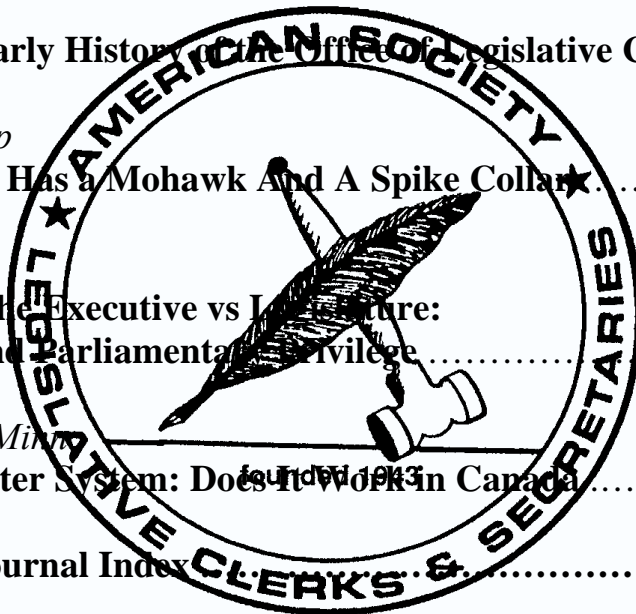


# Journal of the American Society of Legislative Clerks and Secretaries

Volume 10, Number 1

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# **Journal of the American Society of Legislative Clerks and Secretaries**

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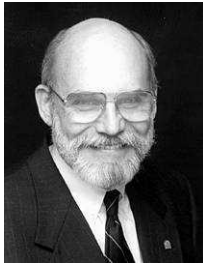
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## NOTES ON THE EARLY HISTORY OF THE OFFICE OF LEGISLATIVE CLERK:

By John B. Phelps

Clerk of the House, Florida House of Representatives

### ABSTRACT

Much has been written about the role of “chief clerical officer” in the modern legislative assembly, but little information exists about the ancient origins of this office. Fragments have been found as elements of larger works; however, no unifying manuscript exists that describes the historic role of the legislative clerk.

This article compiles initial research notes on the history of the chief recording officer from Athenian democracy to the English *Modus Tenendi Parliamentum* (1327?). It attempts, in a limited way, to interpret what was found but is by no means definitive or complete.

The article’s principal purpose is to draw attention to the subject in the hope of encouraging further research and commentary among scholars and current clerical officers.

### Athens

In his writings on the Athenian Constitution,<sup>1</sup> Aristotle describes two assemblies: a 500 member governing Council and a public congress constituted of all citizens of Athens.<sup>2</sup> The Council’s duties were quasi-legislative, but chiefly involved enforcement of the law. The lawmaking<sup>3</sup> function itself was vested in the public congress known as the Ecclesia.<sup>4</sup>

<sup>1</sup> Aristotle, *The Athenian Constitution*, Book 7, Part 54, (written between 334-322 BCE) translated by Sir Frederic G. Kenyon - The full text of this work is available at

<http://www.yale.edu/lawweb/avalon/medieval/athemain.htm>. According to “The Stoa: A Consortium for Electronic Publication in the Humanities,” (see <http://www.stoa.org/demos/>) the text of this work is unavailable in a complete form. The reader is therefore required to make certain assumptions about omitted material. In this case it is unclear whether the “Council Clerk” later became the public clerk mentioned in Book 6, Part 47.

<sup>2</sup> Slaves and women were not citizens.

<sup>3</sup> “Athenians in the 4th century were governed by laws (no/moi, or no/mos in the singular) and decrees (yh/fismata, or yh/fisma in the singular). Decrees were passed by a vote of the Assembly Ecclesia, of the Council, or both. Laws took precedence over Decrees. Anyone who proposed a decree in the Assembly that contradicted an existing law was subject to prosecution on a charge of ‘Illegal Proposal’ (graphē paranomōn). Laws were passed through a process called ‘nomothesia’ (nomothesia) or ‘legislation.’ Each

The proceedings of the Athenian Council were observed and recorded by an officer elected by the larger Ecclesia. This officer was known as an “auditor” (literally “one who hears”).<sup>5</sup> By reserving itself the power to elect the “auditor,”<sup>6</sup> the Ecclesia ensured the Council’s proceedings were witnessed and recorded by an official of its choosing. The auditor’s function in this context can be viewed as an early form of executive oversight.

