to fiscal or financial matters." (Translation)

The President explained that, following well-established customs and practices in this field, accommodation had to be made for the payability or immediate application of fiscal and budgetary measures. Since the application of the measure in this field precedes its legislative authorization, the fact that information is communicated to citizens before the passage of the legislative measure should offend no one. As the situation submitted to the President fell into this category, he ruled out a case of *prima facie* contempt of the National Assembly. However, he expressed the wish that, even in the fiscal field, any advertisement aimed at taxpayers or even Government agents mention the role of the Assembly and its members in the process of adopting measures, which are given effect by their passage.

The President then stated a new requirement to be taken into account in future by all persons concerned with an advertising campaign relating to as yet unpassed legislation. He set out the requirement as follows:

> "In future, advertisements and the communication of information aimed at the public, initiated by a Department or agency and relating to measures prescribed in legislation not yet adopted, must, except in the case of fiscal measures, mention the role of the Assembly and of its members in the process of passing such a measure. The note must in some way refer to the role of the National Assembly and of its members. In this way, the citizen will be informed, the authority of the

Assembly maintained and the important role of the members of the Assembly given greater recognition."(Translation)

The President considered that these measures had become necessary in order to preserve both the parliamentary institution's fundamental role and the independence of members in carrying out their functions. He concluded by inviting ministers to make known the terms of his decision within departments and government agencies.

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The fourth and last case has two parts. The first relates to a minister's announcement at a press conference of budgetary measures, while the second concerns a government agency in this case the Régie de l'assurance-maladie du Québec, and its treatment of certain information. The first part involved a decision rendered by the President on May 14, 1992, and the second, a decision rendered on May 19, 1992.

The first part of this next case began with the sending of a notice of a question of privilege to the President by the Opposition House Leader. The Leader indicated that the Minister of Health and Social Services had committed contempt of the Assembly by making public, at a news conference, a series of measures concerning the financing of the Health and Social Services system.

In particular, on this occasion the Minister allegedly announced important budgetary cuts even though a parliamentary committee had just voted and adopted the budgetary estimates for his department. It was asserted that the Minister had thereby provided the committee with inaccurate estimates.

In addition, the Minister announced at the press conference that a $2 contribution would soon be required of beneficiaries as a contribution to the medication program for senior citizens. The Minister also announced other changes concerning various services provided free of charge by the state. The Minister was criticized for having availed himself of the prerogative of the Minister of Finance, who usually announced such measures during the Budget Speech.

The President put the events into their context by recalling that Government decisions concerning the financing of Quebec's Health and Social Services system fell within the larger context of a vast reform of this system which had involved a number of procedural acts on the parliamentary scene (passage of a bill, tabling of a Health and Welfare policy, public hearings in a parliamentary committee.)

The President stated that the legal authorities have the full right in our political system to make known their decisions, choices and new directions within their area of responsibility. Since a decision's announcement precedes its implementation, the executive's decision-making process should be able to be utilized fully without members of the Assembly seeing this as an attempt to hamper the activities of the Assembly. It is an inherent aspect of the Government's initiative which is involved.

At first sight, the President could find no irregularity in the budgetary estimates, which had been examined by a parliamentary committee and which, as announced by the Minister, were to be re-allocated. The estimates could only be tabled in accordance with the existing legal rules, since the National Assembly's sanction could not be presumed where existing law had to be amended to give effect to the Government's decisions.

Finally, neither was the President won over to the argument that in the circumstances the measures should have been announced by the Minister of Finance in the Budget Speech. The President affirmed that the Government could be represented by any cabinet member and use a variety of means to make known its budgetary choices.

The President noted that the Minister had indicated at his press conference that all of these measures would take effect upon passage of a bill in the Assembly. He concluded that he had not learned of any facts which could lead him at first sight to believe that the Minister had committed contempt of the Assembly.

A few days later, the Opposition House Leader again asserted that contempt of the Assembly had occurred, on the one hand by the Minister of Health and Social Services, on the other hand by the *Régie de l'assurance-maladie du Québec*, in both cases relating to changes to the financing of the health system. This is the second facet of the same case.

The assertion concerning the Minister sought to criticize him for a provision of a retroactive character which was found in Bill 9. The President rejected this claim, noting that the retroactivity of a law is an inherent aspect of our system of parliamentary sovereignty.

The criticism directed at the *Régie de l'assurance-maladie*, meanwhile, was based on the following assertion: since the *Régie* had issued a communiqué addressed in particular to dentists and specialists in buccal surgery to inform them of immediate changes to the Québec Health Insurance Plan, the *Régie* had taken for granted the passage of the bill still under consideration before the National Assembly. The communiqué did not contain any note referring to the important role played by the National Assembly and its members in adopting a measure. Here, the President ruled there to be *prima facie* a matter of contempt of Parliament, and in accordance

with the rules of procedure of the Assembly, the Opposition House Leader was able to enter a motion questioning the conduct of directors of the *Régie de l'assurance-maladie*.

According to the Standing Orders of the National Assembly, this type of motion is given precedence. A motion was in fact entered on the Order Paper of the Assembly but it was withdrawn when the President tabled a letter from the chief executive officer of the *Régie de l'assurance-maladie du Québec*, apologizing to members of the National Assembly for the Régie initiative and stating that it had never had the intention of being in contempt of the Assembly and its members. Resentment created by this matter was thus dissipated and the last episode in a chain of decisions concerning the advertisement or the communication of information relating to as yet unpassed legislation came to an end.

Conclusion

The aforementioned examples illustrate a deep frustration of Members of Parliament concerning the attitude of the Government and Administration which sometimes tend to take for granted passage of a bill presented to the Assembly. By treating this stage as a simple formality, they contribute to a diminishing of the role of the institution and of its members. A summary of decisions of the President of the National Assembly provides a number of guidelines which can be used when considering government information about measures not yet adopted by the legislature. For example:

- A brochure being aimed at a narrow audience with a common interest and representing the fruit of a lengthy consultation process would mitigate the fact of a brochure's content being related to as yet unpassed legislation;
- The essentially informational nature of a document would also mitigate the fact of its content being related to as yet unpassed legislation;
- Another fact considered to be a positive factor would be that the brochure included in it a warning to the effect that the described measure would only come into effect subject to its adoption by the National Assembly;
- A minister who knowingly used legislative provisions still under consideration before the Assembly could be the subject of a *prima facie* accusation for contempt of the Assembly; however, it would have to be proved to the President that unquestionably the minister acted as if the bill had force of law;
- In future, an advertisement or the communication of information to the public relating to as yet unpassed legislative provisions should include a note referring to the role of the Assembly and its members in a measure's adoption process;
- The above-mentioned requirement, while desirable at all times, would not be strictly required for the advertisement of an as yet unpassed legislative measure which relates to a fiscal matter;
- A minister is fully entitled to make known the Government's decisions, choices or new directions which eventually must be the subject of a bill. It is an inherent aspect of the Government's initiative which is involved here. ▲