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Is the Canadian Governing Process Going American?

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In one sense the governing process in Canada is subject to the same trends observable in the United States and other western democracies. Television has fostered the cult of personality, public opinion polling is changing the concept of political leadership and international economic forces have limited independent policy making by national governments.

But I am not going to speak about broad socio-economic trends, important as they may be. I am going to narrow the subject down to something usually called "American influences on Canadian Government" and in particular I want to look at some recent developments in Canada including adoption of the 1982 Charter of Rights; the 1987 constitutional amendments known as the Meech Lake Accord; reforms to the House of Commons arising from a report of a special committee of the House of Commons in 1985; and increased political confrontation between a House and Senate controlled by different political parties since 1984.

With the Free Trade issue fading into the background and the new Mulroney government preparing to meet Parliament we have a period of relative calm in which to review the impact of these changes on the Canadian political process and reflect about likely further developments over the next few years.

Constitutional Issues

Canada is currently in the last stages of some rather fundamental constitutional reform which began in 1980 following defeat of the referendum on independence in Quebec. Prime Minister Pierre Trudeau called all the provincial premiers to a constitutional conference at which he proposed amending the constitution to add a Charter of Rights and Freedoms.

It set forth several categories of rights: including fundamental rights, legal rights, democratic rights, mobility rights, and equality rights. It also contained a section giving constitutional recognition to English and French as official languages and guaranteeing certain rights for English and French language education wherever numbers warrant across Canada.

When the conference failed to agree on the proposed charter Mr. Trudeau announced he would proceed unilaterally. His threat was based on the fact that Canada never had a formal procedure for amending its constitution. When amendments were required Parliament would pass a motion requesting the British House to change the *British North America Act* and this was done on several occasions. It was customary to consult provincial governments if the amendments affected them.

For years successive prime ministers including Mr. Trudeau tried to end this anomaly and to patriate the constitution with an amendment formula that would not involve the British Parliament. Everyone thought this a good idea but agreement on a precise formula proved difficult to obtain.

Mr. Trudeau's plan to act to act unilaterally was opposed by eight of the ten provinces (all except Ontario and New Brunswick). The gang of eight took the position that provincial agreement was necessary for an amendment as fundamental as the Charter of Rights. They argued, among other things, that it conflicted with the doctrine of parliamentary supremacy and that it would reduced provincial authority at the expense of federally appointed judges of the Supreme Court.

Court challenges to the legality of unilateral federal action produced a variety of opinions in different provincial courts. Finally the Supreme Court was asked for an opinion. It said that while the federal government would be legally correct in going ahead without support from the provinces it would not be in keeping with conventions that had developed concerning amendments.

There is no way of knowing what would have happened if Mr. Trudeau had decided to proceed with his threat because a last minute political compromise succeeded in winning over 7 of the 8 opposing provinces.

Mr. Trudeau agreed to add a clause to the Charter allowing any legislature to declare that a specific act may operate notwithstanding some of the rights guaranteed by the Charter. Thus the fundamental freedoms, legal rights, and equality rights can all be over-ridden for a five year period after which a legislature can renew the exemption if it wishes. Language rights are not subject to the notwithstanding clause.

Mr. Trudeau also agreed to accept an amending formula proposed by the provinces. It required unanimous consent of all the provinces in a few areas, such as changes to the Supreme Court; but for most amendments would require the support of 2/3 of the provinces provided they had over 50% of the total Canadian population. Following this compromise the Charter of Rights and the new amendment formula were passed by the British Parliament against the opposition of Quebec.

The government of Quebec had many reasons for its opposition. For one thing the 2/3 and 50% provision effectively eliminated what it claimed had been a traditional veto right for that province. Provisions of the Charter relating to minority language education also rendered unconstitutional some Quebec education legislation.

To mark its displeasure from 1982-1985 Quebec refused to participate in federal-provincial conferences except as an observers and systematically prefaced every bill introduced in the assembly with a clause stating that it operated notwithstanding the new charter of rights.

The federal Liberals were defeated in September 1984 and the Parti Québécois met the same fate fifteen months later. The new governments of Brian Mulroney in Ottawa and Robert Bourassa in Quebec had promised to bring Quebec back into the constitutional fold. Mr. Bourassa established five conditions for accepting the 1982 changes.

1) Recognition in the constitution of Quebec as a distinct society.

