THE RIGHT OF LEGISLATURES TO EXPEL MEMBERS: A MANITOBA CASE STUDY

Gordon Mackintosh

The recent expulsion of a member from the Legislative Assembly of Manitoba attracted much attention and discussion in that province due to the singularity and political sensitivity of the action. For those interested in parliamentary government, the "Wilson affair" also offers some insight into the nature of parliamentary privilege, procedure and law affecting expulsions. The author presents a brief chronicle of the "Wilson affair" and offers some comments on the right of legislatures to expel members.

On December 16, 1980, during the Throne Speech Debate the Honourable Harry Enns (PC — Lakeside) interrupted the proceedings on a point of order. In addressing the Speaker, the Minister said, "It is with some regret I have to inform you of the presence of a stranger in the Chamber. I would ask you to act accordingly." The reference was to the entrance of Robert Wilson, the member for Wolseley. Mr. Wilson had been charged in September, 1979 with conspiring to import and traffic marijuana and was released on bail. The Progressive Conservative Caucus asked him to withdraw from Caucus pending the outcome of his trial and he was given a separate office in the Legislative Building. On November 7, 1980, he was convicted and sentenced to seven years imprisonment. Mr. Wilson filed an appeal with the Court of Appeal and on November 21 he was again released on bail. However as a result of the conviction he was formally expelled by the Caucus. Two weeks later, he was also expelled from the Party.

With the legislature due to reconvene on December 11, Mr. Wilson told the media that he looked forward to " ... a good six months of hard work in the Legislature".[1] The chairman of the Progressive Conservative Caucus expressed what was perhaps the main concern when he was quoted as saying, "the people are mad because they don't want (Mr. Wilson) to be paid".[2] According to Manitoba's *Legislative Assembly Act* the annual indemnity is payable " ... to each member attending a session ... " Mr. Wilson would have to show up only once in order to be paid.

Other than a fear of expulsion, there appeared that little could be done to keep the member from attending. The *Legislative Assembly Act*, while disqualifying persons who may be members of other legislatures or the Parliament of Canada and certain persons who contract with the government, was silent on disqualifying persons convicted of criminal offences. There was no legislative precedent to rely on to deter Mr. Wilson. The only attendance by convicted Members in Manitoba dates back to the aftermath of the 1919 Winnipeg General Strike when three persons were elected to the Assembly while serving one year sentences for seditious conspiracy. After the House convened in February, 1921, the Assembly passed a motion stating that, if the incarcerated Members requested parole, the " ... Governor-General-in-Council should grant such parole in order that the said (Members) might attend the present Session. ..."[3] Consequently, the members were allowed to attend a few weeks before their sentences expired. The circumstances were incomparable, however, in light of the fact that the members were elected while in prison. As Charles Gordon, Clerk of the British House has noted:

> The claim of a person to remain a member when committed to prison after election could be regarded as weaker than the claim of Members elected while prisoners. In the former case the electorate could be said to have been deceived: they elected a person who subsequently betrayed their trust. In the second case the electors must be assumed to have made the choice with their eyes open.[4]

A possible solution to the problem surfaced when section 682 of the *Criminal Code* was discovered by journalists. The significant subsections state:

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(1) Where a person is convicted of an indictable offence for which he is sentenced to imprisonment for a term exceeding five years and holds, at the time he is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.
(2) A person to whom subsection (1) applies is, until he undergoes the punishment imposed upon him or the punishment substituted therefor by competent authority or receives a free pardon from her Majesty, incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of the Parliament of Canada or of a legislature or of exercising any right of suffrage.
(3) ...
(4) Where a conviction is set aside by competent authority any disability imposed by this section is removed.

The section evolved from the United Kingdom's *Forfeiture Act* of 1870 and first appeared in a Canadian statute in the *Criminal Code* of 1892. Therein, subsection (2) disqualified persons sentenced to a term exceeding five years from "... either *House of Parliament*, or of exercising any right of suffrage or other parliamentary or municipal franchise." As a result of *Criminal Code* revision in 1954 the subsection was altered to disqualify persons sentenced to a term exceeding five years from "... the Parliament of Canada or of *a legislature*." There is no record of the clear intent of Parliament in passing the provision, nor is there case law interpreting the section in its present or earlier forms.

