## ARTICLES

# Reform of the Commons Thirty Years After McGrath

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*Much has changed in Canadian politics since the last serious attempt at House of Commons reform. Parliament has been diminished somewhat by one of its own creations — the Charter of Rights and Freedoms. Trade agreements have intruded into matters such as cultural policy, generic drugs, water and energy policy once within Parliament's purview but now partly or completely outside. With advances in polling and social media MPs no longer play the same role in telling party leadership what people are thinking. An anti-politician cult developed in the early 1990's when the controversies surrounding the Meech Lake Accord and the Charlottetown Accord, rightly or wrongly, contributed to a jaded view of politicians.*[1] *However, the House of Commons remains central to our democracy and discussion of its improvement needs to start with a document entitled Reform of the House of Commons, (commonly known as the McGrath Report) tabled almost exactly thirty years ago.*

## 1. THE MCGRATH PROCESS

The first point about the McGrath reforms is that "they should in all accuracy and justice be called the Lefebvre/McGrath reforms."[2] Both committees started from the perspective that the goal of reform was to enhance the role of the ordinary member in the parliamentary process.

The Third Report of Lefebvre led to a number of changes relating to scheduling such as: a fixed parliamentary calendar, the end of evening sittings, shorter speeches (20 minutes) a 5 minute question and comment period, smaller committees, less flexible substitution of members, a requirement for government responses to committee reports, continual review of the standing orders, and a number of simplification and clarifications of House documents.

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1 For a more detailed discussion of these points see Bill Blaikie, *The Blaikie Report: An Insider's look at Faith and Politics* (Toronto: United Church Publishing House, 2011).

2 The Special Committee on the Standing Orders met from June 1982 to September 1983. It was succeeded by the Special Committee on Reform of the House of Commons which met from December 1984 to June 1985. Between them they met 120 times (73 by Lefebvre) and produced 13 reports (10 by Lefebvre). See Magnus Gunther, "The Lefebvre and McGrath Committees: A Review" in Magnus Gunther and Conrad Winn, *House of Commons Reform* (Ottawa: Parliamentary Internship Program, 1991) at 233.

Its Fourth Report (not adopted) dealt with the election of the Speaker by secret ballot. Lefebvre went on to produce six more reports on a variety of subjects but none were adopted by the House before the 1984 election.

The first and second McGrath reports dealt with the items carried over from Lefebvre including the election of the Speaker, a new process for Royal Assent, the televising of committee meetings and a change to Standing Order 1 substituting Canadian legislatures for the United Kingdom as a source of precedent in situations not provided for in the Standing Orders.[3]

A couple of important recommendations in the second report were never acted upon. McGrath proposed introduction of an electronic voting system which would not only speed up voting but might encourage members to vote more independently compared to the present stand and be counted system. It also proposed creation of the "Intendant of Parliament" to have responsibility over the entire precincts of Parliament, Thirty years later, in the area of security, we are still wrestling with problems of divided authority over the parliamentary grounds and buildings.

The reform process that led to the McGrath Report was unusual in that it carried over from one parliament to the next, despite a change in government. Also unusual in light of subsequent experience, both Lefebvre and McGrath were Special rather than Standing Committees and Government and Opposition House Leaders were not members.[4]

The size of the McGrath Committee was unusual. The Chairman had lobbied for a five-member committee whereas the government wanted fourteen. They eventually settled on seven.[5] There was only one Liberal, André Ouellet and one NDP member, Bill Blaikie. The others were Progressive Conservatives. The Chairman discouraged substitutions and no alternate members participated in the work of the committee.

Leadership was important. Tom Lefebvre and James McGrath were senior, highly respected members of the House. Lefebvre, a businessman from Pontiac, Quebec had little expertise in parliamentary procedure but was a former Whip known for getting people to work together. McGrath from Newfoundland was a parliamentary secretary in the Diefenbaker government and Minister of Fisheries under Joe Clark. Experience had left him with strong views about reform.

In both committees there were few formal votes. Nothing was adopted unless the senior members of each party were onside. Members were prepared to look at issues with an open mind. For example, there was much speculation, at least among staffers, that Mr. Ouellet, a leading Quebec member, would oppose an elected Speaker because of the longstanding tradition of alternation between French and English Speakers. But when the Chair went around the table Ouellet agreed that alternation had outlived its usefulness and the public interest would be better served

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3 House of Commons, Special Committee on Reform of the House of Commons, *Final Report* (Ottawa, 1985) App 8.

4 Lefebvre had been a 20 person committee which included five former Conservative and Liberal Cabinet Ministers. Two former House Leaders, Walter Baker and Ian Deans were also members as was Jim McGrath, Bill Blaikie, Albert Cooper and Benno Friesen all of whom later became members of the McGrath Committee.

5 Magnus Gunther, *supra* note 2 at 253.

by a secret ballot election. Another example of open-mindedness was Blaikie's willingness to contemplate freer voting which was somewhat of a departure from the traditional NDP philosophy that favored disciplined voting except on limited matters of personal conscience.

Living up to the spirit of its own recommendations, the process was also unusual in that the caucuses of the respective parties were given no opportunity to veto the recommendations of the committee.[6] In fact, the McGrath Committee worked completely outside the control of the Whips and House Leaders. Only after committee members agreed on the contents of the report did the Chairman brief Government House Leader Ray Hnatyshyn.

Perhaps the most important factor in the success of McGrath was the priority given to it by the Prime Minister. The first item in the first Mulroney Throne Speech on November 5, 1984 was a commitment to establish the Special Committee. Throughout its work the Committee benefited from the openness to new ideas that came with a new government, a new Prime Minister, many new MPs and few experienced cabinet ministers.

## 2. POST MCGRATH

The first concrete result of the McGrath Report was legislation to ensure representation from both sides of the House and from the backbenches on the Board of Internal Economy. This worked well for many years but in recent time the Board has become more partisan and taken to settling issues by majority vote rather than consensus. This was never the intention of the McGrath reform.

A year later the new procedure for electing the Speaker was adopted. Over the next several years other reforms relating to Private Members' Business and Committees were adopted with all party support. But in 1991 the Government, having failed to gain all party agreement on further changes, proposed several major additions to and changes in McGrath, thereby marking the end of the McGrath consensus.[7]

The 1993 electoral upheaval brought two new parties to Parliament, the western based Reform Party and the Bloc Québécois. The election resulted in a turnover of 2/3 of the membership of the House and some major changes in the way it operated including a decline in civility.[8] For example, from the outset Reform wanted recognition as Official Opposition despite having two fewer seats than the Bloc

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6 *Ibid.*, at 245.

7 These included measures to prevent a single Member from blocking the presentation of routine motions, a reduction in the number of sitting days from 175 to 134, cuts in the length of some speeches and debates, revised procedures for the selection of private Members' bills and motions, a block system for committee meetings and easier substitution procedures and new mandates for some standing committees. See House of Commons *Debate*s, 11 April 1991. See also James Robertson, "House of Commons Procedure: Its Reform", *Current Issue 82-15e* (Ottawa: Parliamentary Research Branch, 22 February 2002) at 10.

8 See David E. Smith, *Across the Aisle: Opposition in Canadian Politics* (Toronto: University of Toronto Press, 2013) at 83–98 for a discussion of the impact of the 1993 election.

who, it argued, were supposedly disqualified because they could not allegedly, swear allegiance to the Queen.[9]

Another example of the changing climate was when Speaker Parent, with support from the three recognized parties in the House, ruled that the NDP with nine seats could not be given additional resources, a courtesy extended in the past to Social Credit when they lacked the numbers needed for official status.

