Is the Canadian Governing Process going American

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In the ongoing quest to maintain a separate North American existence Canadians have always prided themselves on adherence to parliamentary rather than congressional institutions.

The theory of parliamentary government is well suited to a political culture that emphasizes order, hierarchy and centralization in contrast to the American preoccupation with due process, individual freedom and the diffusion of power through an elaborate system of checks and balances.[1]

The traditional elements of a parliamentary system — responsible government, limited judicial review, and a strong cabinet with power centralized in the hands of a Prime Minister characterized Canadian politics for over a hundred years. In the last decade, however, there have been significant changes in each of these areas. Today prerogatives formerly held by the Prime Minister and cabinet must be shared with a Supreme Court charges with interpreting the *Canadian Charter of Rights* an activist Senate controlled by the opposition and a House of Commons reformed with the specific purpose of increasing the role of private members.[2]

"Divided Government"

The term "divided government" is usually associated with the American congressional system when one party holds the

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presidency and the other holds one or both Houses of Congress. In theory such a division between executive and legislative branches is impossible in a parliamentary system. But if one party does not control both the House and Senate and if the Senate decides to exercise its constitutional right to block legislation, you have essentially the same situation — worse if there is no provision for an override or an effective mechanism for working out disputes short of an election.

In 1988 the Canadian Senate took the very unusual position of declaring it would not pass the Canada-US free trade legislation without an election thereby "forcing" the government to go to the people. That election has been held and the Free Trade Agreement adopted. In other respects the political situation is unchanged. There is still a Conservative Prime Minister supported by a majority in the House of Commons and a Liberal dominated Senate ready to exercise its full constitutional power.

The movement toward an activist Senate actually predates the free trade debate. It can be traced back to 1979 when Joe Clark managed to form a minority government, the first Conservative administration since 1962. With few seats from Quebec, a province that usually has anywhere from 8 to 12 ministers, Mr. Clark decided to appoint a number of Conservative Senators from Quebec to cabinet and give them some high profile portfolios including Justice.

There is always at least one Cabinet Minister from the Senate to look after the government's interests in that chamber but the presence of several Senators with departmental responsibilities posed obvious problems for the theory of responsible government. The two chambers being completely independent there is no easy way for elected members of the House of Commons to question Senators and hold them accountable.

Under the circumstances Liberal Senators took the position that if the government was going to place ministers beyond the reach of the House of Commons, it would be up to the Senate to hold them accountable. But unlike the Commons, the Senate had no set period for questions; nor was 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. The Upper House has always functioned on the assumption that Senators, being mature legislators, have less need for the detailed rules of procedure and continuous vigilance of the presiding officer that one finds in the Commons.[3] In the new circumstances the Senate became rather disorderly very quickly.

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The minority Clark government was short lived as the Liberals under Pierre Trudeau recaptured control of the House in the 1980 election. However, with an absence of sufficient elected members from the western provinces Mr. Trudeau also decided to compensate by appointing several western Senators to the Cabinet. The Upper House continued to function more and more like a miniature Commons, a tendency reinforced by the appointment of several young and active MPs by Mr. Trudeau and his successor, John Turner, just before the 1984 election.

In 1984 the Conservatives won a massive electoral victory. The new Prime Minister, Brian Mulroney, had representation in the House from all parts of the country, and appointed only one Senator to the cabinet to serve as Government Leader in that Chamber. The Liberals still had a large majority in the Upper House but the absence of ministers with departmental responsibility reduced interest in asking questions since the Government Leader could simply take the question as notice and forward it to the responsible Minister in the House of Commons who would report the answer back through the Government Leader in the Senate. Soon, Liberal Senators began to find other ways to hold the government accountable. After delaying several bills and forcing amendments to others their strategy reached its logical conclusion with the refusal to consider legislation arising from the free trade agreement unless there was an election.

