

Democratic reform and private members' business: Shifting sands or paradigms?

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Introduction

When the Martin Government took office on December 12, 2003, one of its first official acts was to announce plans for enhancing public confidence in our system of government. It issued a statement entitled *Governing Responsibly: A Guide for Ministers and Ministers of State*² setting out key principles of responsible government in Canada as well as the Government's approach to democratic reform. Less than two months later on February 4, 2004, the Government released further details with a second statement entitled *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform*.³

These two statements cover many aspects of democratic government. In this article, I focus on one that lies at the core of democracy: the role of elected Members of Parliament⁴ in making laws, more particularly *Private* Members – those who sit in opposition or on the back-benches of the Government outside the Cabinet. I will provide an overview of the role of Private Members in law-making and the steady progress they have made towards making this role more meaningful. I will then comment on how this progress has been most recently realized in the enactment of Private Members' Bills and conclude with some suggestions for those – whether within or outside government – who may be involved in the enactment of such Bills.

Role of Private Members

Up until the mid-1980s, the law-making process in the Canadian Parliament was dominated, if not monopolized, by the Cabinet. This is a general characteristic of parliamentary government based on the Westminster model. The Government is formed by those who command the confidence of the lower house. Confidence has been most effectively harnessed through the organization of political parties. Party discipline allows the leadership to maintain confidence by controlling the voting intentions of elected Members in house proceedings, including those relating to law-making. The Cabinet decides the position that party Members are to take on all questions before the house and party Members are expected to vote accordingly or else risk expulsion from the party and the loss of the advantages that membership in the governing party entails. The Government's control of the lower house has also meant that its time is devoted to its own Bills to the exclusion of all others.

This feature of parliamentary government in Canada has produced a simmering discontent on the back-benches. The Report of the Special Committee on Reform of the House of Commons (McGrath Report)

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² http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=Publications&doc=guidemin/guidemin_e.htm.

³ http://www.democraticreform.gc.ca/actionplan/actionplan_e.htm.

⁴ This paper does not consider the role of Senators, which has also evolved over recent years and is, of course, the subject of considerable debate in terms of their mandate and selection.

in 1985 voiced this discontent and recommended reforms to parliamentary procedure. Although some were accepted,⁵ the discontent continued, prompting further reforms, the latest of which is a provisional standing order adopted on March 17, 2003.⁶ However, these too failed to satisfy many Members and in the dying days of the Chrétien Government, Mr. Martin garnered considerable support in his leadership quest by listening sympathetically to their complaints and promising action if chosen as leader. Given this constituency of supporters, it was hardly surprising that his first official statement after becoming prime minister promised to enhance their role in the law-making process.

Previous process reforms

To understand the current Government's approach to democratic reform and its implications for the law-making process, it is first necessary to appreciate what Private Members had already achieved in reforming the law-making process.⁷ The process for preparing Government Bills is complex and does not involve Private Members until the caucus briefings that take place just before introduction.⁸ Drafting must be approved by the Cabinet through the submission of a Memorandum to Cabinet. Bills are drafted by the Legislation Section of the Department of Justice on instructions provided by departmental officials and counsel. The Privy Council Office manages the Cabinet approval process and supports the Government House Leader in the parliamentary process.

Since the late 1980s, committees have been increasingly active in amending Government Bills. It is now quite rare for a Government Bill to be enacted without amendment and many are subject to substantial changes. In addition, a new procedure for referring a bill to committee before second reading was instituted in the 1990s, allowing greater scope for amendment, unconstrained by the approval of the principle of the bill. However, the procedure was rarely used.

Just as the preparation of Government Bills does not involve Private Members, the preparation of Private Members' Bills correspondingly takes place independently of the Government. They originate in the offices of Private Members, are developed by their staff, often with the assistance of researchers from the Library of Parliament, and are drafted by legislative counsel in the Office of the House of Commons Law Clerk and Parliamentary Counsel.

