WHATEVER BECAME OF THE WESTMINSTER MODEL?

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A septuagenarian may be allowed a brief initial reflection. In 1939, I became acquainted with the American model of government. One year later, I was taught the Westminster model of responsible (or cabinet) government. How simple it seemed, and how responsive, when compared to the American system with its close to a dozen of built-in vetoes. A parliamentary majority could fulfil its policy mandate, obtained in an election, and an opposition could keep the government accountable at every step. Three fifths of my life since I have lived under the Westminster model. I have come to know its warts — and it has many — but most of those governed by it, from Victoria through London to Tokyo and from Rejkiavik to Wellington, appreciate it for its simplicity and sensitivity. In Canada, the recruitment and exercise of leadership, and the set of organizations making leadership possible — the party system — are constructed according to the Westminster model. It forms the keystone of our politics.

What is government (and politics) according to the Westminster model? The voter has one vote, and one vote only. This vote is cast for one of the candidates for the main (or first, or lower) chamber of Parliament from the voter's constituency. In this chamber, the party obtaining a majority of seats (or a coalition of parties, or a minority party supported by enough others to form a majority) forms the government; its members are appointed, removed, or transferred to other positions by the party's leader, who will have been designated as prime minister (or premier) by the head of state (or province). In the model's pure form, he/she will have been selected by the members of the party's parliamentary caucus. The government (or Cabinet) is responsible to the entire Parliament. "Responsibility" means that the prime minister or ministers explain their actions, as demanded by Parliament (usually, the opposition). In turn, Parliament is expected to pass all legislative proposals of the government, which, under the pure model, arise from the election program of the victorious party. Defeat of such a proposal, or the passage by Parliament of a motion of want of confidence in the government, originally led to the Cabinet's resignation. However, for nearly two centuries now, it has led to the dissolution of Parliament on the advice of the prime minister, bringing on a new election. If confidence is maintained, Parliament expires five years after it is formally constituted. In practice, however, it is dissolved earlier, at the personal discretion of the prime minister.

To the extent to which the ensuing discussion can be taken as a defence of the Westminster model, my argument is based on its effectiveness. I feel that, unless we thoroughly change our system of government, a party obtaining a majority of seats in an election should be able to enact its program. For me, at least up to now, this consideration outweighs all of the model's shortcomings, the worst of which is the quasi-dictatorial position of the prime minister or premier.

There is one important modification the Westminster model has undergone in Canada earlier and more thoroughly than elsewhere.[1] In 1919, the Liberals found themselves with a small and unrepresentative caucus. A leader was needed to succeed Laurier, and to select him the party chose an approximation of the American national convention. This mode of leader selection has since become the universal mode in Canada. It modifies the Westminster model in one important way: the leader is now the creature of the entire party, and no longer solely of its parliamentary caucus. This tends to make the prime minister irremovable except by a lost election or an unrealistic special convention. In the United Kingdom, the leader of the Conservative party is still selected by his/her peers (party colleagues) in Parliament. Thus, Thatcher could be and was removed by her caucus — Mulroney is immune to this fate.

The remainder of the Canadian system of government and politics is firmly grounded in the Westminster parliamentary system. Over the past quarter century, we have been bombarded with efforts to change our constitution. None of the serious of these efforts employs a building set that overtly dispenses with the keystone of our governmental system, the Westminster model.

I say "overtly," because the two federal building sets, *Shaping Canada's Future Together* and *A Renewed Canada*, contain some blocks and beams and other building materials hardly compatible with the never openly questioned keystone. What makes serious Canadians seriously propose structures that might severely endanger the system? Is it oversight, or is it a pious hope that somehow a model under which British government has functioned for three centuries, and ours for one and one quarter of a century, will prove compatible with any amount of tinkering? Before looking for an answer, let us seek out the various possibly or probably incompatible elements of the Clark and Beaudoin-Dobbie papers.

The Clark proposals, *Shaping Canada's Future Together*, contain a 14-point Canada Clause, acknowledging "who we are as a people, and who we aspire to be."[2] Its thirteenth point is "a commitment to a democratic parliamentary system of government."[3] The second of its three parts, "Responsive Institutions for a Modern Canada," deviates from one core principle of the Westminster model, that the country is to be governed according to the wishes of the majority as determined by the immediate past election of the House of Commons.