On December 4, Speaker Harry Graham, forwarded a letter to Mr. Wilson which stated the following:

> I have been informed by the Attorney General that you were recently convicted in the Court of Queen's Bench of an indictable offence and sentenced to imprisonment for a term of seven years. I have also received an opinion from the Law Officer of the Assembly that, as a consequence of the conviction and by reason of Section 682 of the Criminal Code, you are incapable of sitting or voting as a Member of the Legislature at the present time. This disability will be removed if the conviction is set aside by a competent authority.

Copies were also forwarded to all officers and members of the Legislature for their information.

It should be noted that some uneasiness with the *Criminal Code*'s application was articulated at the second sitting of the Session when Sidney Green (Independent New Democrat — Inkster) rose on a matter of privilege and stated that, since the Speaker's letter to Mr. Wilson would have been sent on the members' behalf, he did not want his silence to indicate he believed that "... the federal government has any right to pass laws as to who shall sit in a provincial legislature."

THE DEBATE

Whether for pay or principle, Mr. Wilson did take his seat, which led to the point of order on December 16. Because no provisions of the *Legislative Assembly Act* applied to the situation, guidance had to be found elsewhere. Consequently, the Assembly spent well over four hours debating how, according to practice, procedure and law, Mr. Wilson should be dealt with.

When Mr. Enns expressed his point of order, the Speaker, although recognizing a point of order, did not deal with the substance relating to "the presence of a stranger." He instead referred members to Rule 13 of the *Rules, Orders and Forms of Proceeding of the Legislative Assembly of Manitoba* which say that, "where a question arises touching the conduct of any member or his election, or his right to hold his seat, he may make a statement, and shall withdraw during the time the matter is in debate".

Mr. Enns preferred that the House be guided by citations 108 to 110 of *Beauschene's Rules and Forms of the House of Commons of Canada* (5th edition)[5]. Those provisions refer to the exclusion of strangers from the galleries. If it was held that the matter before the House involved the conduct of Mr. Wilson or his right to hold his seat according to Rule 13, there would be latitude for debate by all members. According to the Minister's remedy, the Speaker puts the question, "Shall strangers be ordered to withdraw?"; it is not debatable but there may be a division. However, how could Mr. Wilson be classified as a stranger in the gallery? One may also question whether Mr. Wilson could rightly be a stranger; citations 29 to 32 of *Beauschene*, which deal with strangers, correlate the term "stranger" to mean "the public". Perhaps many members did not realize that Mr. Enns' use of citations 108 to 110 dealt with strangers in the galleries. Nonetheless, some insisted that Mr. Wilson was a stranger. The Speaker, facing the difference of opinion, summed up the problem as "... whether or not a person, a member of this Chamber, can be classified as a member who has lost his right to sit or whether he is classified as a stranger in this Chamber." Before making his ruling, the Speaker sought the guidance of the House.

At this point, debate focused on the application of section 682 of the *Criminal Code*. Mr. Green initiated the discussion when he said, "There is some apparent question as to whether a person is entitled to sit by virtue

of certain laws." He urged that a motion in the Court of Queen's Bench by way of a writ of *quo warranto* was necessary to test the law. This writ, he said, is designed to challenge whether or not a person is entitled to hold a public office. The Leader of the Official Opposition, Howard Pawley (NDP — Selkirk), disagreed. He believed it was up to the House to make a determination and Mr. Wilson could subsequently seek appropriate remedies through the court process. Accordingly, in light of the legal opinion noted in the Speaker's letter to Mr. Wilson, the House Leader, Honourable Mr. Mercier (PC — Osborne) moved, "That Mr. Wilson be ordered to withdraw from the Chamber."