Reform's populist vision of how a Parliament should work was a significant departure from parliamentary tradition. Members were there to vote the views of constituents not to exercise, in the Burkian tradition, their own independent judgment. Preston Manning often expressed his disappointment that we lacked processes such as impeachment, initiative and recall.[10] In a committee where minority reports had been used sparingly in previous years, such reports became almost routine as both Reform and the Bloc took advantage of this procedure to put their views on record.

After 1993 we had a situation where the two largest opposition parties did not really accept basic aspects of the Canadian parliamentary system and the government no longer looked upon the Official Opposition as a government in waiting. The two sides saw each other as enemies rather than adversaries.

The Chrétien approach to parliamentary reform was not unlike his approach to constitutional reform. He was wary of it. He did approve creation of a Special Committee on Modernisation but unlike Lefebvre/McGrath, the Government and Opposition House Leaders were members and nothing could be approved without their agreement. Mr. Harper has gone beyond the Chrétien approach and virtually shut down discussion about reform unless it comes in the form of private members bills or motions or opposition day motions.

The 2005–2011 minority Parliaments of Martin and Harper were a time when one might have expected some progress on reform, but the House became completely dysfunctional during these years.[11] A low point was Paul Martin's much heralded *Ethics, Responsibility, Accountability — An Action Plan for Democratic Reform*. Some proposed reforms, like the three line voting system, had nothing to do with parliamentary reform and all were drafted and published by the Privy Council Office.[12] What better way to ensure rejection than to draft them without opposition input?

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9 For an explanation of this logic, albeit many years after the fact, see James Bowden, Her Majesty's Loyal Opposition, in *Parliamentum.org* posted on August 27, 2011. In 1994 the numbers were equal at 52 each and the Speaker ruled that the Bloc, on the basis of incumbency, could continue to be the Official Opposition

10 Smith *op. cit.* at 85.

11 For an excellent study on Canada's Dysfunctional Minority Parliament see Robert Hazell and Akash Paun (eds) *Making Minority Parliaments Work: Hung Parliaments and the Challenges for Westminster and Whitehall* (London: Constitution Unit, University College, 2009) at 25–38

12 Online: 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 article and was referred to the Lefebvre and McGrath committees.

The *Accountability Act*, adopted during the first Harper minority government, was a serious attempt at reform with creation of a Parliamentary Budget Office being the most important change. But the *Act* also represents a new way of thinking about reform. Accountability is viewed more in terms of new codes of conduct and transparent record keeping in the expectation that transparency, like the free market, will force people to behave in certain ways.[13] The *Accountability Act* continued the trend of contracting out the responsibilities of parliamentarians and giving the resources necessary to carry them out to appointed Officers of Parliament.

The term accountability also seems to have been redefined 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. This new kind of thinking has no time for the old fashion procedural reform attempts articulated by McGrath years ago and Michael Chong in more recent times.

The following sections look at the issues considered by McGrath thirty years ago and the situation today.

## 3. THE SPEAKERSHIP

Election of the Speaker of the House by secret ballot was the best known recommendation to emerge from the Lefebvre/McGrath process.[14] It was felt the House should exercise a more direct control over the nomination of candidates for the speakership because the Speaker "belongs to the House, not to the Government or the Opposition." It recommended the Speaker be elected by secret ballot from a selection of candidates at the beginning of a new Parliament, instead of being nominated by the Prime Minister and ratified by the House as was the custom.

The election would be presided over by the Dean of the House, or the senior private Member present, and ballots would be taken until one candidate received 50% of the votes cast. The election was intended to be both symbol and substance of McGrath's overall purpose of returning more power to Members of Parliament, both individually and collectively, by enhancing the status and power of the chair.

A few months after tabling the McGrath Report, Speaker John Bosley resigned and an election was held to replace him. The first use of the secret ballot took over eleven hours due to the lack of a mechanism to minimize the number of votes necessary. Only the candidate with the lowest number of votes could be removed which resulted in eleven ballots.[15] This was easily remedied by the next time the Speaker was elected.

The 1986 election of John Fraser as Speaker began a trend whereby a candidate perceived to be favoured by the Prime Minister could be at a disadvantage. This was especially true if the government caucus was divided, creating a situation where sometimes opposition members and dissident government numbers added up

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13 See "The Unaccountable Federal *Accountability Act*: Good-bye to Responsible Government?" 3 Revue gouvernance 2, Fall 2006, at 30–42.

14 The idea goes back to when Jeanne Sauvé became Speaker. She had not served a day on the backbenches and some of her subsequent procedural and administrative actions caused members to have doubts about the traditional practice of selecting the Speaker.

15 Gary Levy, "A Night to Remember: The First Election of a Speaker by Secret Ballot" 9 Canadian Parliamentary Review 4, 1986-87, at 10–14.

to the election of someone whose election had neither been predicted nor preferred by the government.[16]

The secret ballot made the selection of Speaker more independent of government but it has not really led subsequent Speakers to "show leadership in promoting and safeguarding the interests of the House and its members" as hoped for by McGrath.

Leadership by the Chair could be helpful in Question Period. The Standing Orders clearly provide that the Speaker may choose which members ask a question by calling upon those who catch his eye. In fact, each party decides daily which members will participate and provides a list of names to the Speaker. According to Robert Marleau, former Clerk of the House, the use of lists emerged following private discussions between Speaker Sauvé and the party whips. Senior members of the McGrath Committee remembered fondly the time when the Speaker had discretion that could be used in a disciplinary way. If MPs misbehaved they could be sent the appropriate message by repeatedly being ignored by the Chair when they sought the floor during Question Period.

While McGrath made no recommendation about Question Period much has changed since 1985. For one thing, it is virtually impossible today for opposition backbenchers to engage the Prime Minister during Question Period. Former Prime Ministers from Pearson to Chrétien would normally take questions from backbenchers even if occasionally, like Mr. Trudeau, they would simply nod to a Minister to answer instead.

The sponsorship scandal changed this. The Opposition used entire periods to question Prime Minister Martin. Eventually he began accepting only questions from the Opposition Leader and Leader of the Third Party. Other questions were then taken by other Ministers even if addressed to the Prime Minister. Mr. Harper has followed this policy and it is now almost impossible for anyone other than a party leader to engage the Prime Minister. As a result during the Senate scandal and on a few other issues, Opposition Leader Tom Mulcair has taken to commandeering most of the questions allotted to his side since this was the only way to make sure the Prime Minister would respond.

A second change started under Speaker Parent in 1997 also following a private meeting with the House Leaders. It is the enforcement, with a stopwatch, on the time to be allowed (35 seconds) for questions and answers. This was adopted at the time of the so called "pizza parliament" with five parties vying for time in Question Period. The rationale was to allow as many questions as possible but in order to get the question and answer in the tight time frame most questioners resorted to reading prepared texts and ministers responded with prepared written answers.