The modifications proposed for the House of Commons need not thwart the workings of the model. The key one entails changes now in effect in the United Kingdom: the reduction of the application of votes of confidence. The change would permit the Commons to defeat a government measure without forcing the government to dissolve the House and call an election. The Canadian tradition is never to defeat a majority government in the House and, therefore, to pass each one of its measures, no matter what. The pure manifestation of the Westminster model would restrict the government to introduce only such measures as were contained in the mandate of the last election, but a fast-changing environment in the late twentieth century renders such a restriction inoperative. Proof that a negative vote need not be incompatible with Canadian parliamentarism came when Lester Pearson stayed in office after a defeat in the House. The Clark proposal would require the government to maintain the confidence of the Commons after the defeat of a measure.

For the Senate, the Clark paper proposes direct popular election. The argument for an elected Senate is that a federal system requires representation at the centre of the components of the federation, the provinces, as well as of the population at large. The argument continues that a "non-elected Senate is unique among federations."[4] This latter argument is weak. Of the six federations that are liberal democracies, three (U.S., Australia, Switzerland) have directly elected second chambers. Only one of these, Australia, is patterned according to the Westminster model. The Australian Senate, I submit, is not a stellar model for Canada, having represented parties rather than Australian States. The majority of recent Australian elections have been brought on by constitutional crises caused by partisan disagreement between the two chambers.

Those favouring a directly elected Senate for Canada certainly do not deny the strong possibility of a Senate that would be in structural disagreement with the House of Commons, and that two different wills are possibly or probably expressed in the election of the two chambers. I disagree with them over the basis of such disagreement. I doubt that it would be a province or region; I rather suspect that it would be partisan majorities. In any case, the Westminster model would lose if we had two elective chambers. The seamless web of popular mandate and governmental will would be torn in predictable instances. While there would, with considerable probability, be two different popular mandates, only one, that expressed in the Commons election, would be reflected in the composition of the government. The crucial factor in operations would be the rule for resolving conflict between the chambers. The Clark proposals would emasculate the Senate in all fiscal matters (thus avoiding the long squabble over the G.S.T). It would (tacitly) prescribe inaction in other matters of disagreement, giving to the Commons, however, overriding powers in matters of national defence and international issues. The proof of this institutional pudding would be in the eating, but short of persuading Cabinet to yield whenever the Senate objects — a strange manifestation of the model in any case — the Westminster model's operation would be seriously curtailed.

The most constitution-minded person of the French Revolution, the Abbé Siéyès, opposed a second chamber by saying that it would be superfluous if it agreed with the first chamber, and mischievous if it disagreed. While his was not an argument for the Westminster model but for unicameralism, I would extend it to an elective second chamber by warning that it could create major mischief in the operation of the Westminster model.

The Clark paper proposes that major federal appointments — "the Governor of the Bank of Canada and... the heads of national cultural institutions... as well as the heads of regulatory boards and agencies,"[5] but *not* judges of the Supreme Court of Canada — be ratified by the Senate. Such a provision fits the system of separation of powers in the United States. What kind of horse-trading in Canada would result is difficult to predict. In any case, the operation of the Westminster model with its clear lines of responsibility (the Crown's advisers make all appointments) is likely to suffer.

The impact of the Beaudoin-Dobbie Committee's report, *A Renewed Canada*, on the Westminster model does not differ much from that of the Clark report. The Committee felt that revision of federal legislation "should be the primary function of a reformed Senate."[6] The impact on the operation of the Westminster model would be similar to that of the Clark proposals.

Like the Clark report, Beaudoin-Dobbie recommends the direct election of Senators. Election by proportional representation from multi-member constituencies may make it less probable that the partisan composition would be the opposite of that of the House; it also makes it less

probable that the two majorities would be identical in the partisan sense. Either way, a popular mandate, no matter how indistinct, is likely to differ from that of the Commons, again jeopardizing the operation of the Westminster model. Diversity between the two chambers may also be furthered by the proposal that Senators be elected for a fixed term.

Beaudoin-Dobbie suggests that all non-fiscal legislation be treated equally in Senate review, but that Commons have the power to override. The Committee is protective of Commons legislation and favours a limit of 180 days for its disposition by the Senate. That this may prove to be the saving of the Westminster model operation is felt by the Committee's Liberal members, who for this reason dissented from the proposed dispatch. Regarding supply bills, the Committee denies any role to the Senate, turning the role of defining supply bills over to the Speaker of the House of Commons.

On the ratification of federal appointments, Beaudoin-Dobbie does not differ from the Clark report.

