

Seven Observations on Parliamentary Reform

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My first exposure to parliamentary reform goes back to the 1970s when as a Library of Parliament researcher I was attached to a three person sub-committee on the Use of Time. The members were Marcel Lambert, John Reid and Stanley Knowles.

Mr. Lambert, a former Speaker had a huge office in the Confederation Building with a well stocked liquor bar where our weekly meetings were held. Discussions were remarkably freewheeling and not just because of the alcohol. Mr. Knowles as I recall was a tee totaler.

Every week the young John Reid would put forth one radical idea after another. Knowles, a parliamentary icon and an architect of the 1960s reform, would mercilessly shoot them down.

At one point Reid remarked to me that perhaps Jerry Rubin's famous observation should be applied to parliamentary reform --- "Never trust anyone over 30." I would not go that far but I did observe how difficult it can be to take on the status quo. Opposition will often come from unexpected places and what constitutes reform is mainly in the eye of the beholder.

My next observation goes back to 1984 when I was a researcher for the McGrath Committee. The Chairman asked me to prepare a paper comparing certain procedures in Canada and Britain. A few days later McGrath called to thank me and he said "so that is how the British do it—Well, we certainly do not want to do it that way."

Professor David Smith made this point more elegantly in a 2002 article entitled "The Westminster Model in Ottawa: A Study in the Absence of influence"¹

I have difficulty accepting the idea that we cannot look to the most successful parliamentary democracy for ideas and inspiration. But Canadian politicians delude themselves when it comes to our parliamentary institutions. We send people abroad to lecture about parliamentary democracy while our own struggles to perform the most basic functions.

A third observation, also from my time with McGrath, is that reform works best when members approach the task with an open mind. My favourite example is the

¹ David Smith, The Westminster Model in Ottawa: A Study in the Absence of Influence, *British Journal of Canadian Studies* vol 15 nos 1 and 2, 2002 pp. 54-64. See also David Smith, The Crown and Parliament in Canada, paper presented to a Canadian Study of Parliament Group conference on the Crown, Ottawa, May 23, 2014

decision to elect the Speaker by secret ballot. Alternation of the Speakership was a longstanding parliamentary practice if not a hard and fast convention.

I remember there was much speculation, at least among staffers, that when push came to shove André Ouellet, the senior francophone member on the Committee, would oppose an elected Speaker and this would scuttle the idea. But when McGrath went around the table Ouellet agreed that alternation had outlived its usefulness. The public interest would be better served by a secret ballot election.

A fourth observation is to keep House Leaders a good distance from the reform process. In the 1960s Speakers Macnaughton and Lamoureux were central figures in the reform movement. In some provincial legislatures Speakers still play an active role. Unfortunately Ottawa Speakers have long ceased to be players. If they make occasional references to a need for reform they invariably suggest the matter be taken up by the procedure committee which is firmly in control of the leadership.

We could use something like the British Speaker's Conference which is a body appointed and chaired by the Speaker with members from all parties that can be used to examine certain process issues. These have been used mainly for electoral issues in the UK but we could find other uses for them.

The practice of putting House Leaders or their parliamentary secretaries on reform committees is like putting the fox in charge of the sheep. Under Jean Chrétien we did see creation of two Special Committees on Modernisation but the Government and Opposition House Leaders were members and nothing could be approved without their agreement.

Paul Martin showed what can happen when you involve the leadership too closely. His much heralded *Action Plan for Democratic Reform* was actually drafted by the Privy Council Office with a preface by the minister of democratic reform.² What better way to ensure rejection of a parliamentary reform plan than to have it drafted by the PCO without opposition input.

² See <http://www.pco-bcp.gc.ca/docs/information/publications/aarchives/dr-rd/docs/dr-rd-eng.pdf> One precedent for such an approach was Walter Baker's 1979 *Position Paper on Parliamentary Reform* also produced by the PCO but it was clearly labelled a discussion paper and was referred to the Lefebvre and McGrath committees.

Mr. Harper has gone beyond Chrétien or Martin and virtually shut down discussion about reform unless it comes in the form of private members bills or opposition day motions.

The McGrath recommendations were not even submitted to caucus let alone to the House Leaders. Can anyone image that happening today?

A fifth observation is that certain reforms seem to have as their objective the convenience of members rather than the good of the institution. Let me give some examples.

One is the 1980 agreement between the House Leaders and Speaker Sauvé, establishing that henceforth the Speaker would use lists provided by the whips for the recognition of members during question period. This is very convenient for the Speaker, for members and for the leadership. But I do not see any advantage for the institution.