2) Changes in the amending formula to re-instate Quebec's veto right over amendments.

3) Participation in the appointment process of Supreme Court judges.

4) Constitutional guarantees of an increased role in immigration policy.

5) Limitations to the federal spending power giving it the right to opt out of national programs and still receive funding for its own program having similar objectives.

After negotiations all these conditions were accepted by Ottawa and the other provinces although in order to get this agreement other items were made at the request of certain other provinces. For example the Meech Lake Accord provides that future appointments to the Canadian Senate be made from lists provided by the provincial governments.

To come into force the Accord had to be approved by Parliament and by all of the provincial legislative assemblies. So far all but two of the necessary approvals have been obtained but in Manitoba and New Brunswick there have been elections and changes in government since the accord was signed. The new governments are threatening to withhold approval unless certain changes are made.

Nevertheless assuming the Meech Lake Accord is ultimately adopted we will have seen over a fairly short period of time not only the introduction of a constitutionally entrenched Charter of Rights limiting the powers of legislatures and increasing the importance of the judiciary but also inserting into the Canadian system a modified form of checks and balances.

Together with certain social changes such as an increase in "rights consciousness" I think this amounts to a marked shift toward accepting some of the underlying assumptions of congressional rather than parliamentary government.

Changes at the constitutional level have ramifications for the operation of the central political institutions, the Senate and House of Commons. To understand these one has to put them in perspective and my starting point is the brief Conservative administration of Joe Clark in 1979.

The Senate and House of Commons

In 1979 the Liberal Party had been in office for most of the 20th century and its view of the relationship between the cabinet and the ordinary member of parliament was summed up nicely in one of Mr. Trudeau's most famous one liners. "MPs", he said, "are nobodies once they are 100 yards from parliament hill."

The Conservatives, for all their years in opposition, had never articulated any coherent alternative role for members. Finally under the leadership of Joe Clark and the late Walter Baker they came up with one. In effect they said, "wait a minute Pierre you have it backwards. When members get away from parliament hill and into their constituencies they are inundated from all sides by constituents, journalists, and members of interest groups all of whom think they have some influence in Ottawa. It is only on parliament hill itself, where they have to toe the party line, that MPS are nobodies".

Mr. Clark won the 1979 election and set up a caucus committee to look at ways to give members a greater role in the House. It produced a working paper on the subject but his government was defeated shortly thereafter and the Liberals, with Mr. Trudeau coming out of retirement, were returned with a majority.

The years 1980 to 1984 represent the nadir of the House of Commons as an effective institution. The country was divided regional and linguistically as never before -- the Conservatives held only 1 of 75 seats in Quebec and the Liberals only 4 of 70 seats west of Ontario. In a state of shock at losing power so quickly the Conservatives ousted Joe Clark and replaced him with Brian Mulroney. In the House they used every imaginable tactic to block and obstruct a government they perceived as having gained power through trickery.

Each debate was more unruly then the next with the climax occurring in March 1982 over an Energy Security Bill. The Conservatives moved a motion to adjourn. The bells rang to summon the members to vote but the conservative whip refused to enter the Chamber to give the traditional indication he was prepared to proceed with the vote. In the absence of this customary gesture the Speaker therefore declined to call the vote and left the bells to ring.

They continued to ring for 14 days until it dawned on everyone that debate had been replaced by coercion and Canada's credibility as a politically developed nation was in doubt. The bells crisis came to a negotiated end and part of the agreement was establishment of a special committee on reform. It produced a dozen reports but few major changes were adopted before the 1984 election.

During the campaign Mr. Mulroney promised that if elected he would give parliamentary reform a high priority. His first throne speech announced creation of another special committee on reform, this one chaired by longtime member James McGrath.

The theme throughout its three reports was that Canadian politics has become too dominated by the cabinet and by the ethic of party solidarity. It sought to restore a modest balance to the tension between individual judgment and party discipline; to give members more of a voice in what happens in the House instead of leaving so much in the hands of party leaders, whips and house leaders.

The Speakership

One of the first recommendations was that the Speaker of the House cease to be nominated by the Prime Minister and instead be chosen by secret ballot of members. Canadian Speakers have always been very reluctant to use the considerable authority vested in them as exemplified by Speaker Jeanne Sauvé during the Bells crisis.