Two disputes then arose. Was the motion in order and, if so, was it debatable? Mr. Cherniack (NDP — St. Johns) suggested that the dilemma could be resolved by reference to the Standing Committee on Privileges and Elections. That went unheeded. Mr. Green insisted the motion was out of order. He said

> I don't know how any member can ever get up and make a motion that somebody not be permitted to sit in the Chamber. The member's rights to sit in this Chamber are established by an electoral writ and after that, the only way a member can be asked to leave the Chamber is on the basis of the rules. If there is a Speaker's ruling which he refuses to obey, he can be named. There has been no ruling, Mr. Speaker. . . . He can only be refused the right to sit here by well-recognized judicial proceedings in the way of *quo warranto*.

The Premier then entered the debate. He stressed that the House was incapable of making a legal decision on the applicability of section 682 of the *Criminal Code*, as Mr. Green stated, but, because the law, *prima facie*, applied, the onus was on the Speaker to rule that Mr. Wilson may neither sit nor vote in the Legislature, but that he remains the member for Wolseley pending the outcome of his appeal. Section 682, he said, ". . . must be taken to be the law of the land," unless the courts ruled otherwise. On the other hand, Mr. Green urged the Speaker not to make a ruling until he had received ". . . not a section of a code, but a judicial document having more force and effect than the writ and the return of the election of (Mr. Wilson) . . . " Subsequently, the Speaker did not make the ruling as the Premier had suggested but did rule that the motion was in order. Mr. Green challenged the ruling but was defeated by a vote of 42 to 1.

The controversy as to whether the motion was debatable or not was not as easily resolved. The Speaker again asked for clarification from the members as to whether Mr. Wilson could be classified as a stranger, thereby making the motion non-debatable, or whether Rule 13 applied, thereby making the motion debatable. He suggested that ". . . our Rules of the Legislature take precedence over *Beauschene*, and in that case, we would be dealing with this as a debatable motion." Messrs. Mercier, Enns and Cherniack all argued that Rule 13 did not apply. Neither the right of Mr. Wilson to hold his seat nor his conduct were in question, they said; the issue was whether or not he was presently *capable* of sitting or voting. Mr. Cherniack, disputed that the motion was not debatable. Mr. Mercier added that it was a matter of privilege of the House.

The Speaker ruled that the motion was not debatable. He referred members to Rule 36 which lists types of debatable motions. The motion before the House did not resemble any of those listed. Mr. Cherniack argued that to "deny a member of the Legislature the right to debate a matter which deals with the proprieties of the House, the maintenance of its authority, the appointment or conduct of its officers, the management of its business, the arrangement of its proceedings is, Mr. Speaker, a denial of the right of members of this House to debate their own problems and their own order within the House".

Several members, mindful that the situation was unprecedented, made it clear that the Speaker's ruling would be challenged. Mr. Boyce (NDP — Winnipeg Centre) suggested that the *Rules* could now be waived by unanimous consent. Both the Premier and Mr. Mercier suggested that opposition members should challenge the ruling if they were unhappy with it, thereby implying that the government did not want debate but, after further calls for debate, the Premier suggested the matter should be assessed more carefully over the dinner break. He stated he hoped for ". . . a consensus of the House with respect to how its procedures should be handled in a matter of this sort." The Speaker accepted that suggestion.

When the House reassembled, Mr. Mercier rose to say that, in view of the importance of the matter and the lack of precedent, the motion should be debated after all. Mr. Green rose on a point of order to suggest the debate be placed on the *Order Paper* for consideration after the Throne Speech Debate because he believed the latter had precedence over all other matters. Mr. Mercier again stated his belief that this was a matter of privilege and said he expected the issue to be settled in the next two hours anyway. The Opposition House Leader added that ". . . there is enough precedent to indicate that matters of privilege should be dealt with at the earliest and in the most expeditious way." With Mr.

Green apparently satisfied, the House embarked upon debating the motion.

Mr. Mercier began by noting that there was no known precedent to fit the particularities of the situation but that "... the Legislature has an inherent power to deal with motions to expel or suspend a member for conduct unbecoming members, and there is precedent for that type of action. ..." Mr. Cherniack said he was critical of the wording of the proposed motion because it did not indicate the reason for the motion nor propose a time limit on its applicability. He therefore proposed an amendment which could change the motion to read as follows:

> THAT WHEREAS the Member for Wolseley has been found guilty in a court of law for a serious criminal offence and sentenced to a term of seven years in prison; and
> WHEREAS he has appealed the conviction and the appeal is still pending;
> BE IT RESOLVED that the said Member for Wolseley be required to withdraw from the Chamber and remain suspended unless a Court of Appeal finds him not guilty of the offence.