Indeed I have argued in another paper that this change has helped create an atmosphere where members believe that the Speaker counts for very little and the leadership counts for everything. The only rules are what the leaders say.

I am not suggesting that a Speaker with more discretionary powers would cure all that is wrong with our parliament but it would be an important symbolic step to returning some dignity to the House.

The present Speaker has ruled that he retains the full power to recognize who speaks in Question Period and in debate but for reasons of convenience he chooses to continue the 1980 practice.

Since we have a process to elect Presiding Officers it is open to candidates in the next election for Speaker to indicate if they would go back to the traditional system. I hope at least one of them will give serious consideration to that idea at the appropriate time.

A second example of reform for convenience is the parliamentary calendar. In the 1990s changes were made when two unrelated forces came together. One was the goal to make Parliament a family friendly place without evening sittings and with more breaks.

The other was the newly established Reform Party whose members believed that the role of an MP is first and foremost to consult their constituents and find out what their electors wanted them to do. They wanted more time at home and less time in Ottawa.

The result is the House's present calendar whereby in a normal year, with no election, there are 29 weeks off and 23 weeks on. The highest number of sitting days in a single year over the last decade is 129. Many years the number has been under 100. In the 1980s in a normal year the House sat about 160 days per year.

The effect of the present calendar is to leave fewer hours for House and committee work, to encourage obstruction to get to the break weeks. It has resulted in a vast expansion of the use of time allocation and even the dreaded omnibus bills can be seen in part as a reaction to the constricted schedule.

Members get angry when journalists refer to break weeks as holidays. MPs are busy and meet with various constituents and interest groups but it is a holiday from parliament and from their duties to hold government to account.

A sixth observation is that more voting does not necessarily improve our procedures.

One example is the Allotted Opposition Days. These were introduced in the 1960s in return for the Opposition giving up its ability to hold up supply indefinitely. Originally only one or two of these motions were votable. The other days were essentially what we now call take note debates where members express their opinion but there is no formal vote at the end.

The absence of a vote was frustrating to many and gradually the number of votable opposition days increased until today they are virtually all votable. In a majority parliament every opposition motion is defeated. But during the five years of minority government a number of opposition day motions were adopted and subsequently ignored by the government. Such motions, the government said, were not really binding.

But when they dealt with a change to the parliamentary rules they did seem to be binding. And when they contained a motion of non-confidence they were absolutely binding. On two occasions this resulted in the defeat of a government.

How can the same motion under the same rules be either binding or non-binding? And if a government can ignore a vote on an allotted day why could it not declare a non confidence vote on an allotted day to be merely an expression of opinion, ignore it and prorogue Parliament for up to a year until the fixed election date.

What we need is a separate procedure for non-confidence votes that has nothing to do with the allocated days. Quebec has done this and I do not see how any self-respecting parliament can allow the timing of confidence votes to be left exclusively in the hands of the government which schedules or cancels them as it pleases.

Another example of where more voting provoked undesirable consequences is private members' business. It has been reformed by making all bills votable, which seems like a logical idea but in fact has helped render private members business much more partisan and much more an extension of government business, which the government has not hesitated to use as a short cut to implement parts of its agenda.³

A seventh observation is that we are badly served by a general failure to update or at least periodically review our democratic institutions and practices

Insofar as the House of Commons is concerned I think the whole notion of parliamentary privilege is badly in need of review. Before I give some examples let me acknowledge the recent Discussion Paper by the Senate on this topic.⁴ It contained no recommendations but is a small step in the right direction.

In the lower House the last report on privilege was a generation ago. So perhaps it is not surprising that during the period of minority government and even beyond we have seen some dubious precedents established. For example:

- We saw a committee find an RCMP witness in contempt for lying in what was basically a dispute about who said what and when. This eventually led to a law suit and an apology.
- We saw a Chair badger a witness by threatening to find him in contempt if he did not answer a question even though it takes a vote of the whole house, not just the committee, or the Chair to find someone in contempt.
- We saw a public accounts committee determined to charge a witness with perjury for discrepancies in his testimony before the House and the Gomery Commission.
- We saw several committees insist on witnesses testifying under oath and then denying witnesses' lawyers the ability to speak to what they perceived as violations of due process in the procedure or the questioning of their clients.
- And perhaps most famously we saw a government found in contempt of parliament supposedly over the production of documents but in reality in order to set the stage for a non confidence motion and an election campaign.