That there have been so few deadlocks between House and Senate is due largely to long periods of one party dominance resulting in the same party holding a majority in both Houses throughout most of Canadian history. When the House and Senate were controlled by different parties, the appointed Senate, after making its objections, usually yielded to the will of the popularly elected House. The convention of responsible government was interpreted to mean responsibility to the elected Chamber. This understanding and the conditions that made it possible have been changing for at least a decade. The free trade debate merely marked the culmination of this process. But such understandings or conventions, once broken, are not easily re-established. While it would be foolish to expect the Liberal majority in the Senate to use its position to obstruct the Mulroney Government at the start of its second mandate, as time goes by and issues emerge the Senate will surely be tempted to build upon precedents established during the last few years in its attempt to assert a larger voice in the Canadian political process. It is within the power of the Senate to completely tie up a government thereby forcing it indirectly, if not directly, to call an election.

For the immediate future the important point for observers of Canadian politics is to realize that we have a form of "divided government" *without* any effective dispute resolution mechanism. The Fathers of Confederation are often maligned for not anticipating all the consequences of modernity but one problem they did anticipate was the possibility of disagreements between the House and Senate. They envisaged a mechanism for joint conferences to work out such disputes. This procedure has been used so little, the last time in 1947, that no one really knows how it should operate. Perhaps a special joint committee should be established to look at the way other federations, including the United States, deal with the issue.

The Meech Lake Accord

Canada is on the verge of some important constitutional changes that must be examined in the context of developments since the 1976 election in Quebec. In that year René Lévesque and the Parti Québécois came to office on a platform that promised a referendum on the question of Quebec independence. The referendum was held in 1980 and the NO forces prevailed. During the debate Prime Minister Trudeau and other federalist leaders promised, albeit vaguely, a better deal for Quebeceurs if they defeated the referendum. In line with this promise Prime Minister Trudeau called all the provincial premiers to a constitutional conference at which he proposed a constitutional amendment to establish a Charter of Rights and Freedoms.

The Charter set forth several categories of rights including: fundamental rights (speech, religion), legal rights (freedom from arbitrary arrest, right to counsel), democratic rights (right to vote) mobility rights, and equality rights. It also contained a section giving constitutional recognition to English and French as official languages and guaranteed certain rights for English and French language education, wherever numbers warrant, across Canada. He also proposed to "patriate" the constitution with an amending formula that would not require reference to the United Kingdom for future amendments.

When the conference failed to agree on the proposals Mr. Trudeau announced the federal government would proceed without provincial approval to ask Great Britain to make the changes. His plan to act unilaterally was opposed by all the provinces 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 it was incompatible with the doctrine of parliamentary supremacy; 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 go ahead with his threat because a last minute political compromise succeeded in winning over all the opposing provinces except Quebec. It was 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. For example, 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 notwithstanding clause again if it wishes. The other rights are not subject to the notwithstanding clause.

All the governments, except Quebec, also agreed on an amending formula which, while requiring unanimous consent of all the provinces in a few areas, such as changes to the Supreme Court, provided that most other amendments would require the support of parliament and 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 amending formula were submitted to and passed by the British Parliament.

Quebec had many problems with the 1982 changes. For one thing the 2/3 and 50% provision effectively eliminated what it claimed had been a traditional veto right for that province over constitutional amendments. Provisions of the Charter relating to minority language education also rendered unconstitutional some Quebec education legislation. To mark its displeasure the Quebec government, still led by Rene Lévesque, refused to participate in federal-provincial conferences except as observers and systematically prefaced every bill introduced in the National Assembly with a clause stating that it operated notwithstanding the new Charter of Rights.

By 1985 Mr. Trudeau, Mr. Lévesque and their respective parties were out of office and the new governments led by Brian Mulroney in Ottawa and Robert Bourassa in Quebec promised to bring Quebec back into the constitutional fold. Mr. Bourassa established five conditions for accepting the 1982 changes.

- Recognition in the constitution of Quebec as a distinct society.
- Changes in the amending formula to re-instate Quebec's veto right over amendments.
- Participation in the appointment process of Supreme Court judges.
- Constitutional guarantees of an increased role in immigration policy.
- 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 discussions with the other Premiers, some of whom added their own items, such as a new method of appointing Senators from lists submitted by the provinces, an agreement was signed in 1987. Under terms of the 1982 amending formula the Accord had to be approved by Parliament and all ten provinces. Unlike the 1982 amendment which required the consent only of the governments, it was agreed that the 1987 amendments would be submitted to the legislatures in each jurisdiction for ratification. So far Ottawa and eight provinces have given their approval. Two provinces where

there have been elections and changes in government since the Accord was signed (Manitoba and New Brunswick) are threatening to withhold consent unless certain changes are made.