A third change in recent years has been the tendency of Speaker Scheer to allow Ministers to answer a question from the opposition with a question to the opposition. An extreme example was the recent "Calandra incident" where a parlia-

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16 John Fraser was selected over Quebec MP Marcel Danis, widely thought to be the government's favourite. Gilbert Parent, in 1993, won over former Liberal Whip and preferred government candidate Jean-Robert Gauthier as a result of support Parent received from the Reform Party due to his profile as a pro-life MP. Both Speaker Peter Milliken and Speaker Andrew Scheer were Deputy Speakers before becoming Speaker.

mentary secretary repeatedly answered a serious question about the number of Canadian troops in Iraq with a question to the Leader of the Opposition about his opinion on an unrelated tweet about Israel.[17]

Mr. Mulcair criticized the Speaker for not disciplining the parliamentary secretary and subsequently introduced an opposition day motion giving the Speaker authority to deal with relevance in Question Period in the same way as in debate. The motion was defeated but the problem was not really relevance. Ministers have always obfuscated or simply refused to answer certain questions. But turning around and answering questions with another question flies in the face of a basic understanding whereby government answers to the opposition not vice versa.

Question period has never been a two way street. Yet, incredibly during debate on the NDP motion Government House Leader, Peter Van Loan, made the argument that Question Period actually IS a two way street and it is only fair that the government be permitted to question the opposition.[18]

The standing orders alone cannot prevent another Calandra incident but if we had a strong Speakership perhaps there would have been a statement much earlier that stopped the unparliamentary practice of answering questions with a question. Left unchallenged by competent authority the Van Loan understanding of parliamentary government will render question period even less relevant.

If the election of Speakers by secret ballot has not led to a stronger Speakership and more use of discretionary powers, it is perhaps because of widespread misunderstanding of the oft cited concept that the "Speaker is the servant of the House" That phrase goes back to 1642 when King Charles entered the British House to seize five members. The King demanded that Speaker William Lenthall point them out and turn them over. The Speaker replied, "May it please your Majesty I have neither eyes to see nor tongue to speak in this place but as the house is pleased to direct me, whose servant I am here." It established the Speaker is servant of the House not of the King. But in Canada that phrase is too often taken to mean that the Speaker exists to carry out the will of the majority of the House. A clear expression of this was by former Opposition House Leader Jay Hill in 2005 when he told Speaker Milliken: "I would remind you, Mr. Speaker, and I know that you do not need to be reminded, that you are a servant of the House and it is my understanding that the House could collectively come to a decision and ask you to do something."[19] If this is the widely held view of parliamentarians it is going to be difficult to muster the support necessary to reinvigorate the Speakership.

Another reason for our weak Speakership is the view that politics is a team sport with the Speaker in the role of an impartial referee. According to this logic it is normal for Team Opposition to co-ordinate questioning of Team Government. Sheila Copps has argued that the public interest and the capacity to hold govern-

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17 Gary Levy, "Weak Speaker Hurts Us", *Hill Times* (29 September 2014).

18 House of Commons, *Debates*, 29 September 2014.

19 House of Commons, *Debates*, 17 November 2005.

ment to account would not be well served if questions were posed by members selected at random by the Speaker instead of from co-ordinated lists.[20]

In fact the sports analogy is a poor one. Government has many times more resources at its disposal than the opposition. The Speaker should be more like a judge in a courtroom whose obligation it is to make sure the process unfolds fairly with authority to put a stop to unfair tactics introduced by either side.

A return to the Speaker using discretion to recognize members during Question Period would only be a first step. To counter the mechanical process whereby questions and answers are often read into the record, Speaker's discretion should allow questioning to proceed without a fixed time limit or a fixed number of supplementaries. If in a Speaker's opinion a question has been answered or it has become clear that no further information is likely to be elicited he would move on to the next question. In practice this could lead to more or fewer supplementaries.

Ideally a Speaker using discretion instead of lists should know in advance the subject matter of a question and whether it is national or local in scope. This might require some kind of notice procedure so the Chair could choose judiciously as well as giving everyone a chance. Canadian parliamentarians have traditionally looked askance at legislatures that require notice for questions.[21] But if we want to improve the quality of questions and answers it is not a bad idea to consider ways to give notice.

In 2010 Michael Chong's Private Members' Motion proposed a number of changes to Question Period. He wanted to give the Speaker more power to enforce decorum, to lengthen the amount of time given for questions and answers; to examine the practice whereby the Minister questioned need not respond and to allocate half the questions each day for Members selected by the Speaker, not the Whips;

He also proposed a British style Prime Minister's Question Time on Wednesday with the other days for questions to other Ministers who would be required to be present for two of the four days.[22] The motion was debated and sent to committee but no action was taken before dissolution of the House for the 2011 election. Nor was it revived in the new House elected in 2011. We need not adopt holus bolus the British approach but we should be open to looking at its features and adopting those which could improve our Question Period.

If Speakers were to use discretion instead of lists there would have to be greater scope given to government backbenchers to question ministers, provided

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20 See the panel on the Evolution of Question Period and Proposed Changes to It, Canadian Study of Parliament Group, 21 September 2010. http://www.cpac.ca/en/digital-archives/.

21 Ned Franks argued in 1985 that "question period in Britain is sophisticated and frequently clever but it is rarely as spontaneous or dynamic as Canadian Question Period." See C.E.S. Franks, The Problem of Debate and Question Period in John C. Courtney ed, *The Canadian House of Commons: Essays in Honour of Norman Ward* (Calgary: University of Calgary Press, 1985). Thirty years later he said of Question Period "I find it so scripted and so much hyperbole both in the questions and the answers that I think it has lost a lot of its value except as entertainment" *Ottawa Citizen* (30 December 2014).

22 See House of Commons, *Debates*, 27 May 2010.

these were not the obvious set up questions that have become the norm when government backbenchers ask questions now.

In other respects it might not be that great a change. The leaders of the recognized parties and departmental critics would continue to get priority in Question Period. The parties could continue to organize informally the order in which their members seek the floor.

The issue of using lists arose in April 2013 when Conservative MP Mark Warawa claimed that during Members Statements he was denied the chance to speak on sex-selective abortion by his party Whip. In a ruling, Speaker Scheer clearly stated that the Speaker's authority to decide who is recognized to speak is indisputable and has not been trumped by the use of lists, as some Members seemed to suggest. However, he said that he accepted lists from the whips for reasons of convenience and efficiency.

Not all responsibility for the use of lists should be attributed to the Speaker or even to the Whips. As Speaker Scheer noted:

> I cannot exercise my discretion as to which Member to recognize if only one Member is rising to be recognized. . . . Were the Chair to be faced with choices of which Member to recognize at any given time, then of course the Chair would exercise its discretion. But that has not happened thus far during Statements by Members, nor for that matter, during Question Period. Until it does, the Chair is not in a position to unilaterally announce or dictate a change in our practices. If Members want to be recognized, they will have to actively demonstrate that they wish to participate. They have to rise in their places and seek the floor.[23]

While this ruling was helpful in upholding the Speaker's theoretical right to use his discretion, it will take a much stronger statement to overturn thirty five years of a practice that diminishes the most visible part of our parliamentary day.

Since the present operation of Question Period was designed and supported by the party leaders it is not clear how this could change. One way would be for an all-party committee, like McGrath, to be given an opportunity to study Question Period and to make recommendations without the influence of the party establishment. This approach has not been used for many years.

Another possibility would be that prior to the election of the next Presiding Officer one or more of the candidates made it clear that if elected he or she would not use lists in Question Period. If that candidate was elected the result could be instant reform. Of course, the candidate could lose in which case the status quo would be reinforced with added legitimacy.

Going back to the old system would greatly increase the difficulty of the Speaker's job. The Chair would be under pressure to deliver a better Question Period and might pay a heavy price if that turns out to be impossible. So it is not surprising that successive Speakers have chosen to go along with the lists and our Office of Speaker continues to be a vastly underused cog in our parliamentary system.