By contrast the first Speaker elected by the secret ballot process, John Fraser, has indicated he is ready and willing to play a more active role if necessary to assure the smooth operation of the House. In 1987 he effectively ended a filibuster to a bill extending drug patent protection even though he had to allow a rather unusual government motion in order to accomplish this. The following year the Senate instructed its Finance Committee to divide a bill that had been passed by the House. When the Senate returned half the bill to House the Speaker suggested this was an

infringement of the rights of the House and eventually the Senate reconsidered its position.

Both these issues were more political than procedural. With the House and Senate controlled by different parties for the next four years I think we will see a continuing role for the Speaker in expediting parliamentary business. In fact it would not surprise me if Canadians eventually come to conclude that too rigid adherence to the role model of the British Speaker is perhaps not the most appropriate one and begin to look for an officer who acts a bit more like the Speaker of the House of Representatives.

Private Members Business

Of course most House business will continue to be controlled by the government. They decide which bills are introduced, how long they are debated and, assuming they have a majority, the outcome of the debate.

One carryover from earlier days when government control was less pervasive is a special one-hour period several times a week known as private members business when motions or legislation can be introduced by private members -- i.e. those who are not members of the cabinet. Such bills are limited in scope in that they cannot impose a tax or require the expenditure of public funds, although to some extent the decision as to what amounts to an expenditure can be rather subjective and is ultimately decided by the Speaker.

In the past these bills were chosen by lot. After being discussed for one hour they were dropped from the order paper without as much as a vote. Under the new rules the decision as to which bills are chosen for debate is no longer a matter of chance. Members submit their proposals to a committee on private members business. It chooses ones to go forward for debate including a certain number that will be voted upon. This obviously encourages lobbying, coalitions and horse-trading among members of different parties in an attempt to convince the committee to choose one bill or another.

That will hardly seem unusual to anyone familiar with congressional politics but Canadian parliamentarians have had little scope for such activity since the advent of disciplined parties over a hundred years ago. In fact, I think part of the reason Canadian politics has been criticized for its obsession with process rather than substance is that with 75% of elected members having little input into policy; there is little to do except debate process and look after constituents.

Has the reform to private members business make a difference. Have ordinary members replaced the cabinet as the effective law makers? The answer is no, nor was that the intention of the recent reforms but some of you may have heard of at least one recent law that is a direct result of these changes.

Traditionally the best a private member could hope for was the mixed joy of seeing an idea taken over and implemented by the government. In 1988 Lynn Macdonald an NDP member introduced a bill called the *Non Smokers Health Act* which prohibited smoking virtually anywhere under jurisdiction of the federal government.

When the Health Minister introduced a modified version of the anti-smoking bill it looked as though the conservative majority would defeat the private members bill and support the government. But they didn't. Lynn Macdonald's bill became law, effectively pre-empting the government on this issue. Not exactly a revolution but something that could not have happened five years ago.

Committees

There have also been a number of reforms to the structure and powers of committees. For example in order to undertake studies committees used to need approval by the House which gave the government pretty close control over committee activity.

Now every standing committee can, without a mandate from the government, launch its own study or investigation into matters falling within its jurisdiction. To obtain money to travel or to hire staff its budget must be approved not by the government but by a committee made up of the chairmen of all standing committees and chaired by the Speaker. Thus, once again a hierarchical system of operating and thinking has been replaced by a more egalitarian one whereby chairmen and members have to lobby each other.

The greater freedom of committees has not had as great an impact as some observers, including myself, had expected. I suppose it comes down to a question of individuals. A chairman of a committee is two steps removed from the cabinet and someone would have to think very hard about jeopardizing his chances for promotion by being too critical.

The best example of a committee operating along the lines envisaged by the new rules was the Standing Committee on Finance. During the last parliament it undertook independent studies of tax reform, credit, banking and other areas under consideration by the government. It became an alternate source of public policy discussion. The chairman became a figure of some importance on Parliament Hill and membership on the committee was perceived as a political asset not a thankless and unrewarding obligation.

Review of Appointments

The reform committee also looked at ways to give the House of Commons a voice in the appointment process, as promised by Mr. Mulroney during the 1984 election campaign. The question arose because of the many patronage appointments made by the Liberals in the last months before their defeat.