If the Meech Lake Accord, or some modified version is adopted by June 1990 [4] we will have seen, in less than a decade, changes that reflect some American assumptions about the political process. These include the need for a Charter of Rights limiting the powers of all levels of government, a sharing of certain appointment powers formerly held by the Prime Minister and a movement toward a system characterized more by checks and balances less by responsible government.

Reform of the House of Commons

Aside from constitutional changes during the last decade there have also been a number of important reforms to the rules of the House of Commons. Indeed, soon after taking office Mr. Mulroney made it clear that one of his priorities was reforming an institution which had reached a nadir in 1982 during the so-called "bells crisis" – a shut-down of the Chamber caused when the Official Opposition refused to appear for a vote and the Speaker let the bells ring for 14 days and nights until the parties had worked out a compromise.

The Office of Speaker

Nothing personifies the principles of parliamentary government more than the office of Speaker of the British House of Commons. The historic struggle between Crown and Commons produced an office dedicated to upholding the rights of the individual members against the government and acting as a spokesman for the House collectively. For historical and social reasons the Canadian Speakership never enjoyed the prestige and independence of its British counterpart. But only recently did legislators realize that the conditions responsible for the strength of the British Speakership may not be reproducible. The need for imitation was less than the need for innovation.

One of the first recommendations of the Special Committee on Reform accepted by the Government and adopted by the House was that the Speaker 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 their considerable authority as exemplified by former Speaker Sauvé during the Bells crisis. By contrast the first Speaker elected by the secret ballot process, John Fraser, has indicated he is willing, if necessary, to play a more active role to foster 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 the House the Speaker took the initiative in suggesting this was an infringement of the rights of the House and eventually the Senate reconsidered its position.

Both issues were more political than procedural. With the House and Senate controlled by different parties for the foreseeable future and no dispute settlement mechanism in sight, we may see a continuing role for the Speaker in expediting parliamentary business and as spokesman for the House vis-à-vis the Senate. In fact having given the Speaker a very powerful mandate it would not be illogical if, over time, legislators begin to expect more leadership from the Chair in certain areas such as time allocation. Of course such a development will not happen overnight. It may take a couple of minority parliaments to establish the full powers of the new Speakership. But ultimately we may see an office having more like the Speakership of the U.S. House of Representatives and less like that of the British House of Commons.

The Role Of the Private Member

The business of the House of Commons is, for the most part, controlled by the government. It decides which bills are introduced, how long they are debated and, assuming it has 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 constitutes an expenditure can be rather subjective and is ultimately decided by the Speaker.

In the past these bills, after being discussed for one hour, were usually dropped from the order paper without as much as a vote. Under the new rules bills and motions are still drawn for by lot but the decision as to which bills come to a vote rests with a Committee on Private Members Business. This obviously encourages lobbying, coalitions and horsetrading across party lines 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 a hundred years ago. In fact, if Canadian politicians are criticized for being obsessed with process perhaps it is because 75% of elected members (i.e. those not in the cabinet) have little input into day-by-day policy-making so there is an understandable tendency to concentrate on process and problems of constituents.

Has the reform of private members business make a difference? 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 McDonald

an NDP member introduced a bill to prohibit 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 did not. Lynn McDonald's bill became law, preempting the government on this issue. Not exactly a revolution but something that would not have happened five years ago.

The Committee System

A legislative body with nearly 300 members is not an effective forum for many kinds of debates so it is not surprising that most work of the House is done in committees. Without going into detail about the structure and operation of the committee system before and after the recent reforms, a few general points should be kept in mind.