Aside from question period there are other areas where our House of Commons would benefit from increased use of discretion by its Speaker. One McGrath

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23 House of Commons, *Debates*, 23 April 2013.

recommendation was to strengthen powers of the Chair by making it easier for the Speaker to discipline members for breaches of order in the House.

The only sanction traditionally available to the Chair was to "name" the offending member, a procedure conventionally but not necessarily followed by the Government House Leader moving a motion to suspend the offending member, customarily for the remainder of the day's sitting. This was seen by McGrath as too mild a penalty and one that made the Chair vulnerable since the Government House leader was not obligated to move the motion, and if moved, the House was not obligated to pass it, although there was certainly a strong tradition of supporting the Speaker. The other downside of the naming procedure was that the process had a tendency to attract rather than deter those who sought opportunities to be mildly martyred for their behavior.

McGrath recommended the Speaker be empowered on his or her own to order the withdrawal of a member for the remainder of a sitting, but that the naming procedure would remain as a back-up measure, with the idea that the penalty or suspension would be more significant than had previously been the case.

This recommendation had some unintended consequences. For example, MPs are now less likely to be disciplined by the Chair, despite the ease with which this may now occur. Perhaps Speakers feel more vulnerable disciplining a member on their own. Or perhaps McGrath did not foresee how much Speakers who wished to be re-elected would be reluctant to use this measure against those who might have a say in their future. For whatever reason there has been no "naming" of a member since 2002 (and in that case it was by the Deputy Speaker).

The abusive use of omnibus bills was not addressed in McGrath, although ironically the movement for procedural reform started because of an omnibus bill that led to a boycott and a ringing of the division bells for two weeks in 1982.[24]

Recent experience with omnibus bills raises the question of what powers the Chair should possess in order to make sure that legislation is presented to the House in a format conducive to meaningful debate and decision. When a Bill to amend qualifications to sit on the Supreme Court (in order to resolve the Nadon appointment) is included as part of a budget implementation bill (later to be struck down by the Supreme Court), it is obvious the use of omnibus bills is now completely out of control.[25]

There is no specific prohibition of omnibus bills in the Standing Orders and plenty of precedents exist where Speakers have given reasons why they cannot reject or divide such bills. However some Speakers have expressed deep concern for the right of Members to make themselves heard properly and to vote separately on

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24 Charles Robert, "Ringing in Reform: An Account of the Canadian Bells Episode of March 1982" (1983) 1 The Table 51, at 46–53.

25 In a recent session 38% of government legislation was contained in budget-implementation bills, *The Globe and Mail* (15 March 2012). On the impact of omnibus bills in general see Joe Jordon, "Our federal parliamentary process is in need of a make-over", *Hill Times* (9 February 2015).

separate issues.[26] On February 19, 2015 a Private Members' Bill by Peter Stouffer was introduced to try and curb the use of omnibus bills.[27]

Other legislatures have shown how we might deal with this issue. For example in Saskatchewan a legislative committee was set up to consider the issue of omnibus legislation and reported in November 2013.[28] It codified Saskatchewan's convention on these bills.[29] The Speaker of the House, Dan D'Autremont, chaired the committee and was a strong advocate of the reform.

In Ottawa Speakers have long ceased to take a leadership role in the advocacy of parliamentary reform. If they do make occasional references to a need for reform they invariably point out the matter should be taken up by the procedure committee. That is true in a narrow sense but during the major reforms from 1963–1968 Speakers Macnaughton and Lamoureux took a leading role in in the reform process. They chaired procedure committees and used the influence of their office to advance the process.

Recent House Speakers have taken on a myriad of additional administrative duties but seem to have let fall by the wayside their role as guardians of the House and protector of the written and unwritten rules essential for its effective operation.

The Speaker could also be given a greater role when it comes to the allocation of legislative time, or at the very least the power to prevent an abuse of the government's power to limit debate on matters of high importance. In the present Parliament virtually all legislation is accompanied by strict time allocation. It will have been used more than 100 times by the time the present Parliament comes to an end.[30] There is precedent for giving the Speaker more power in regard to time allocation in other Parliaments and it is arguably even more critical if the practice of presenting huge omnibus bills accompanied immediately by time allocation motions persists

Under the current rules, the Speaker plays essentially no role, beyond enforcing the limits declared by the majority although some have argued this should be changed.[31] In 1993 the *Committee on House Management 81st Report* recommended that closure and time allocation should only be permitted when the Speaker

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26 See O'Brien and Bosc, *op. cit.* at 724–727.

27 See *Bill C-654, An Act to amend the Parliament of Canada Act (omnibus bills).*

28 Online: http://www.legassembly.sk.ca/legislative-business/legislative-committees/house-services/hos-report-5-27-legislature.

29 The first part sets out a general prohibition against omnibus bills. The second part sets out the conditions that provide for an exception to the general rule. Essentially exceptions are only allowed for bills that are traditionally called consequential amendments to other laws and laws dealing with a single broad policy.

30 Aaron Wherry, "Why is the Harper Government Using Time Allocation so Often", *Maclean's* (24 June 2014), online: http://www.macleans.ca/politics/why-is-the-harper-government-using-time-allocation-so-often/.

31 See Franks, C.E.S., *The Parliament of Canada* (Toronto: University of Toronto Press, 1987) and Thomas Axworthy, *Everything Old is New Again: Observations on Parliamentary Reform* (Kingston, Ontario: Centre for the Study of Democracy, 2008).

feels there has been enough debate, as is the case in the UK. This recommendation was not implemented.[32]

Governments and Prime Ministers can be expected to resort to any parliamentary tactics to get their way. The motivation is to survive and to enforce their will by whatever means available. A majority government can be a powerful force and we do not have an American style system of checks and balances to restrain this power. Many studies decry the excessive influence of the Prime Minister but few of them recognize that one of the checks we do have is the Speaker of the House. Canadians should be disappointed that Presiding Officers have not done more to check abuses of power and the resulting decline in respect for the House of Commons as an institution.

## 4. THE CONFIDENCE CONVENTION

The Lefebvre/McGrath decision to discuss confidence derived from a belief that Members of Parliament should not be subject to bullying by whips who would tell them that that every vote is a matter of confidence. When the Standing Orders were amended in 1968, it was specified that, in each of the three supply periods, the opposition could designate not more than two opposition day motions as non-confidence motions. "This was the first time the notion of confidence found expression in the Standing Orders."[33]

McGrath wanted to enable all MPs to be able to vote for or against opposition day motions without having to factor in considerations of confidence in their decision thereby removing the excuse for party voting for or against a motion and encouraging freer voting based on the merits of the argument. The solution for both Lefebvre and McGrath was to remove all references to confidence from the standing orders.[34]

McGrath also offered five observations (not recommendations) on the direction it believed the House should move.[35] These were based on a study by Senator Eugene Forsey and Graham Eglinton specially commissioned by the Committee.[36]

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32 See Matthew Hennigar, "The Protection of Parliamentary Democracy by the Speaker of the House" (Article Presented to the Annual Conference of the Canadian Political Science Association, Brock University, St. Catharines Ontario, 27 May 2014) at 15.

33 Audrey O'Brien and Marc Bosc, eds, *House of Commons Procedure and Practice* 2d ed (Cowansville: Editions Yvon Blais, 2009) at 44.