At that point Mr. Green commented "... if we are now moving from saying that (Mr. Wilson) is disqualified because of a parliamentary law, which in my opinion would not apply, to making his expulsion one of misconduct by virtue of having been found guilty, I would say, Mr. Speaker, we have moved from a doubtful situation to a worse situation in terms of the members of this House voting to expel one of their number."

Another dispute then arose. Mr. Wilson stood and was recognized by the Speaker. Before Mr. Wilson could advance any argument, the Premier rose on a point of order and said:

> I do not think that any rules of this House or of any parliament in the British parliamentary system permit of a Member in such a situation as the Member for Wolseley to address the House. He should, in common decency, withdraw from the House while this is being debated. ... I ask, Sir, that you ask him to withdraw from the House while this debate and while this vote is being taken.

The Speaker disagreed, stating that Rule 13 allowed Mr. Wilson to speak. Mr. Cherniack also added, "I don't know of any rule other than that of good conscience on his part ... that denies a person the right to launch some kind of defence on his own behalf." The Premier replied "... I suggest that a rule of conscience is as binding on Parliament as any other rule." He again referred to the *Criminal Code* provision and said to the Speaker, "Your job, Sir, if I may say so, is to enforce the law of this country." Sensing the difficulty of the moment, the Speaker recessed the House in order to consult with legal counsel. When he returned to the Chair, Mr. Wilson had removed himself, thereby eliminating the necessity for a ruling.

Mr. Cherniack's proposed amendment was then defeated by a vote of 29 to 18, whereupon the Honourable Mr. Jorgenson (PC — Morris) proposed another amendment. It would alter the motion to read, "That Mr. Wilson be ordered to withdraw from the Chamber and remain outside the Chamber unless a competent authority set aside his conviction." Mr. Pawley lamented that the substance of the two proposed amendments achieved the same objective and that Mr. Cherniack's proposal was defeated merely because it was not from the Government side. Mr. Green then warned that, "This motion will keep the member disqualified even if (the *Criminal Code* provision) is found to be *ultra vires*." He deduced, "It's not a question of the conviction. It's not a question of the federal law. It's a question of the personality of the Member for Wolseley." Mr. Mercier nonetheless affirmed that the motion was valid because of the inherent power of a legislature. The Premier then summarized the Government's position as follows:

> So what we are saying tonight, Mr. Speaker, is this: that there is, *prima facie*, a law of the Parliament of Canada which, *prima facie*, has been abrogated by virtue of the conviction registered against the Member for Wolseley in a recent court action and that, *prima facie*, he is not entitled to sit in this Legislature because that law exists. And we are saying further, although it is not part of the motion itself, but it is implicit in the motion, that this Legislature has the right to make a determination at any time upon the competency of people who should sit in the Legislature.

The Premier furthermore promised that the Government would introduce legislation to complement the *Criminal Code* provision and would ensure that Mr. Wilson would not receive any indemnity "... by virtue of his mere physical presence in the Legislature or momentarily his brief recognition. ..." The question on the amendment was carried and the main motion, as amended, was carried by a vote of 47 to 1; only Mr. Green voted against the expulsion.

DISCUSSION

The procedure charted to expel Mr. Wilson and legal arguments used in the debate invite examination here. With regard to procedure, there are two significant matters. First, when the expulsion motion was introduced,

Mr. Mercier did not explain that he rose on a matter of privilege, although he later said it was a privilege motion. If it was neither a privilege motion, placed on the *Order Paper*, a matter of urgent public importance, nor introduced by unanimous consent, it would be out of order according to the *Rules*. Only because the Assembly supported the ruling that the motion was in order by a vote of 42 to 1 is it expedient to accept the motion as a matter of privilege. However, it should be noted that later during the same session another member's privilege motion was ruled out of order because the member did not introduce it as such.[6]