There is, in conclusion, no definitive answer to my initial question. Constitutional reformers may or may not be mindful of the Westminster model. It seems, in any case, that they feel their reforms would not jeopardize our parliamentary system any more than past modifications, in Ottawa or London.

In 1986, I wrote that only regional representation *short of* direct election was compatible with the Westminster model, and that those favouring an elective Senate should consider abandoning the model altogether.[7] I, for one, have not changed my mind. Lest I be accused of engaging in constitutional niceties, let me become quite practical and close with an argument based on our federal system.

Friends and foes of an elective Senate would, I believe, agree that the Westminster model makes for effective decision-making. Nobody I know of suggests that the provinces give up their version of the model which gives full decision-making powers to the premiers and their governments. An abandoning or jeopardizing of the Westminster model for Ottawa would tend to give us strongly governed provinces and a weaker federal government, regardless of the division of powers. Unless this is what we want, let us be a bit more solicitous about maintaining and protecting the Westminster model at the federal level.

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1. In a recent conversation, Kenneth D. McRae persuaded me to emphasize this modification in this context.
2. *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services, 1991) at 12.
3. *Ibid.*
4. *Ibid.*, p. 16.
5. *Ibid.*, p. 21.
6. *A Renewed Canada: The Report of the Special Joint Committee of the Senate and the House of Commons* (1992) at 43.
7. Frederick C. Engelmann, "A Prologue to Structural Reform of the Government of Canada," *Canadian Journal of Political Science*, Vol. 19, no. 4 (1986), pp. 667-678.

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8. *Ibid.* at 598.
9. *Supra*, note 3.
10. *Ibid.* at 340.
11. *Ibid.*
12. S.C.1976-77, c.52, as amended by S.C.1988, c.35 and c.36.
13. [1989] 3 F.C. 3.
14. [1990] 2 F.C. 534.
15. *Ibid.* at 550.
16. *Canadian Civil Liberties Association* v. *Canada (Attorney General)* (1990), 74 O.R. (2d) 609 (H.C.) took this approach. The Ontario Law Reform Commission, *Report on the Law of Standing* (1989) at 58 ("*Ontario Report*"), and T. A. Cromwell, *Locus Standi* (Toronto: Carswell, 1986) at 173 both take the position that the absence of a traditional legal interest does not mean a plaintiff will present a case with less competence or zeal.
17. *Ontario Report*, *ibid.* at 60, and W.A. Bogart, "Understanding Standing, Chapter IV: Minister of Finance of Canada v. Finlay" (1988) 10 Sup. Ct. L.R. 377 at 392 discuss this concern.
18. *Ontario Report*, *ibid.* at 47 notes that the "floodgates" argument assumes that the types of claims now advanced in the courts are to be preferred to the "new" claims that constitute the threatened flood, and suggests that it is not self-evident that present consumers of court services deserve access to the courts any more than person with claims that the law does not now recognize.
19. *Report of the Auditor General of Canada to the House of Commons*, (1990) at 352-353, 383-384.
20. *Ibid.*
21. *Canadian Abortion Rights Action League Inc. (C.A.R.A.L.)* v. *Nova Scotia (Attorney General)* (1990), 69 D.L.R. (4th) 241 (N.S.S.C., A.D.); leave to appeal to denied (1990), 127 N.R. 158 (S.C.C.) denied standing to C.A.R.A.L. on the basis that precisely the same issues were being raised in an ongoing prosecution of Dr. Morgentaler.
22. In *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, McLachlin J. justified the choice of remedy in the case (striking down a regulation prohibiting dentists' advertising, rather than addressing only its application in the case) on the basis that the continuing existence of the regulation would "chill" the freedom of expression of dentists, who as professionals would be unwilling to challenge their governing bodies.
23. *McKay* v. *Manitoba* (1989), 61 D.L.R. (4th) 385 (S.C.C.); *R.* v. *Danson* (1990), 73 D.L.R. (4th) 686 (S.C.C.).
24. *R.* v. *Danson*, *ibid.*; *Ontario Report*, *supra*, note 16 at 57-58, and Cromwell, *supra*, note 16 at 173.
25. (1991), 87 D.L.R. (4th) 287 (S.C.C.); rev'g (1988) 55 D.L.R. (4th) 523 (Que. C.A.). The Court allowed the appeal expressing essential agreement with the dissenting decision of Chouinard J.A.