Chapter IV of the *Standing Orders*⁹ of the House of Commons provides one hour of debate each day for

⁵ See Nora S. Lever, "New Rules for Private Members' Business", *Canadian Parliamentary Review*, Vol. 9 no 3, 1986 at http://www.parl.gc.ca/infoparl/English/09n3_86e.htm.

⁶ See "The New Rules at a Glance" at http://www.parl.gc.ca/information/about/process/house/Private_Members_Business/PMB-e.htm.

⁷ For a general description of this process, see the House of Commons *Précis of Procedure*, chapter 11 at <http://www.parl.gc.ca/information/about/process/house/precis/chap11-e.htm>.

⁸ See *Guide to Making Federal Acts and Regulations* at http://www.pco-bcp.gc.ca/default.asp?page=publications&Language=E&doc=legislation/lmg_e.htm.

⁹ <http://www.parl.gc.ca/information/about/process/house/standingorders/toc-e.htm>.

the business of Private Members. This is critical since a particular item cannot proceed unless a certain amount of time is devoted to it. Given the number of Private Members and the limited time allocated to their business, only relatively few Private Members' Bills can receive the attention of the House if any of them is to proceed through the parliamentary process.

Chapter XI of the *Standing Orders* elaborates on how Private Members' Business is to be dealt with. It provides that at the beginning of each Parliament, the names of 30 Members are drawn to establish the "order of precedence". The Member at the top of the order has their item (either a bill or a motion) debated for one hour and then drops to the bottom to await another turn as the other Members' items reach the top of the order and are debated.¹⁰ A bill must be debated for 2 hours at second reading, at which time it is put to a vote on whether to refer it to committee. It typically takes 6 weeks of sitting days (2 to 6 calendar months) for an item to work its way up the order to the top. However, Members are allowed to change places on the order of precedence. Thus, with a little help from their friends, their items can be debated more quickly.

It is also worth noting that all Private Members' items are now votable, unless the Subcommittee on Private Members' Business decides otherwise. Its decision is based on criteria adopted by the Standing Committee on Procedure and House Affairs. The criteria provide that bills and motions are non-votable if they deal with matters outside federal jurisdiction, violate the Constitution or concern questions that have already been voted on or are items of Government Business.¹¹

New approach

Against this backdrop of existing procedures, the current Government laid out its approach to democratic reform. The first element has to do with how it will deal with Private Members' Business and confirms a practice that was already in place under the previous Government. The Government determines its position on each Private Member's item. Ministers, working principally through their Parliamentary Secretaries, are responsible for ensuring that Members of both the governing party and the opposition parties are informed of this position for the purpose of seeking their support, either to oppose the item or put forward amendments. This means that persuasion, and not party discipline, will be used to advance the Government's position.

The second plank of the Government's new approach establishes a system of votes:

- *one-line free votes* on which all Members are free to vote as they see fit,
- *two-line free votes* on which the Government takes a position that Ministers and Parliamentary Secretaries are expected to support, but which other Members are free to vote on as they wish.
- *three-line votes* on which all party Members are expected to support the Government as a matter of confidence.

¹⁰ For further details on how the list is replenished, see *Standing Order 87*.

¹¹ Above n. 6.

Most votes will be one-line or two-line free votes. Three-line votes will be reserved for matters of fundamental importance to the Government.

A third element has to do with parliamentary committees:

The government will look to committees to play an active role in policy and legislative issues, and Ministers should place a high priority on developing good relationships with parliamentary committee chairs and members, and supporting the essential work of the committee.¹²

To this end, bills subject to one-line and two-line free votes will routinely be referred to committee before second reading, allowing committees greater scope to amend them since the principle of the bill has not yet been approved.