Second, the attempt to prevent Mr. Wilson from speaking because that would be improper and contrary to parliamentary practice is noteworthy. The only relevant reference on this matter can be found in *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament* (17th edition).[7] It states, "it is customary to order the member, if absent, to attend in his place before an order is made for his expulsion, in order to give him an opportunity to vindicate himself; but where it is apparent that no question of vindication can arise an order for attendance has not been made." (Bourinot's *Parliamentary Procedure and Practice*[8] adds that the power to order attendance "... has been repeatedly exercised by colonial parliament ..." and was exercised by the federal Parliament in the expulsion case of Louis Riel in 1874, although he disobeyed the order.)

Since Mr. Wilson's case was to be settled before the courts, it would seem redundant, if not ill-advised, to allow an opportunity for vindication before the Legislature. It could therefore be said that the Premier's approach was correct according to May. However, according to the *Rules*, if the expulsion motion was a matter of privilege, any member may speak and if Rule 13 applied, the Assembly was bound to allow Mr. Wilson to make a statement. The Speaker's anticipation of having to rule that Mr. Wilson was entitled to speak, against the wishes of the government, was perhaps the most difficult moment of the debate; Mr. Wilson's disappearance from the Chamber was surely welcomed by the Chair. It is clear from the debate that the expulsion was performed in a haphazard manner and that the *Rules* did not easily facilitate the Legislature's goal.

A significant statement made of the Wilson debate was the Premier's comment that "... we do not intend to permit that the will and the conscience of the people of Manitoba should be frustrated by some legal quibble." The expulsion of Mr. Wilson was seemingly a political exercise as well as a legal one; members were cognizant of the political value of expelling Mr. Wilson and of withholding his pay. To this end, section 682 of the *Criminal Code* was a convenient tool. Although it did not explicitly form the basis of the final motion, it perhaps helped to justify the expulsion by serving as "the rule of law." The applicability of section 682 must be questioned on two grounds, however. As members and officers of the Assembly were aware, a strong case could be advanced that the section is *ultra vires* the legislative authority of the Parliament of Canada. It possibly encroaches on provincial jurisdiction in that a federal law interferes with the conduct of provincial legislatures apparently beyond the provisions of the Canadian constitution. Second, it can be argued that section 682 does not apply to members of a legislature or Parliament. Section 682(1) apparently applies to "... an office under the Crown or other public employment. ..." Could a seat in the legislature be classified as "an office under the Crown"? There is well-recognized jurisprudence supporting the contention that members of the legislature hold a "seat" but do not hold an "office", although they may be appointed to some office in the body (*Tolfree v. Clark et al* (1943) O.R. 501). A person must fulfill the requirements of 682(1) for subsection (2) to apply, even though subsection (2) specifically attempts to disqualify a person from "... being elected or sitting or voting as a member ... of a legislature. ..."

Nonetheless, the Premier's contention that the expulsion should have been reasoned by section 682 and enforced by the Speaker by way of a ruling has merit. Section 682 could, *prima facie*, be broadly construed to apply. This is the basis of the disjunction of the beliefs of the Premier and Mr. Green. *Prima facie* is the key qualifier here. Furthermore, because it is the Speaker's duty to "... preserve order and decorum and ... decide all questions of order ...", the Speaker may have the right, or obligation, to enforce section 682. After all, it may be argued that disabilities are rightfully imposed every day by persons (for example — police officers, human rights officers) on others based on laws which apply, *prima facie*, without reference to judicial review. Mr. Green's argument that section 682 of the *Criminal Code* had to be judicially tested by way of *quo warranto* should be questioned. Case law confirms that the courts have no jurisdiction to determine the eligibility of a member to sit in a legislature.[9]