34 Special Committee on Reform of the House of Commons, *op.cit.* at 106–108. To this day the only reference to confidence is Standing Order 6 which says "The election of a Speaker shall not be considered to be a question of confidence in the government."

35 See House of Commons, Special Committee on Reform of the House of Commons, *Final Report* (Ottawa, 1985) at 9-10. The essence of the observations was that government backbenchers should have more freedom to vote against legislation without necessarily bringing down the government.

36 For an abridged version of this study see G.C. Eglinton, "The Question of Confidence in Responsible Government", in Peter Russell and Christian Leuprecht eds, *Essential Readings in Canadian constitutional Politics* (Toronto: University of Toronto Press, 2011) at 33–42. On the confidence convention see also D. Desserud, "The Confidence

During years of majority government there were no problems with the confidence convention although the lessening of party discipline hoped for by McGrath never took place, except to a limited extent with regards to private members' business. With the advent of minority government in 2004 the situation changed dramatically and two parliamentary crises have resulted from the absence of a proper procedure to deal with the expression of non-confidence.

The first dates to late 2003 when Paul Martin inherited not only a majority parliament but also a report by the Auditor General on what came to be known as the sponsorship scandal. All the problems took place under the Chrétien government but Martin decided to launch a public enquiry. He also called a snap election for June 2004 well before the Gomery Commission could report. The sponsorship scandal dominated the election campaign and the subsequent Martin minority parliament. The opposition insisted over and over that the Liberals were unfit ethically or morally to govern the country.

In February 2005 the first Martin budget appeared ready to go down to defeat, thereby triggering an election. The government strategy was to avoid an election until the Final Report of the Gomery Commission (scheduled for February 2006). Mr. Martin expected it would exonerate him personally from any responsibility for the scandal. Thus in April 2005 he addressed the nation on television and took the unusual step of promising to call an election within 30 days of the Final Report. The opposition responded by using an upcoming opposition day to introduce a non-confidence motion. But the timing of Opposition Days is exclusively within the purview of the government. So Mr. Martin postponed every Opposition Day and went as far as to undesignate one already set but on which debate had not started.[37]

The events that unfolded over the next ten days are rather complex but illustrated a serious shortcoming in our process for dealing with non confidence motions. With the opposition unable to get a simple motion of confidence on the floor, the Conservatives moved that a committee report be concurred in with an amendment asking that the government resign.

This led to numerous procedural skirmishes and Speaker's rulings but eventually this procedure was ruled in order. Consequently a confidence motion as an amendment to a committee report did come to a vote on May 10, 2005 and passed by a margin of 153 to 150. The opposition felt they had clearly expressed non-confidence. The government argued that the adoption of such "procedural motions" did not qualify as matters of confidence in the government.

After examining the precedents and arguments on both sides most experts concluded that we had witnessed a valid expression of non-confidence.

> All three opposition parties had stated well in advance that they believed this vote to be a test of confidence. A clear majority of members believed that the motion was a confidence vote, and a majority voted in favour of it. The vote was not simply a technical motion of parliamentary procedure. While the wording was convoluted, especially to non-parliamentary ears,

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Convention under the Canadian Parliamentary System", 7 Canadian Study of Parliament Group: Parliamentary Perspectives, October 2006.

37 See Gary Levy, "The Confidence Game", 25 Inroads, summer/fall 2009.

> the content still clearly inferred that supporters of the motion were in favour of the Government's resignation.[38]

The Government did agree to hold a second and "definitive" confidence vote on May 19 which it survived after inducing Belinda Stronach to defect. Thus a political and tactical fight for survival had trumped constitutional convention. A government had lost the confidence of the House and had failed to resign.

The second parliamentary incident involving non confidence motions was, of course, the 2008 prorogation crisis.[39] Prime Minister Harper followed the Martin precedent by first postponing an opposition non confidence motion and then taking it a step farther by proroguing parliament so the motion could never come to a vote. Regardless of one's opinion on the correctness of prorogation in these circumstances, it seems clear that we have a problem in the way we deal with non confidence motions.

In retrospect, McGrath never anticipated the lack of respect for fundamental parliamentary conventions that took hold during the life and death struggles for survival that characterized the Martin and Harper minority governments. If the next election produces a more dispassionate majority or minority parliament it should hopefully be possible to find a better procedure for future parliaments.

Our view is that confidence needs to be put back in the standing orders in a way that does not permit undue postponement and does not return routine opposition days[40] to the pre Lefebvre/McGrath era. One possibility would be to follow the example of the Quebec National Assembly which found all party agreement during a minority parliament and codified the confidence convention in its Rules.[41]

## 5. PRIVATE MEMBERS' BUSINESS

McGrath noted that "the House does not attach any great importance to private members' business as it is now organized", and that this was the case largely because private members' bills and motions rarely come to a vote. Giving more significance to private members' business was consistent with the overall purpose, "to restore to private members an effective legislative function . . .", "to give them a meaningful role in the formation of public policy," and in so doing help "restore the House of Commons to its rightful place in the Canadian political process."

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38 See Andrew Heard, "Just What is a Vote of Confidence? The Curious Case of May 10, 2005" (2007) 40 Canadian Journal of Political Science 2, at 395–416.

39 For a discussion of the 2008 parliamentary crisis see Peter Russell and Lorne Sossin eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009.

40 During a minority parliament, for example, Opposition Day motions are frequently adopted against the will of the government (17 during the Martin minority and 27 during the 39th Parliament. See O'Brien and Bosc, *op cit.* p.44. The government reacts by saying such votes are not binding on the government. So what makes a non-confidence vote on an opposition day binding on a government that does not want an election?

41 See Evelyne Gagné and Alexandre Regimbal, "National Assembly of Quebec: New Rules for a More Effective Parliament", (2009) 32 Canadian Parliamentary Review 4, at 33–35. Also Quebec, National Assembly, *Standing Orders and other Rules of Procedure*, Ch IV SO 181 and 182.

There were eight recommendations for changes to private members' business, but the main one had to do with requiring a certain number of private members' bills and motions to be voted on. The idea was to replace the status quo whereby only those bills or motions which had unanimous consent would be allowed to come to a vote, or, more likely, be passed without a vote actually being taken. Sometimes this meant that only the unanimous consent of those in the House at the time was required, as was the case with the few who agreed one afternoon to pass the motion establishing July 1st as Canada Day and doing away with Dominion Day.

The relevant recommendation was that six out of every twenty bills or motions that made it to the House would be deemed votable. The selection of the six votable items would be the responsibility of a special committee established for that purpose. This committee would also be assigned the responsibility of determining the number of hours allocated for debate of any particular votable item, up to a maximum of five hours.

The recommendation was accepted and implemented, and worked well for a number of years. The House went from voting, or passing as the case usually was, only those private members' bills and motions which could obtain unanimous consent, to voting on a limited number of matters that were deemed worthy of a vote, and extra debate, by an all-party committee that used a defined set of criteria to make their selection. Members would appear before the committee to make the case for why their bill or motion should be selected.[42]

Three features of that early stage of reform to private members' business deserve to be highlighted. First, the draw for the twenty bills or motions was a draw from all the motions and bills submitted by members. Because NDP members tended to have many more such bills and motions in the hopper, they had more chances of having one of their bills or motions drawn, and therefore eligible for being selected as votable. This was addressed, NDP concerns notwithstanding, in 1990, when amendments transformed the draw from a draw amongst proposed items, to a draw from amongst Members' names.