Aristotle describes the role of the auditor (identified as “clerk” in this translation<sup>7</sup>) in more detail below. “... He has the charge of all public documents, and keeps the resolutions which are passed by the Assembly (Ecclesia), and checks the transcripts of all other official papers and attends at the sessions of the Council. Formerly, he was elected by open vote, and the most distinguished and trustworthy persons were

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year the Assembly met to discuss the current body of laws. Any citizen could propose a change in the laws, but could only propose the repeal of a law if he suggested another law to replace the repealed law. If the Assembly decided to change the laws, a board of ‘Nomothetai’ (nomothetai) or ‘legislators’ was selected to review and revise the laws. The process of legislation was like a trial, with advocates speaking in defense of the existing laws, and others speaking against the existing laws. The Nomothetai would vote on changes, and any changes that passed were published on inscriptions near the statues of the Eponymous Heroes and read aloud at the next meeting of the Assembly. The Nomothetai also undertook an annual review of all existing laws, to make sure that none contradicted others, and that none were redundant.” Christopher Blackwell, “Nomothesia (Legislation)” in C.W. Blackwell, ed., *Demos: Classical Athenian Democracy* (A. Mahoney and R. Scaife, ed., *The Stoa: a consortium for electronic publication in the humanities* [www.stoa.org]) edition of January 2003.

<sup>4</sup> The Ecclesia was made up of the free male citizens of Athens, a potential population of 40,000. Usually, only 6 or 7 thousand citizens appeared for meetings. Meetings were convened forty times per year and held on a hillside near the Acropolis known as Pnyx. For certain purposes a quorum of 6,000 was required. For a detailed description of meetings of the Ecclesia see: Donald Kagan, *Pericles of Athens and the Birth of Democracy*, Free Press, New York, 1991 pp. 46-64. Ecclesia is also spelled “Ekklesia” and is the root for the term Ecclesiastical.

<sup>5</sup> “A hearer,” the first meaning for the term “auditor” in the Oxford English Dictionary, 1971, Oxford University Press, 1971, p. 560.

<sup>6</sup> Darwin Patnode, *A History of Parliamentary Procedure*, Third Edition, (Minneapolis: Parliamentary Publishing, 1982), p. 11.

<sup>7</sup> A third alternative translation is found at the Stoa Project website where reference is made to a “legislative secretary who made copies of all laws and attended meetings of the Council.” Blackwell, January 2003, “Nomothesia (Legislation)”

elected to the post, as is known from the fact that the name of this officer is appended on the pillars recording treaties of alliance and grants of consulship and citizenship.”<sup>8</sup>

This passage implies that with the passage of time the “auditor” (hereafter referred to as “clerk”) assumed broader responsibilities, including safekeeping of “all public documents” and decisions (resolutions) of the Ecclesia. In Book 6, Section 47, Aristotle makes reference to a “public clerk” in a passage relating to a specific function of the Council, but it is unclear whether this is a reference to the office described in the previously quoted passage.<sup>9</sup>

These citations confirm that the Council clerk was a trusted and influential official within early Athenian democratic institutions. It is also clear that before the fourth century BCE, the duties of that office were well established in Athenian civic life.

### **Early Roman Assemblies**

Available commentary on the role of recorder in Roman popular assemblies<sup>10</sup> and the Roman Senate presents a different view from the Athenian model. Reference could not be found to the “highly esteemed” legislative recording officer present in the Athenian assembly, perhaps because clerks were ubiquitous and accorded little status in Rome’s patrician and highly bureaucratic civil government. William Smith, author of *A Dictionary of Greek and Roman Antiquities*, says, “Being very numerous, they (*scribes*) were divided into companies or classes (*decuriae*) and were assigned by lot to different magistracies ...”<sup>11</sup> He goes on to say, “In Cicero’s time, indeed it seems that any one might become a *scriba* or public clerk, by purchase, and consequently,

as freedmen and their sons were eligible, and constituted a great portion of the public clerks at Rome, the office was not highly esteemed.”<sup>12</sup> This plebeian view of clerks as a class is supported by references related to the proceedings of the Roman Senate.

During the Roman Republic, the Senate possessed only limited lawmaking powers. Most scholars<sup>13</sup> view the Senate’s principal purpose as that of providing a forum for Roman patricians to debate policy and advise the ruling authority.<sup>14</sup> A Senate possessed of such a narrow legislative role had little need for clerical support of high stature and trust. The passages below confirm this view.