The employment of section 682 of the *Criminal Code* to justify Mr. Wilson's expulsion became less pervasive as the debate evolved. This may have been due to a growing wariness of the *Code*'s applicability or Mr. Green's warnings. Concurrently, the members seemed to

gain greater appreciation of the inherent power of the Legislature to expel a member. Indeed, it was unnecessary to use section 682 to expel Mr. Wilson. Legislatures have at various times, albeit rarely, expelled members, not because of legal disabilities, but because a member was deemed unfit for parliamentary duties or because the member detracted from the dignity of the body. Bourinot argues that, "Such a power is absolutely necessary to the conservation of the dignity and usefulness of a body."[10] Usually the expelled members have been found guilty of criminal offences although expulsions have been reasoned because a member's conduct was perceived as "discreditable, corrupt and scandalous",[11] because of "extreme partisanship"[12] and, in the British House of Commons, because of "... conduct unbecoming the character of an officer and a gentleman."[13] This power may be likened to the self-disciplinary powers given to some professional organizations. According to *Erskine May*, however, "the purpose of expulsion is not so much disciplinary as remedial, not so much to punish members as to rid the House of persons who are unfit for membership."[14]

The legislature's power of expulsion, like other powers, is apparently not subject to judicial review and the only checks are constitutional provisions and political considerations. At present, the Canadian constitution contains no provision regarding the right of members to sit, although it should be noted that section 3 of the proposed Charter of Rights and Freedoms for inclusion in a new Constitution states that, "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.[15] Section 1 of the Charter qualifies that the above section is "... subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In contested cases, then, the courts would have the power to adjudicate according to a test of "reasonableness". Only political considerations may constrain the actions of Canadian legislatures today, however. In the Wilson case, members perceived a public will to expel Mr. Wilson and withhold his pay. There is little public evidence that they may have been wrong except for an editorial in the *Winnipeg Free Press* on December 18, 1980, stating

> (The legislators) supported a resolution dismissing Mr. Wilson from the legislature, which was based on nothing more principled than the legislature's power to do just about any fool thing it wants to do. That resolution will have two results. It will make it a little easier the next time the legislature, for a bad reason or no reason at all, wants to kick out one of its members, and it will ensure that the voters of Wolseley ... will remain without a spokesman in the House for a little longer.

The popular will has indeed been subverted in the past. Two Canadian cases in 1829 and 1831 and a British case in 1764 serve as unhappy precedents. Members were expelled for "seditious libel", "misconduct" or "gross, scandalous and malicious libels, intended and calculated to bring (the) House ... into contempt," were re-elected but again expelled, obviously contrary to the wishes of constituents. The British resolution was later expunged from the Journals because it was "subversive of the rights of the whole body of electors of this kingdom." One of the Canadian resolutions was also later expunged from the Journals.[16]

The laws of Parliamentary practice, as set down by precedent, do attempt to prescribe procedures and parameters for expulsions. For instance, a specific charge

must be made of a member's actions; expulsion should not affect the right of a member to run again and be re-elected; a record of the criminal conviction should be laid before the House before expulsion, and, as already noted, where there may be vindication, the member should attend to make a statement. Again, these "laws" can only serve as guidelines in expulsion cases; the legislatures may act however they wish.

Four Canadian jurisdictions (Ottawa, British Columbia, Manitoba and Quebec) have enacted specific

legislation prescribing the expulsion of members convicted of criminal offences. Section 682 of the *Criminal Code* would seemingly apply to the federal government with the already-noted caveat that the section may not affect the holding of a "seat".

Section 54 of British Columbia's *Constitution Act* provides that, "if a member of the Legislative Assembly ... is convicted of treason, or felony or any infamous crime ... his election becomes void and the seat of the member shall be vacated. A writ shall issue, within 6 months after the time when the seat of the member becomes vacated, for a new election."

If the Legislature ever wishes to enforce this provision, it must be recognized that there is great latitude for interpretation of what constitutes an "infamous crime". *Black's Law Dictionary* (5th ed.)[17] states that the term, "was applied at common law to certain crimes ... upon the theory that a person would not commit so heinous a crime unless he was so depraved as to be unworthy of credit. These crimes are treason, felony, and the *crimen falsi*." According to interpretations of "infamous", as found in the fifth amendment of the United States' Constitution, "a crime punishable by imprisonment in the state prison or penitentiary, with or without hard labour, is an infamous crime." In laws which establish self-regulation of the medical and dental professions there is sometimes provision for disciplinary action to be taken against persons for "infamous conduct". In this regard *Halsbury's Laws*[18] offers further guidance in that, "the question is, not whether what was done was an infamous thing for anyone to do, but whether it was an infamous thing for a medical practitioner to do". With little applicable interpretive precedent, the British Columbia legislation is almost wide open for interpretation.