The second feature was the tendency of members appearing before the committee to focus on the policy case for their item, as though its policy merits were being debated, and not on why the committee should select it as votable.

The third, and related feature, was the criteria, and the difficulty some members had in appreciating them. A good example of this was the debate in the committee surrounding a private members' motion calling for the return of capital punishment. One criterion was that an item should not be selected for a vote if it was already before the House in some form, or was expected to be before the House in some form, presumably in the context of a government initiative. Using this criterion, the committee refused, against vociferous arguments to the contrary, to select as votable the item having to do with the return of capital punishment, on the grounds that the Prime Minister at the time, Brian Mulroney, had promised that in his first term the House would have an opportunity to express itself on the issue, which it did, in 1987.

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42 For an historical perspective on Private Members' Business and the changes after 1984 see O'Brien and Bosc, *op. cit.* at 1103–1117.

Other criteria had to do with being legally and constitutionally acceptable, not being couched in partisan language, and not being something that the House could address in some other way. The idea was that votable items were niche items, but there were some who felt that all items drawn for consideration by the House should be votable. The pressure for this would grow with the arrival of the Reform Party in force after the 1993 election. They proposed that everything be votable in 1997, something that eventually became the case in 2003, after Bill Blaikie, NDP House Leader from 1997 to 2002 was no longer in that position.

As the one remaining member of the McGrath Committee, Blaikie had resisted, as NDP House Leader, attempts to make everything votable. His view was that if the filter of selecting votable items at the beginning of the process was removed, then there would end up having to be a filter at the end of the process to determine not what was votable, but what would pass, and that this, particularly in majority Parliaments would re-introduce an element of government control that ran contrary to the spirit of the McGrath reforms.

The report of the 2003 Special Committee on the Modernization recommended "the basic elements of the revised system are that all eligible Members of the House should have at least one opportunity to present a private members' bill or motion during the course of a Parliament, and that all these items should be voted on after two hours of debate."[43] The former selection process was replaced by a reverse process that provided for some items to be selected as non-votable, along with an appeal process for members who objected to their bill or motion being deemed non-votable.

The consequences of the latest reforms are significant. For one thing, private members' business has gone from a process that was dominated by opposition MP's thirty years ago, to a process which by definition is dominated by the government caucus, given that every member of the House is entitled to a votable item in the life of a parliament. This is certainly not what the McGrath committee had in mind.

Secondly, the proliferation of votable items has led to a reduction of hours of debate on votable items, leading to a situation in which more votes are held, and more decisions are made, based on less consideration.

Thirdly, the almost universal availability of a votable item, accompanied by less debate, has led to a situation where it could be argued that a procedural universe once held to be a refuge from partisan activity, and party discipline, has become too much of a temptation for the parties to pass up. For the government this has meant the temptation to use private members' business to pass without adequate scrutiny measures that otherwise might not survive scrutiny, and to enlist government backbenchers who traditionally might not even have submitted anything into a partisan private members' strategy/government strategy.

According to the *Globe and Mail*, no fewer than 25 out of 30 crime bills were tabled by private members, bills which are used as "potent political marketing tool" in pitches to the Conservative base. As one columnist has observed the current

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43 House of Commons, Special Committee on Modernisation, *Third Report*, 17 March 2003.

PMO has "repurposed the private members' bill as a vehicle for advancing the government's tough on crime legislation."[44]

The Opposition is not without blemish in this regard, however insignificant their transgressions may be in the light of the current government's House strategies. For example, subsequent to 2003, the NDP would sometimes herald the introduction of certain private members' bills introduced by their MPs as NDP bills, and began to refer to certain private members' bills in the past as NDP bills or motions, instead of referring to them as bills or motions introduced by an NDP MP. The distinction may seem a fine one, but "the growing habit of deliberately characterizing bills and motions as partisan in order to accrue credit to the party rather than to the individual MP is damaging to the nature and integrity of private members' business."[45]

Another post McGrath change to Private Members' Bills occurred in 1998 when the Standing Orders were amended to provide that at the end of a session, all private members' bills and motions, instead of dying with the session, would be deemed to be at the same stage in the new session as they were in the last.[46] This provision, adopted when there was still only a handful of votable items, preserved the votability of those items that had been chosen to eventually come to a vote, but in a House where everything is votable, it means that there is one less avenue than there might have been for clearing the decks and starting over again if the House is seized of a particularly bad bunch of private members' legislation.

## 6. COMMITTEE REFORM

McGrath recommended many changes to the committee system. The most important were those designed to give committees, and by extension, the MPs more independence. Not all the recommendations were accepted. Some were tried and then abandoned. Some were implemented and remain to this day. And some were good recommendations by themselves, but did not work out when adopted in combination with other recommendations of the McGrath committee.

The main McGrath recommendations were: to give standing committees more power to investigate or review the full policy departmental policy array, independent of government instructions; to create legislative committees to deal specifically with legislation, to remove parliamentary secretaries from standing committees, and to abolish alternate membership making Members themselves responsible for their own replacements instead of the party whips. Only the first of these rec-

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44 Konrad Yababuski, *Globe and Mail* (8 September 2014). Another example is the controversial *Act to Amend the Income Tax Act* with respect to unions, involved the imposition of unprecedented reporting of the internal affairs of unions introduced by British Columbia MP Russ Hiebert. Under previous rules the obvious partisan nature of the bill would have kept it from becoming votable

45 See Bill Blaikie, *The Blaikie Report: An Insider's Look At Faith and Politics* (Toronto: United Church Publishing House, 2011).

46 For the way different governments tried to bring back business from previous sessions see Gary Levy, Reinstatement of bills after prorogation: a thirty year odyssey, *Hill Times*, 15 December 2003.

ommendations is still in force. The second and third were in place for a while and then abandoned. The fourth was never adopted.

The most interesting reform was creation of legislative committees, specific committees that would be established on an *ad hoc* basis solely for the purpose of considering a particular bill after it received second reading, and which would then cease to exist once the bill was reported back to the House. The idea was that the standing committees would be freed up to do their newly mandated ongoing work of policy review and study, and would be able to do so without such work being interrupted by referral of legislation. Likewise, it was thought that busy standing committees would not get in the way of expeditious legislative review, as bills would not have to wait in any pipeline to come before the appropriate standing committee.

The legislative committees would be chaired by members appointed to a special panel that would be chosen by the Speaker from members on all sides of the House who could act as neutral and impartial presiding officers over this core activity of Parliament. Successful experience in the British House with such a panel of neutral chairs was noted by McGrath. Parliamentary secretaries were expected to sit on legislative committees, even as they were being excluded from standing committees.

This change only lasted for a few years. It shipwrecked on the shoals of too little expertise spread too thin, and on the telescoping of committee work into a smaller parliamentary day. The creation of legislative committees occurred at around the same time that evening sittings were abolished. The abolition of evening sittings was recommended with a view to having the evenings free from House work, and therefore free for committee work. It did not work out as planned. Without the discipline of mandatory evening sittings there were too many members, especially those with their families in Ottawa, who wanted to go home at supper time and stay there, making evening committee work harder to generate and sustain.

It was also the case that every caucus had only so many people knowledgeable in any given policy area, and that often the same people were expected to do the job for their party on more than one legislative committee, as well as the standing committee. And all of this was happening in the context of a shorter day than was the case before when standing committees would get around to a study of an issue, or consideration of a bill, when time and the queue permitted. What worked at Westminister with over 600 MPs was not working with Canada's less than 300 at the time.