This wooly headed idea about contempt only devalued the concept. Yet incredibly the tactic was copied a few month later in the minority Parliament of Ontario.

³ According to Kinrad Yakabuski the current PMO has "repurposed the private member's bill as a vehicle for advancing the government's tough on crime legislation. *Globe and Mail*, September 8, 2014.

⁴ Canada, Senate, Sub-committee on Parliamentary Privilege of the Standing Committee on Rules, Procedures and the Rights of parliament, *A Matter of Privilege: A Discussion Paper on Parliamentary Privilege in the 21st Century*, January 2015.

Hopefully we will not see this again as it has twice proven unsuccessful electorally and is clearly an abuse of the idea of privilege.

Personally I think members need to educate themselves about privilege. One way to do this might be to try and codify it as some other Westminster parliaments have so that everyone has an idea what it means and what it does not mean. Even if we fail to agree on a statute the attempt would be useful.

The main argument against codification is that it gives powers to the courts to intervene in an area where they have been reluctant to go. This could be addressed by using the notwithstanding clause to pass the legislation. Of course that expires every five years but by happy coincidence (or maybe not a coincidence) that is exactly the maximum life of a parliament so the statute could be renewed at the start of every parliament as an ongoing reminder of the inherent privileges of parliament.

Conclusion: A few years ago I gave a lecture with the provocative title “Who Killed Parliament” Much to the dismay of the audience I did not name names but suggested many shared the blame including recent Prime Ministers, Speakers, House Leaders, and of course the members themselves.

After more reflection, and having read David Smith’s book, *Opposition in Canadian Politics*, I have refined my ideas somewhat.

Smith argues the 1993 election was a watershed. The two new parties, Bloc and Reform, did not, for different reasons, support the institutional status quo. Reform, in particular, did not share many assumptions that underlie a traditional Westminster system. So when the spirit that motivated Reform came to power in the embodiment of the Conservative Party we found ourselves with a government much more in tune with American style democracy and with little patience for the traditional Westminster approach.

I am not thinking of just fixed date elections, balanced budget legislation, a partisan approach to election laws or even the Burkean concept of a Member of Parliament as one who exercises his own independent judgement.

In our parliamentary institution unlike the American one the checks are largely self-restraint on the part of the executive, an ethical sense of fair play, and the existence of independent officers like the Speaker, the Governor General and the Clerks who are willing to stand up to Executives determined to get their way at any cost.)

The term accountability also seems to have been redefined in an American sense so that no one ever resigns for misleading Parliament or for policy blunders.

Ministers simply admit mistakes “take responsibility” like an American President and then move on

The Accountability Act is largely inspired by a free market analogy that if you make everything transparent the daylight will provide the necessary corrective mechanisms. In my view transparency is a vastly over-rated objective whose main accomplishment seems to be to keep us all focused on how much everyone spends for lunch rather than on serious debates about public policy.

Current thinking about unethical behaviour, as exemplified by Preston Manning’s recent proposal for an institute to teach ethics to legislators, relates almost exclusively to the misuse of public funds.⁵ While important that is mainly an issue of accounting and if necessary the criminal code.

What is really unethical is proroguing parliament in the face of a non confidence motion, calling elections in spite of fixed election legislation, changing the composition of the Supreme Court in a Budget Implementation Bill, tampering with audits, non-consensual changes to electoral law, refusing to engage witnesses critical to the government. There is a long list.

A truly comprehensive public ethic would concern itself with the misuse of power, and what contributes to a healthy democracy, and a healthy Parliament

The last ten years has been a difficult time for our parliamentary institutions. But a decade is not long in the life of a nation. Most of the problems could be addressed by an appropriately mandated special committee on reform in the new parliament. Failing that we might consider a more ambitious Royal Commission on Governance as advocated by the former Parliamentary Budget Officer.⁶

Will any political party make that part of its platform in the coming election? High powered political strategists tell their clients that the electorate does not care about process issues. But I think political leadership not public apathy is the key. In 1957 John Diefenbaker managed to get people riled up about the use of closure.

So it is not beyond the realm of possibility, at least in my world, that reform could emerge as an issue in the fall campaign. For the moment that prospect is enough to keep me happy.

⁵ See Preston Manning, Let’s train our leaders to be ethical, *Globe and Mail*, April 6, 2015.

⁶ Kevin Page, Royal Commission needed for institutional woes, *Whitehorse Star*, March 12, 2014.