“When a *Senatusconsultum*<sup>15</sup> (decision of the Senate) was passed, the consuls (presiding senators) ordered it to be written down by a clerk in the *presence of some senators* (emphasis added), especially of those who had been most interested in it or most active in bringing it about.”<sup>16</sup>

The clerk’s role in this context was merely to transcribe the text of a decision already reached. No mention is made of receiving, preserving, signing, or delivering significant papers. Even in the act of transcribing a decision of the Senate, the clerk’s (i.e., scribe’s) work was monitored by Senators with an interest in the issue.<sup>17</sup>

“The transactions of the Senate were from the time of Caesar registered by clerks appointed for the purpose, under the superintendence of a senator.<sup>18</sup> *In cases which required secrecy (senatusconsultum tacitum)*,

<sup>8</sup> Aristotle, Book 7, Part 54

<sup>9</sup> “The tablets containing the lists of the installments are carried into the Council, and the public clerk takes charge of them.” A later passage in Part 48 reads: “These officers receive the tablets, and strike off the installments as they are paid, in the presence of the Council in the Council-chamber, and give the tablets back to the public clerk.” Aristotle, Book 6, Part 48.

<sup>10</sup> The four Roman Assemblies forms were:

Comitia Curiata – under the Roman Kings, acted as the peoples assembly

Comitia Centuriata – the council under the Kings representing the military units (the centuries i.e. ...military legions)

Comitia Tributa – the tribal assembly, elected lower magistrates

Concilium plebes – the plebeian assembly, after 287 BCE

passed laws for all Romans

For more detail see: <http://www.roman-empire.net/republic/rep-assembly.html>

<sup>11</sup> “Scribae,” LacusCurtius: Into the Roman World, “*A Dictionary of Greek and Roman Articles*,”

[http://www.ukans.edu/history/index/europe/ancient\\_rome/E/Roma/n/home.html](http://www.ukans.edu/history/index/europe/ancient_rome/E/Roma/n/home.html)

<sup>12</sup> “Scribae,” *A Dictionary of Greek and Roman Antiquities*.

<sup>13</sup> Though most scholars consider the Senate an advisory body, some disagree. For example, “Many *Senatusconsulta* (recommendations of the Senate) were enacted in the Republican period, and some of them were laws in the proper sense of the term, though some modern writers have denied this position. But the opinion of those who deny the legislative power of the Senate during the Republican period is opposed by facts.”

“*Senatusconsultum*,” *A Dictionary of Greek and Roman Antiquities*.

<sup>14</sup> As noted below, this was essentially the same authority exercised by the early English Parliament.

<sup>15</sup> “A Law is properly a rule or command of the sovereign power in a state, published in writing, and addressed to and enforced upon the members of such state; and this is the proper sense of *Lex* in the Roman writers.” “*Lex*,” *A Dictionary of Greek and Roman Antiquities*.

<sup>16</sup> “*Senatusconsultum*,” *A Dictionary of Greek and Roman Antiquities*.

<sup>17</sup> This monitoring process is reminiscent of enrolling committees known to exist in some state legislatures in modern times. In these committees, bills enrolled by the Clerk are reviewed and approved before delivery to the presiding officer for a signature.

<sup>18</sup> “*Senatus*,” *A Dictionary of Greek and Roman Antiquities*.

*the senators themselves officiated as clerks* (emphasis added).<sup>19</sup>

The final sentence in this paragraph makes it clear that the Senate did not entrust clerks with sensitive materials.

“The *Senatusconsulta* were originally intrusted (sic) to the care of the tribunes and the aediles,<sup>20</sup> but in the time of Augustus the quaestors<sup>21</sup> had the care of them. Under the later emperors the *Senatusconsulta* ... were preserved in ‘*libri elephantini*’ (books with leaves of ivory.)”<sup>22</sup>

This segment reaffirms the earlier point that officials of high status, not clerks, were trusted with the decision papers of the Senate.

## England

The first mention of the “Clerk of the Crown in Parliament” occurs in 1316 when that unicameral body was constituted largely of land holders and clerics.<sup>23</sup>

“During the fourteenth century simultaneous gatherings of barons and prelates for the purpose of a High Court of Justice (*parliamentum*), and of representative knights and burgesses, as deputies of the commonality, for the consideration of grants of taxes, coalesced: the single assembly (of two houses) that resulted was Parliament in its permanent form.”<sup>24</sup> Reference to the office of Clerk of the House of

Commons<sup>25</sup> first occurred in 1363.<sup>26</sup> Like the Clerk of the Crown in Parliament, the Clerk of the House of Commons was appointed by the ruling monarch.

The clerk’s role in an early sitting of Parliament is mentioned in the written notes of an observer and thought to have been composed around 1397.