The prohibition of parliamentary secretaries on standing committees had its origins in the view that too often the parliamentary secretary acted as someone dedicated to promoting and preserving the interests of the Minister and the government, instead of the free and open inquiry that was now to be expected of standing committees. It was felt that the government members on a standing committee could do without a coach and/or a person reporting back on who was perceived as supportive of the government, and who had demonstrated an overdose of independent or critical thinking.

The demise of legislative committees provided a context for the return of parliamentary secretaries, but the vision of a committee without government supervision never quite died and in the minority parliament of 2004–2006 there were mo-

tions in some standing committees to unseat parliamentary secretaries.[47] More recently an editorial in The Hill Times referenced the concerns of the NDP, and Conservative turned Independent MP, Brent Rathgeber, about too much direct government influence over House committees.[48]

The independence of committees from close management by government or party was at issue with the McGrath recommendations on how committee members were to be replaced. Appointing members to a committee for the duration of a session and giving the power of self-replacement to the members themselves, was intended to prevent the sudden removal of committee members by party whips who felt that their members were straying from the preferred party line on an issue. The intention was to prevent what came to known as parliamentary goon squads, whereby members entirely unfamiliar with the matter at hand would suddenly show up to replace members who might vote against the party line. The parliamentary secretary would be there to show them how to vote. This recommendation was arguably at the heart of the McGrath recommendations for more independent committees and it was never adopted.

Finally, the ability of standing committees to study any and all matters within the policy purview of the department or departments assigned to that committee has been both a curse and a blessing. The freedom is a good thing, but the bottomless pit of things to study or review means that committees are always busy with one study or another, thus raising the question of whether MPs have been locked into a culture of make-work projects that keep them busy while the government goes about running the country without more meaningful forms of accountability to Parliament.

In recent years the work of committees has not only retreated from the spirit of McGrath, but regressed to a state where the use of time allocation on committees and inappropriate in-camera meetings are rampant, public hearings are harder to get, witnesses are harassed by government members, and there has been evidence of deliberate government policies to make committees dysfunctional.[49]

## 7. SCRUTINY OF ORDER IN COUNCIL APPOINTMENTS

The legitimacy of political appointments is almost as important as the legitimacy of the electoral process. Unlike the United States Congressional system, in

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47 See for example House of Commons, Standing Committee on National Defence and Veterans Affairs, *Evidence*, 17 October 2004

48 Time for Parliamentary Secretaries to get off House Committees, *Hill Times*, 2 February 2015.

49 Speaker Milliken acknowledged the dysfunctional state of committees in a statement on March 14, 2008. A few months earlier the Conservatives were providing their chairman with a secret guidebook telling them how to favour government agendas, select party-friendly witnesses, coach favourable testimony, set in motion debate-obstructing delays and, if necessary, storm out of meetings to grind business to a halt. See *Calgary Herald*, 18 May 2007. Since the return of majority government numerous journalists and othershave commented on the abuse of process in committee. See for example Lawrence Martin, "The descent of democracy: A country under one man's thumb", Ipolitics, 27 April 2011; Brent Rathgeber, *Irresponsible Government: The Decline of Parliamentary Democracy in Canada* (Toronto: Dundurn Press, 2014).

the Westminster model appointments are a Crown Prerogative and there is no formal confirming or ratifying role for Parliament.[50] Following a number of controversial appoints by Prime Minister John Turner during the dying days of his administration, Brian Mulroney promised during the 1984 election campaign to give Parliament a say in the appointment process. We are still wrestling with the implications of that promise.

The appointments issue had never been discussed by Lefebvre. For McGrath it was by far the most difficult issue, at least for government members, but in light of the Mulroney promise the committee felt obliged to consider the issue. After much discussion and compromise they opted for a kind of non-constitutional confirmation process whose benefits would outweigh the problems.

> This type of informal mechanism is the hallmark and strength of responsible government. Parliament's traditional relationship with the executive comes not only through approval, rejection or alteration but also through the deterrent effect of bad publicity.[51]

Four principles underlay McGrath's approach to appointments:

- the primary purpose of a nomination procedure is to seek the best possible people;
- it is important that the public see appointments as more than simply political patronage;
- there are good reasons for excluding certain appointments from any political scrutiny; and
- some appointments warrant different degrees of scrutiny.

Based on these principles, the Committee recommended that certain types of non-judicial Order in Council appointments should be subject to parliamentary review.[52] Standing Orders 110 and 111 were adopted in 1989 to give effect to the McGrath recommendations.[53] The Committee did not give any guidelines or suggestions as to how the new scrutiny process would work in practice. Nor were any additional resources recommended to encourage committees to undertake scrutiny. So it is hardly surprising that the McGrath changes did not lead to an orgy of com-

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50 See Paul Benoit, "Recovering the Royal Prerogative" (Article presented to a Conference on the Crown and Parliament, Ottawa, 23 May 2014). See also John Pepall, *Against Reform*, University of Toronto Centre for Public Management (Toronto, 2010) at 110–120 for arguments against parliamentary involvement in the appointment process.

51 House of Commons, Special Committee on Reform of the House of Commons, *Final Report* (Ottawa, 1985) at 31.

52 See Lydia Scratch, "Governor in Council Appointments: Recent Changes and Suggestions for Reform", Parliamentary Research Branch publication 06-21e, 17 May 2006.

53 They require a Minister to Table a copy of the Order-in-Council within 5 days of its publication. It is then deemed referred to a Standing Committee for a period not to exceed 30 days. The committee may call the nominee and examine the nominee's qualifications and competence for a period not to exceed ten days. The Standing Orders give no authority to committees to force a withdrawal of an appointment or nomination and are silent as to what happens when a committee reports unfavourably on the appointee,

mittee scrutiny. Between 1989 and 2004 only 62 meetings out of a total of 12,783 committee meetings dealt with Order in Council appointments.[54]

There was only one instance of a committee voting against a nominee.[55] That resulted in a Speaker's ruling confirming that Order-in-Council appointments are the prerogative of the Crown. "While the government can be guided by recommendations of a standing committee on the appointment or nomination of an individual, the Speaker cannot compel the government to abide by the committee's recommendation nor by the House's decision on these matters.[56]

McGrath had specifically excluded judicial appointments from parliamentary review but in a policy article on the democratic deficit Prime Minister Paul Martin proposed that henceforth standing committees, and Parliament, would play a more important role in the appointments process.[57] In February 2004 he asked the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, how best to implement prior review of appointments of Supreme Court of Canada judges.[58] Its report recommended that "more credibility in the appointments process would be beneficial to the Supreme Court and lend it more legitimacy in the eyes of Canadians.[59]

Martin then took the unusual step of striking an Ad Hoc Committee of House of Commons Members to review the nominations of two Supreme Court Justices before the appointments were to be made.

> Dimly aware that it had strayed well beyond the pale of the Westminster system, the Ad Hoc Committee constituted itself not as a parliamentary committee but rather as a committee of parliamentarians. It would no longer be bound by the Standing Orders but be free to make up its own rules of procedure; strangely, it would also include two non-Parliamentarians as Members. Finally, recognizing that the authority to make such appointments is constitutionally vested in the Governor in Council, the Committee would

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54 Data compiled by the Library of Parliament using information from the *Annual Report on Committees Activities and Expenditures* prepared by the Committees Directorate of the House of Commons.