In reforming their committee structure Canadian legislators made a conscious effort to avoid the more anarchical features of the congressional committee system, such as the proliferation of subcommittees. On the other hand the objective of the reform was to make committees less dependent on the executive. For example in order to undertake studies committees formerly needed a reference by the House which in effect gave the cabinet pretty close control over committee activity.

Now every standing committee can, without a mandate from the House, launch its own study or investigation into matters falling within its jurisdiction. To obtain money to travel or to hire staff its budget is approved by a committee made up of the chairmen of all standing committees and chaired by the Speaker. Thus, a hierarchical system of operating and thinking has been replaced by a more egalitarian one whereby chairmen and members have to lobby each other to see "who gets what, when".

During the last parliament the best example of a committee operating as envisaged by the new rules was the Standing Committee on Finance. 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.[5]

The greater freedom has not produced any discernable problems for the government or any serious breakdown in party discipline. Committee chairmen are about two steps removed from the cabinet and, human nature being what it is, they would have to think very hard about jeopardizing their chances for promotion by being too critical. Nevertheless a framework has been provided for a much wider participation in the legislative process and further movement in this direction can be unexpected.

Review of Appointments

Traditionally Canadian parliamentarians have had little experience with scrutinizing government appointments. During the 1984 election campaign Mr. Mulroney suggested that patronage could be reduced if there were some kind of legislative scrutiny process. This question too was referred to the Special Committee on Reform of the House.

From the very outset some argued that an American type confirmation process was incompatible with the principles of responsible government. After long and difficult debate the reform committee recommended two categories of appointments for scrutiny. One did not give any veto power to members of the legislature and would apply to deputy ministers and heads of some crown corporations. The other would be used for appointments to a few specified regulatory agencies having a substantive policy making role with little executive control over their activities. Appointment to these agencies would be automatically referred to the appropriate parliamentary committee. Should the committee report negatively on a nominee the government would be obliged to withdraw the nomination.

This latter part of the recommendation was eventually rejected by the government. The result is a situation whereby nominees are examined by committees but their appointment cannot be stopped. Presumably adverse publicity itself is enough to discourage unsuitable appointments. But one must wonder if this argument holds much appeal to parliamentarians. Having started down the path of scrutiny will they not seek to enlarge their role in the review process? Again, it may take a minority parliament before the issue is revived. Or, the review of appointments might eventually be considered as part of Senate reform which is where it probably belongs.

Conclusion

Canadians have always been attracted by certain aspects of the American political system – federalism in the last century, the Bill of Rights in this one. Does this mean we are on the way to full scale congressionalism? I do not think so. For one thing, in practical terms the American legislature's distinctiveness derives not so much from a different constitutional theory as from the process by which Members of Congress are elected and the independence this gives them vis a vis their party.

The American laissez-faire approach to voter registration and primaries, their ritualistic conventions and debates, and their methods for election financing and reapportionment hold little attraction for most Canadians. Without significant

changes in Canadian electoral law and party organization there is little cause to worry about Canada's parliamentary system becoming "congressionalized". Sir John A. Macdonald was a great admirer of the American form of government and never hesitated to borrow ideas. H e sought to improve upon defects which time and events had shown to exist in the American system. This is probably still a good rule of thumb for Canadian reformers.

Notes

1. Numerous authors have written about the differences between American and Canadian political culture. See for example, Edgar Z. Friedenberg, *Deference to Authority*, M.E. Sharpe, Inc., White Plains New York, 1980.

2. The origin of most reforms since 1984 will be found in the *Report of the Special Committee on Reform of the House of Commons*, Ottawa, June 1985. Also known as the McGrath Report.

3. See statement by former Senate Speaker Allister Grosart, Senate *Debates*, October 18, 1979, pp 115-116.

4. Some of those responsible for signing the agreement are under the impression that the Agreement expires if it is not ratified by the legislatures in three years, June 1990. Other experts maintain there is no deadline and argue that the Supreme Court should be asked for its opinion on the question. (See Gordon Robertson, "No deadline for Meech Lake" *Globe and Mail*, June 20, 1989.

5. See Robert J.O. O'Brien, "The Finance Committee Carves Out a Role" *Parliamentary Government* Vol. 8 No. 1 pp. 3-10.