“According to the usual form, the cause of the meeting was declared and then the King’s will. A *clerk* (emphasis added) began with a dignified speech setting forth the main points before them all and asking above all for money, with flattery to the great men to avert complaints. When the speech was ended, the Knights of the Shire were commanded to meet on the morrow, before dinner, with the citizens of the towns,<sup>27</sup> to go through the articles which they had just heard and grant all that had been asked them. But to save appearances, and in accordance with custom, some of them falsely argued at some length ... Some had been got at before hand by the Council, and knew well enough how things would have to end, or the assembly would be sorry for it... Some members sat there like a nought (sic) in arithmetic that marks a place but has no value in itself.”<sup>28</sup>

This lively description observes that the session was initiated by a speech given by a clerk. One cannot deduce from this fragment whether the clerk spoke extemporaneously or, as is more likely the case, was reading from remarks prepared for him by the reigning authority. In either event, the clerk’s role, in this context, is prominent in so far as his actions set the stage for the proceeding.<sup>29</sup>

The last three sentences of the preceding account suggest that political assemblies have faced many of the same problems over the centuries. Specific

<sup>19</sup> “*Senatus*,” *A Dictionary of Greek and Roman Antiquities*.

<sup>20</sup> The name of these functionaries is said to be derived from their having the care of the temple (*aedes*) of Ceres. The aediles were originally two in number, and called *aediles plebeii*; they were elected from the plebes, and the institution of the office dates from the same time as that of the *tribuni plebis*, B.C. 494. Their duties at first seem to have been merely ministerial; they were the assistants of the tribunes in such matters as the tribunes entrusted to them, among which are enumerated the hearing of causes of smaller importance. At an early period after their institution (B.C. 446), we find them appointed the keepers of the *senatusconsulta*, which the consuls had hitherto arbitrarily suppressed or altered (Liv. iii.55). “*Lex*,” *A Dictionary of Greek and Roman Antiquities*.

<sup>21</sup> (*kw<sup>ēs</sup>’tōr*) Roman magistrate, with responsibility for the treasury; in early times a quaestor also had judicial powers. At first there were two quaestors. Sulla named 20, and Caesar set 40 as the number (45 B.C.), but Augustus reduced them to 20. Quaestors were in theory deputies for consuls, praetors, or proconsuls. A quaestorship was the first magistracy sought by an ambitious young man. (*The Columbia Encyclopedia*, 2001 Edition)

<sup>22</sup> “*Senatusconsultum*,” *A Dictionary of Greek and Roman Antiquities*.

<sup>23</sup> Josef Redlich, *The Procedure of the House of Commons*, (Translated by A. Ernest Steinthal), London, 1908. Vol I, p. 10.

<sup>24</sup> Redlich p. Vol. 1, p. 7.

<sup>25</sup> The office of Clerk of the House of Commons is technically styled “Under Clerk of the Parliaments ... to attend upon the Commons.” He serves for life under letters patent from the Crown. Erskine May (Sir Charles Gordon), *Parliamentary Practice*, 20<sup>th</sup> ed., (London: Butterworths), 1983; The name House of Commons derives from the French term “*les communes*” used earlier to describe the assembly of knights and borough representatives. It refers not to “commoners” but instead to various communities (shires and counties) represented. Maurice Bond, 21 June 1966, “The History of the Parliament and the Evolution of Parliamentary Procedure,” (Lecture) <http://www.parliament.uk/documents/upload/bond.pdf>

<sup>26</sup> W.R. McKay, *Clerks in the House of Commons 1363-1989*, House of Lords Record Office Occasional Publications No. 3. 1989. The first Clerk of the House of Commons was Robert de Melton.

<sup>27</sup> Presumably the “borough representatives”

<sup>28</sup> Bond, Section II

<sup>29</sup> This role may have been the origin of the modern practice of the clerk of an assembly reading a governor’s proclamation convening an assembly in special session.

reference is made to saving face, false arguments, preordained outcomes, and members who count for naught.

The earliest known treatise on English parliamentary law is the *Modus Tenedi Parliamentum*,<sup>30</sup> whose title means the Mode of Holding the Parliament (hereafter referred to as the *Modus*). Although there has been spirited scholarly argument about its accuracy, it is today accepted as authentic and “probably written sometime between 1294 and 1327 CE.”<sup>31</sup> Within the context of the current subject, our interest in the *Modus* centers on its description of the role of the clerks.

The *Modus* includes twenty-six sections, three of which relate in some detail to the clerical officials serving the Parliament. In a section entitled “De Principalibus Clericis Parliamenti” (concerning the principal clerks of the parliament), the duties of the two “principal clerks” are specified. (Commentary follows each direct cite from this section.) The first passage of this section describes the physical location of the clerks during sittings of the Parliament and notes their responsibility for enrollment of its decisions.