Finally, the Government has promised additional resources to support committees and Private Members in their law-making activities, particularly for legislative counsel services provided by the Office of the House of Commons Law Clerk and Parliamentary Counsel. Although resources may seem to be simply a matter of internal house-keeping, they are critical to an enhanced role for Private Members. The preparation of laws is a complex affair, demanding considerable effort and expertise in determining legislative policy and how to implement it. These resources have until recently been concentrated within the Government. If committees and Private Members are to assume a larger role, they must have access to the resources needed to fulfil it effectively.

What does it all mean?

Despite the reforms instituted in the wake of the McGrath report in 1985, relatively few Private Members' Bills have been enacted. And of these, most have addressed matters of relatively little legislative significance, such as the designation of public days or changing the names of electoral ridings. However, in its last two sessions, Parliament has enacted eight Private Members' Bills, four of which made significant changes to the law.¹³ This is a record, not only quantitatively, but qualitatively as well. There are several lessons to be learned from this as a harbinger of more to come.

First, Private Members' Bills on the order of precedence have to be treated with the same seriousness as Government Bills. Those who are interested in their subject-matter, whether in Government departments or in the private sector, must follow them closely and be prepared to advance their positions effectively. For the Government, Parliamentary Secretaries now act as the link between the caucus and their Minister on these matters. The task of lobbying Members' is for the political staff of the Minister and Parliamentary Secretary. However, Government policy officials are responsible for supporting their

¹² Above, n. 2.

¹³ An Act to amend the Statutory Instruments Act (disallowance procedure for regulations) SC 2003, Chapter 18; User Fees Act, SC 2004, Chapter 6; An Act to amend the Hazardous Products Act (fire-safe cigarettes), SC 2004, Chapter 9; An Act to amend the Criminal Code (hate propaganda), SC 2004, Chapter 14. For a complete list of enacted Private Members' Bills, see <http://www.parl.gc.ca/information/about/process/info/pmb.asp?lang=E&Hist=N>.

minister and parliamentary secretary in analysing and formulating a position on Private Members' items. In this respect, they must treat these items in the same way as Government Business.

The second lesson is that success in asserting a position on Private Members' Business depends on being able to marshal arguments that have broad appeal for Members. Technical correctness is of little use if it cannot be translated into a comprehensible argument that speaks to Members.

The third lesson is that it is often easier and more effective to suggest amendments than to oppose altogether a Private Members' Bill. The objective should be to find a middle ground that substantially avoids any problems in the original proposal, while at the same time advancing its main purposes. The experience with Bill C-205¹⁴ is instructive. This Bill proposed to enact a procedure for the revocation of statutory instruments on the basis of a report of a parliamentary committee responsible for scrutinizing them. The Bill was based on a procedure already in place under the *Standing Orders* of the House of Commons. However, this procedure lacked legal effect and was limited in scope to statutory instruments made by Ministers.

The Government initially opposed the Bill on the basis that it would have applied to many instruments of a non-regulatory nature and that it did not allow enough flexibility in preparing for revocation. A compromise was reached at second reading that saw the Bill amended by unanimous consent so as to narrow its scope to regulations (as opposed to the broader category of statutory instruments) and provide a role for regulation-makers in their revocation. In addition, the Government addressed some of the underlying concerns of the committee about delays in Government responses to its inquiries about regulations.¹⁵ The experience on Bill C-205 suggests that the Government and Private Members can work together effectively in the enactment of their Bills. If this experience is generalized, it may help address concerns about resources for committees and Private Members. And beyond the resource considerations, it may also avoid the debilitating conflict that often characterizes the legislative process and leads to results that are less satisfying for all concerned, most especially those Canadians who, as the Government has said, "are expecting more from their government and representatives."

So what does it all mean? Well, much remains to be seen. But one thing seems certain: the sands, if not

¹⁴ 2nd Session of the 37th Parliament:
http://www.parl.gc.ca/common/Bills_House_Private.asp?Language=E&Parl=37&Ses=2#C-205.

¹⁵ See the Cabinet Directive on Law-making, s. 7: http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=legislation/lmgcabinetdirective_e.htm.

the paradigms, are likely to keep shifting.