After the "Wilson affair", the Legislative Assembly of Manitoba enacted tailor-made, retroactive amendments to *The Legislative Assembly Act*. Section 19.1 states in part

> (1) ... where a member is convicted of an indictable offence for which he is sentenced to imprisonment for a term of 5 years or more, he is ineligible to sit or vote as a member, and
>
> (a) if, on the expiry of the time allowed for bringing an appeal of the conviction or of any decision of a court upholding the conviction in an appeal of the conviction, he has not commenced an appeal of the conviction or of the decision, as the case may be; or
>
> (b) if on an appeal of the conviction, or of a decision upholding the conviction, to a court from which there is no further appeal, the court upholds the conviction;
>
> the member is disqualified as a member and his seat is vacated.
>
> (2) Where subsection (1) applies to a member, he shall not be paid any indemnity or allowance under this Act for or in respect of the period during which he is ineligible to sit or vote as a member.
>
> (3) Where a conviction mentioned in subsection (1) is set aside by a court of competent jurisdiction or a court of competent jurisdiction reduces the sentence to less than 5 years imprisonment, the ineligiblity of the member to sit or vote as a member or to receive indemnities and allowances is terminated.
>
> (4) Where a conviction mentioned in subsection (1) is set aside by a court of competent jurisdiction, the assembly may, by resolution, authorize the payment to the member affected of any indemnity or allowance, or a part thereof, withheld from the member under subsection (2).

Section 16 of Quebec's *Legislature Act* states that "every person found guilty of treason or of a criminal act punishable by two years imprisonment or more shall not ...

(c) be elected a member of the said Assemblée nationale or hold a seat therein." The *Act* goes on to state

> Each such legal disqualification or incapacity shall be absolute and a matter of public order and shall subsist for life, in the case of a person found guilty of treason, and for five years after the term of imprisonment fixed by the sentence, in the case of a person found guilty of any other criminal act; nevertheless, if, in the latter case, the condemnation was to a fine only or if sentence is suspended, such legal disqualification or incapacity shall subsist for five years from and after the date of such condemnation or suspension of sentence.

The legislation noted above would appear to be beneficial for several reasons. Foremost, it can generally be argued that it is better to have a government of laws, and not of men and, as likely sensed during the Wilson expulsion, it is more palatable for a legislature to act according to established, sober law in such cases. *Halsbury's Laws* remarks that, "the House is ... bound to take notice of any legal disabilities affecting its members, and to issue writs in the room of members adjudged to be incapable of sitting."[19] But the House is only likely to *feel* bound by such laws since legislatures may violate their own legislation in the absence of occasion for judicial review. Yet, the expression of public policy by way of a law is surely a stricter guide than whim. As well, the procedural difficulties experienced during Mr. Wilson's expulsion could have been averted if the *Legislative Assembly Act* had prescribed the expulsion; the Speaker

could thereby have simply made an expulsion ruling without the drawn-out wrangles.

There are legislative provisions in several provinces which are not as specific in their application as noted above but which may serve to guide legislatures in expulsion cases. The Legislative Assembly Acts of Saskatchewan and New Brunswick state that a person who is disqualified "... by this Act or by any other law," may not sit nor vote in the provincial assemblies. Alberta's *Legislative Assembly Act* recognizes disqualification "... by any other Act ..." But could this term be interpreted to include extra-provincial legislation? Assuming section 682 of the *Criminal Code* does apply to legislators, these clauses may make that section applicable to the legislatures, possibly eliminating the constitutional argument. The *Legislative Assembly Act* of Alberta as well as that of Ontario simply preserve "... the right of the Legislative Assembly to expel a member according to the practice of Parliament or otherwise."

