The Primacy of Parliament and the Duty of a Parliamentarian

by John Bryden

Since adoption of the Charter of Rights in 1982 the primacy of Parliament in the Canadian constitutional framework has been challenged, particularly as the result of Charter decisions by the courts. This article argues that legislators must try to ensure that public confidence in the integrity of the parliamentary process is not undermined.

Let me begin with a common misconception about the relationship between Parliament and the courts. The Supreme Court of Canada was created by an act of Parliament in 1875. The Constitution of Canada makes bare mention of the courts. The Supreme Court that we know was created by Members of Parliament debating in the House of Commons, voting and passing the necessary legislation.

In a Westminster parliamentary system like ours Parliament, which consists of the House of Commons, Senate and the Crown, is supreme. This should not be confused with the American democratic system where the executive – the President and his ministers – the legislature and the judiciary are defined in the U.S. Constitution as separate and equal entities with an intricate set of checks and balances to ensure that one does not dominate the others.

In my opinion the primary duty of a parliamentarian is to defend Parliament. In our democracy everything flows from Parliament. I do not mean to belittle Canada's judiciary or its executive – the Prime Minister and his ministers – but in Canada both of them obtain their legitimacy from Parliament. They are instruments of the Canadian democracy, the instruments of the democratic institution. Consequently, if the public loses confidence in Parliament everything else fails. That is why I was never in agreement with Preston Manning in his early years when he would use question period to attack Parliament. It took him a long time to realize that the purpose of question period is to attack the government, not Parliament.

I would like to mention a few laws that are very important in determining if Members of Parliament are going to be successful in maintaining public confidence in the institution. The first is the *Access to Information Act*. It enables parliamentarians to hold government to account by directly or indirectly obtaining information beyond what can be elicited in question period. The House is a partisan place and it is fairly easy for ministers to be less than candid. It is less easy when the questioning is based on evidence.

The *Access to Information Act*, however, is almost as old as the *Charter* and in need of updating. I am pleased to see there are proposed amendments presently before the House. One suggested change would bring the financial affairs of parliamentarians under the Act. This increased transparency will be tremendously helpful in improving respect for Parliament.

John Bryden represented Ancaster-Dundas-Flamborough-Aldershot in the House of Commons from 1993 to 2004. This article is a revised version of an address to the Law and Parliament Conference organized by the Law Clerks of the Senate and the House of Commons and the Continuing Legal Education Committee of the Canadian Bar Association, held in Ottawa on November 22-23, 2004.

Another positive development was the election expense legislation adopted at the end of the last parliament. Anyone who had been in office for ten years or more, in government or opposition, knew that there was something wrong when certain members could raise vast sums of money for their election campaigns. There was no evidence of corruption or criminality but we needed to limit the ability of lobbyists and others to give large donations to individual politicians. I was tremendously supportive of the legislation that was adopted.

> ***Everyone in this country watches American television and the message they see is that politicians are influenced by money. We must do what we can to combat this impression.***

There are a couple of other areas that can go a long way toward helping parliamentarians maintain the confidence of Canadians. The *Parliament of Canada Act* gives standing committees the power to call witnesses and to compel them to speak truthfully. This is an important power but if it is abused – by not giving witnesses certain rights against self-incrimination, for example – Parliament will lose credibility. People will come to the conclusion that Parliament is not sensitive to the rights of individuals.

The *Security of Information Act*, adopted in the aftermath of the attacks of September 11, poses a very different problem. It led to a disturbing proposal whereby private members of parliament – backbenchers – are to be recruited by the executive to serve on ad hoc committees that can review issues of national security and have access to current secret operational information. Those MPs who are given this access are to submit to the restrictions on disclosure defined by the Act or face its penalties. The individual charged with enforcement would be the Clerk of the Privy Council who is an officer of government not of Parliament. In my view this compromises the independence of MPs and ultimately Parliament itself.

The responsibilities of Canada's executive, legislatures and the judiciary are spelled out fairly clearly by law or precedence. I have always thought of backbenchers, however, as a kind of fourth order of governance and that anything that restricts their ability freely to speak or freely to act is dangerous to the health of our democracy.

That is why I was concerned to see so many additional privy councillors created when the Martin government decided to make all parliamentary secretaries members of the Privy Council. This means fewer free and independent voices in the House of Commons. It enlarges the executive at the expense of Parliament.

Let me conclude by referring to the ideas of two individuals who were very important in the development of our parliamentary form of government. I am very much a believer in the ideas of Edmund Burke who in the late 18th century wrote that an elected member of parliament's primary responsibility is to use his best judgment in making decision. I believe that within the limitations we all have as individuals, all MPs must strive to act correctly not just for their parties, not just for their constituents, but first and ultimately for all Canadians.

The political party process is very helpful in this respect. If everyone acted as an independent member in the House of Commons there would be in chaos. I am strong supporter of the party system and the principle of party discipline. I also believe, however, that the MP's first responsibility is to his own conscience and this must outweigh party loyalty if a serious conflict arises.

John Stuart Mill, another of the great minds who influenced the development of Westminster-style parliamentary institutions, warned against the "tyranny of the majority." This quotation from *On Liberty* is often taken out of context and used to justify the proposition that the courts should have a lawmaking role in the interests of minorities. But Mill was talking about the tyranny of public opinion in an age still reeling in the aftermath of the French Revolution. He went on to say that he supports absolutely the power of Parliament to act in the name of everyone provided that all minorities have reasonable opportunity to be heard.

In Canada protecting the interests of minorities was clearly intended to be the task of Parliament. The Senate, in particular, was designed to operate as a check on the excesses of the elected representatives. That is why, surely, it was decided that senators should be selected by means other than by general election. A constitutionally independent judiciary is needed in the United States precisely because its upper house is elected; American senators are subject to the same public pressures as congressmen. Canadian senators are not.

Let us remember that our system, which is not the American system, is focused on Parliament. There are other voices. We have a free press. We have the courts. We have the right to assemble and speak. But in the end, in our form of democracy, it is the elected institutions that make the decisions. The federal Parliament, in concert with all the provincial parliaments, can even change the Constitution.

With so much at stake, and until and unless the Constitution is altered, we must do everything we can to ensure that confidence in Parliament is maintained.