55 In February 2005, Prime Minister Martin referred the nomination of Glen Murray as head of the National Round Table on the Environment and the Economy to the Standing Committee on Environment and Sustainable Development. The Committee voted against endorsing the candidate by a margin of 7 to 4 and issued a report to the House of Commons calling for Murray's name to be withdrawn and another candidate proposed.

56 House of Commons, *Debates*, 3 May 2005, at 5547-5548.

57 This development was spelled out in greater detail in the February 2004 document *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform*.

58 In March and April 2004, the Committee heard many witnesses on this issue. The Minister of Justice outlined the present method of appointing Justices of the Supreme Court in an appearance before the Committee on 30 March 2004.

59 House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, "Improving the Supreme Court of Canada Appointments Process", *Report* (May 2004).

> cleverly make the point that it was only *advising* the Government, not *consenting* to the nominations.[60]

Under this process the nominees did not appear themselves but questioning was directed toward the Minister of Justice. A research article for the Gomery Commission suggested that the government establish a more formal selection process for appointments. It said there should be an "opportunity for MPs to expose to the public the qualifications of candidates, their links to the government and to particular interests, the process by which they were selected, and sensitize the candidates to parliamentary interests — including their responsibility for financial stewardship."[61]

The Harper government took the process one step further, causing nominees to be scrutinized in person by parliamentarians of the Ad Hoc Committee. Thus on February 23rd 2006, Mr. Harper announced that: "Marshall Rothstein's candidacy was scrutinized by a comprehensive process initiated by the previous Government that included members from all the political parties"; four days later, Justice Rothstein appeared before the Ad Hoc Committee and on March 1st he was appointed to the Supreme Court.[62]

This same process was followed for the appointments of Justices Andromache Karakatsanis and Michael Moldaver in 2011, Justice Richard Wagner in 2012, and for the controversial appointment of Justice Marc Nadon in October 2013. The Nadon appointment was subsequently challenged in the Courts on the grounds of his eligibility and following a decision of the Supreme Court the appointment was revoked. This set off a series of accusations and counter-accusations as to why the parliamentary scrutiny had failed to raise the question of eligibility. The subsequent appointments of Clément Gascon and Suzanne Côté in 2014 were done without any parliamentary scrutiny supposedly due to breaches of confidentiality during the Nadon process.

In 2006 the new Harper government took a new approach to other appointments with its *Federal Accountability Act*, which established a Public Appointments Commission. The mandate of the Commission would be to:

- establish guidelines governing selection processes for Governor in Council appointments to agencies, boards, commissions and Crown corporations;
- approve the selection processes proposed by Ministers to fill vacancies within agencies, boards, commissions and Crown corporations for which they are responsible;
- monitor, review and evaluate selection processes in order to ensure that they are implemented as approved; and

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60 Benoit, *op. cit*. at 10.

61 Peter Dobell and Martin Ulrich, "Parliament and Financial Accountability," *Restoring Accountability Research Studies: Vol.1 — Parliament, Ministers and Deputy Ministers* (Canada, 2006) at 52.

62 Online: http://www.pm.gc.ca/eng/news/2006/03/01/pm-announces-appointment-mr-justice-marshall-rothstein-supreme-court.

- provide an annual report to the Prime Minister, to be tabled in both Houses of Parliament, on the Government's performance in following the code of practice.

The person designated to head this Commission, Gwyn Morgan, was criticized by the Government Operations Committee during boisterous hearings and the government decided not to proceed with the Public Nomination Commissions as long as it was in a minority position. Nothing changed in this respect following the advent of majority government in 2011 and the Conservatives have limited their commitment in this area to making increased use of a web site to list appointments and to enhance transparency.[63]

Thirty years after McGrath we are still seeking to improve the legitimacy of the appointment process. The old idea of informal consultations on certain appointments such as Officers of the House, National Security Officials and certain other individuals seems to have fallen into disuse. Perhaps the easiest way to ensure good appointments would be a return to such informal practices.

Another approach is found in a private members' bill by Ted Hsu. Bill C-626 dealt with appointment of the Chief Statistician of Canada and provides that the Cabinet, after consulting with the leader of each party in the House of Commons, choose a candidate from a list prepared by a search committee whose composition is set out in the statute.[64]

Assuming the Leader of the Opposition (and perhaps the Leader of the Third Party) is sworn in as a Privy Councilor why not have him or her participate in a special Committee of Council for the purpose of certain appointments? This would respect the four principles set out by the McGrath Committee and meet the criticism of those who argue that the present process, particularly the Ad Hoc committees for judicial appointments, is unparliamentary and has proven to be irrelevant to the appointment process.

## 8. CONCLUSION

Successful parliamentary reform balances the interests of government and opposition. It is a process of negotiation and compromise. Each side gives up something in order to get something else in return. Ideally reforms should be adopted by consensus rather than majority vote and designed to work in either a majority or minority context. Perhaps most importantly there should be recognition among all the actors that reform of the institution is in the long term public interest and not just in the temporary particular interest of one side or another.

Judged according to these criteria the 1985 McGrath reform process was, by and large, successful. However, if the reforms are judged today by their lasting

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63 See Governor in Council Appointments, online: www.appointments-nomination.gc.ca.

64 The search committee must consist of three persons each of whom holds or has held one of the following offices: Clerk of the Privy Council, Chief Statistician of Canada, Governor of the Bank of Canada, Chairman of the National Statistic Council, President of the Statistical Society of Canada, President of the Canadian Institutes of Health Research, President of the Natural Sciences and Engineering Research Council, President of the Social Sciences and Humanities Research Council. The Bill came up for second reading on 7 November 2014 but was defeated.

ability to create a parliament in which MP's have the kind of independence, individually and collectively, from the Prime Minister or the party whips, it is fair to conclude that they did not succeed.

The failure of the reforms to create the kind of Parliament that most Canadians wished they had, has no doubt contributed to a decline in the public's regard for the House of Commons. This in turn leads to public apathy or ignorance of parliamentary traditions which seems to enable those who trample on them to do so with impunity.

Since key elements of the McGrath reforms, particularly with respect to making committees more independent, were never fully implemented, we cannot judge the merits of the reforms as a seamless whole. It is also easy to conclude, as we have, that certain reforms had unintended or unforeseen consequences, either in and of themselves, or in terms of changes to the reforms over time that were arguably at odds with the original intent.

Unfortunately the years since McGrath have shown that, as with the proverbial horse, you can procedurally lead MP's, to the waters of freedom, but you cannot make them drink. There has to be leadership from the top, and tolerance for diversity of opinion and real debate. And MP's themselves have to be able to show political courage in helping to create such a political context. Sadly such is not the prevailing context. The reasons go far beyond the shortcomings of the McGrath reforms, implemented or otherwise, and point to larger systemic questions about the current state of parliamentary democracy than can be dealt with in a discussion primarily of procedural reform[65].

Nevertheless with an election set for October 2015 and the prospect of a new crop of MPs we hope that discussion of institutional reform (and not just proportional representation or compulsory voting) will be part of the election campaign. When the new parliament assembles those who have lived through the descent of Parliament in recent years will have an opportunity to combine with some of the best newly elected members to rediscover the appetite for reform that existed at the time of McGrath.

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65 See David E. Smith, "A Question of Trust: Parliamentary Democracy and Canadian Society", (2004) 27 *Canadian Parliamentary Review* 1, for a thoughtful review of the limits to reform as a remedy for what ails parliament.