CONCLUSION

From the above discussion it is clear that legislatures have great discretionary powers to expel members and have at times invoked this prerogative. Through customary usages, certain parliamentary procedures have been followed in expulsion cases but no hard and fast rules can ever be established. Each Assembly's approach to an expulsion is almost entirely unpredictable. Political considerations of the day, recognized procedure, legislation and case law all play a role. Manitoba's "Wilson affair" may have been an unfortunate incident, but it did offer interesting insights into this little used form of Parliamentary privilege.

NOTES

1. *Winnipeg Sun*, November 24, 1980.

2. *Winnipeg Free Press*, December 5, 1980.

3. Manitoba, *Journals of the Legislative Assembly*, February 18, 1921, p. 40.

4. Charles Gordon, *Newsletter to Commonwealth Clerks*, May, 1981, p. 10.

5. Toronto: Carswell, 1978, p. 36.

6. Manitoba, *Votes and Proceedings*, April 13, 1981.

7. Toronto: Butterworths, 1964, p. 106.

8. Toronto: Canada Law Book Co., 1916, p. 65.

9. This principle has been clearly laid down since the eighteenth century. In 1797 a British judge said, "... it would be great Presumption in this Court to meddle with Elections to Parliament before the Matter hath been determined in Parliament." (3 *Levinz's Reports* (1797) p. 30). In *Lamb v. McLeod* (No. 1), (1932) 1 W.W.R. 206 (Sask. C.A.), Turgeon J.A. said at p. 208; the Assembly is the guardian of its own prerogatives and privileges, and the Courts have nothing to do with questions affecting its membership except in so far as they have been specially designed by law to act in such matters. In *Tolfree v. Clark et al* (1943) O.R. 501, (1943) 3 D.L.R. 684, leave to appeal refused (1944) S.C.R. 69, (1944) 1 D.L.R. 495, at p. 698, Laidlaw J.A. said: "The Legislature has surrendered part of its jurisdiction by Acts relating to controverted elections. But those Acts must be construed strictly and literally. They do not take away from the Legislative Assembly all power to deal with matters pertaining to election of its members." As late as in *Wallace v. A.G.* of B.C., (1978) 1 W.W.R. 411 (B.C.S.C.), this principle has been upheld. As well, despite judgments affecting elected municipal office holders such as *R. v. Brown*, (1923) 1 W.W.R. 1337; affirmed (1923) 2 W.W.R. 511, 33 Man. R. 184 (C.A.) where Dysart J. said "... where a man elected to office is disqualified for holding the office, his right to occupy the office may properly be challenged in *quo warranto* proceedings," it has been held that *quo warranto* cannot be used to challenge a member's right to hold a seat in a legislature. According to section 96(1) of Manitoba's *Queen's Bench Act* (R.S.M., c. 52), *quo warranto* is to be used in "... proceedings against any person who unlawfully claims or usurps, or is alleged to claim or usurp, any office, franchise, or liberty ..." As already noted, it has been determined that a "seat" in the legislature is not an "office" (*Tolfree v. Clark et al, supra*). In a *quo warranto* action against a Member of the Legislative Assembly of Manitoba in 1964 (*R. ex rel. Stubbs v. Steinkopf* (1964) 49 W.W.R. 759), Bastin J. said, when dismissing the application, "the language of the various statutes is so clear and the principle of law I have referred to is so well known that I find it difficult to understand how the experienced counsel who launched this proceeding, or the relator himself, who is a barrister of many years standing, were unaware that this application sought relief which the Court had no power to give and was therefore ineffectual." In light of the above, it would appear that the only way to test the validity of section 682 of the *Criminal Code* would be an application for a declaratory judgment.

10. Toronto: Canada Law Book Co., 1916, p. 64.

11. *Beauschene*, citation 37, p. 16.

12. Bourinot, p. 66.

13. *May*, p. 105.

14. Ibid

15. Canada, House of Commons, *Votes and Proceedings*, April 23, 1981, p. 1743.

16. Bourinot, p. 67-8.

17. St. Paul: West Publishing Co., 1979, p. 335.

18. 3rd edition, vol. 26, p. 4.

19. 3rd edition, vol. 28, p. 342.