From the very outset some argued that an American type confirmation process was incompatible with a parliamentary form of government. After long and difficult debate the reform committee recommended two types of scrutiny: -- one that did not give any veto power to members of the legislature -- to be used for deputy ministers and heads of some crown corporations. It also proposed another type to be used for appointments to a few specified regulatory agencies having a substantive policy making role with little executive control over their activities. These would be automatically referred to the appropriate committee. Should the committee report negatively on a nominee the government would be obliged to withdraw the nomination.

This part of the recommendation was, unfortunately in my opinion, rejected by the government. The result is a situation whereby nominees are examined by committees but their appointment cannot be stopped. This cannot hold much appeal to parliamentarians and I tend to think that having started down the path to increasing the role of private members we will see an enlargement of their role in the review process although it may take a minority parliament to go the rest of the way.

The review of appointments might eventually be considered as part of Senate reform and speaking of the Senate I would like to conclude with a few words about that body.

Senate

Once again the background to recent changes can be traced back to 1979. With few seats from Quebec, a province that usually has anywhere from 8 to 12 members in the cabinet, Prime Minister Joe Clark decided to appoint a number of Conservative Senators from Quebec to the Cabinet.

There is nothing intrinsically wrong with having cabinet members in the Senate. It was done with some regularity in the last century, in fact at least one prime minister held a seat in the Senate rather than the House of Commons for a brief period. But this poses obvious problems for the theory of responsible government.

The two chambers being completely independent there is no easy way for the elected members to question and hold accountable Senators who have departmental responsibilities.

The Liberal majority in the Senate took on the job of holding the Senate Ministers accountable by asking questions. But unlike the House of Commons there was no set period for questions. Nor is there any time limit to the length of interventions, nor does the Speaker of the Senate have the same powers as the Speaker of the House to call members to order. In such circumstances the Senate became rather disorderly very quickly.

The Conservative Government was short lived but from 1980 to 1984 the Liberals had to appoint a few extra Ministers to the Senate to make up for their absence of representation in western Canada. Once again, given the presence of Ministers with departmental responsibilities, the Upper House continued acting like a miniature House of Commons.

Indeed the Senate is coming to resemble the House in terms of age and background of its members. This blurring of lines was reinforced just before the 1984 election when several relatively young and active Liberal MPs including the former Deputy Prime Minister were appointed to the Senate by the soon to be defeated Liberal government.

Since 1984 question period in the Senate has been de-emphasized as the Conservatives appointed only one Minister but the opposition soon took another tactic serving notice of its intention to play a more active role in opposing government legislation.

After delaying several minor bills and forcing amendments to others this strategy reached its logical

conclusion when the Senate refused to pass the free trade agreement unless there was an election. This put into question the traditional understanding of responsible government where the timing of elections normally rests with the Prime Minister based on his support in the House.

Now you can say that free trade was an unusual issue, you can say that the government was already into its fifth year and had to call an election anyway, you can say that the Senate did not technically force the government to call the election. That is all true.

It is also true that increased confrontation between the House and Senate has been developing over a number of years. I think the government would be unwise to continue, as it did in the last parliament, -- to resist the idea of joint conferences with the Senate as set out in the rules but unused since 1947. If new mechanisms are required to work out disputes, once again the logical place to seek ideas is not Westminster but the American Congress.

Conclusion

Canadians have traditionally distinguished themselves from the United States by their adherence to parliamentary as opposed to congressional institutions. Lately, however, constitutional changes and reforms in Canada's House of Commons and Senate suggest an attraction towards certain aspects of the American congressional system.

However this movement does not, in my opinion, signify an end to anything distinctive about Canadian politics. Properly understood the Canadian form of government rests less on its historical derivation from Great Britain and more on the continuing process of incorporating and adapting certain features of the American form of a government.

In 1865 Canada's first Prime Minister, Sir John A. Macdonald stated with confidence that he and his colleagues had devised a system that “avoided the defects which time and events have shown to exist in the American constitution” This has been the challenge of the last decade and it will likely remain even more of a challenge in the days ahead.

My point is this: The Canadian constitution and the central institutions that derive from it namely the Senate and House of Commons are evolving in a direction where we have to ask ourselves if it is still useful to think of Canada as having a British style form of parliamentary government with some American inspired modifications? Are we not moving close enough to accepting certain assumptions of the American form of government as to give us essentially an American style theory of government while maintaining a parliamentary shell.