“Also, the two principal clerks of the Parliament who shall inroll (sic) all the pleas and transactions of the Parliament shall sit in the midst of the justices.”<sup>32</sup>

This sentence has significance because the sittings of Parliament were secret. In contrast with the Roman Senate, the clerical recorder in attendance in the English Parliament would have been entrusted by the justices and the King to keep confidential the proceedings of the chamber.

The *Modus* goes on:

“And be it known those two clerks are not subject to any of the justices... these clerks are subject immediately to the King and his Parliament in common, unless perchance one or two justices be assigned to them to examine and amend their inrolements (sic).”

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<sup>30</sup> Thomas Duffus Hardy (Ed.), *Modus Tenedi Parliamentum*, London. Eyre & Spottiswoode. 1846

<sup>31</sup> Hardy, p. xvii.

<sup>32</sup> Meetings of the Parliament were then closed. Under certain conditions (Standing Order No. 136), the Parliament may be closed today and the public galleries (known as “strangers galleries”) cleared.

This section of the *Modus* portrays the principal clerks as responsible to the King and the Parliament jointly and beholden to no individual member of the body. It affirms the important principle that the clerk is an independent officer whose records should be true and not subject to influence or amendment by any member or political interest.<sup>33</sup> It also makes reference to the practice of member review of the enrolled petitions first mentioned in Roman practice,<sup>34</sup> though the phrasing in this context suggests the practice may have been rarely used.

The *Modus* then addresses the nature of the clerk’s record.

“... nor have they by themselves records in the Parliament, except so far as a new power is assigned or given to them in the Parliament by the King and Peers of Parliament...”

Records of the clerks in those days were considered the possession of the chamber. Clerks were expressly forbidden from creating a personal record of any action taken or words said.<sup>35</sup> This segment of text further reinforces the importance of secrecy in the early parliaments.<sup>36</sup>

“... those two clerks may inrol (sic) principally all pleas and all judgments in the principal roll of

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<sup>33</sup> Josef Redlich presents a contrary view, holding that the independence of the principal clerks noted in the *Modus* is not supported elsewhere in the historical record. In his words, “There is no support elsewhere for what is stated in this work (*Modus*) at some length about the clerks, or for the emphatic assertions of their independence of the judges and immediate subordination to the King and Parliament; this is moreover, opposed to the long-continued insignificance of these officials.” Redlich, p. 10-11. Redlich appears to view the clerks in a purely technical role, much as did the Roman Senate.

<sup>34</sup> It is current practice for most chambers to approve records created by the clerk either by formally approving them during sessions or by affixing to them the signature of its presiding officer.

<sup>35</sup> John Hatsell notes the courage of the Assistant Clerk (Rushworth) who, contrary to specific orders, took down the words of Charles I and the famous reply of Speaker Lenthall in 1648. When asked by the King where certain absent members who were suspected of treason could be found Lenthall said ““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, and I humbly beg your Majesty’s pardon that I cannot give any other answer than this to what your Majesty is pleased to demand of me.”

<sup>36</sup> In later Parliaments, secrecy was important not so much to keep matters from the public as to keep them from the King. It suggests that open sessions would discourage members from forthright debates. At the same time, it seems likely the King would have debated friends in Parliament to know what was being said and done.

Parliament, and deliver those rolls to the King's treasurer before recess of Parliament ...”

This fragment of the *Modus* notes that the two principal clerks were entrusted with the responsibility for assembling the final records of Parliament and delivering them to the King's treasurer. As noted by Redlich<sup>37</sup> and supported by Black,<sup>38</sup> the reference to “rolls” in this context means the “record of proceedings.”<sup>39</sup> The rolls were probably delivered to the King's treasurer for archival preservation in the Royal Treasury.

The need to retain a learned (or at minimum, literate) official to create the “rolls” and copy legislative petitions<sup>40</sup> may have been the principal rationale for the creation of the office of legislative clerk. The presence of such an official freed the members from the burden of minutiae and allowed them to focus their attention on matters of policy.

In the fourteenth century all lawmaking power resided entirely with the King.<sup>41</sup> The actions of the Parliament had not yet attained such stature as would require formal Royal Assent.<sup>42</sup> Therefore, it seems reasonable that the original “rolls” of Parliament would not be delivered to the regent in person.

The King was, however, responsible for the sustenance of the clerks.

“These two clerks, unless they be in some other office under the King and take fees from him

wherewith they can live creditably, shall receive of the King one mark a day for their expenses ...” This wording imposes upon the public purse responsibility for compensating the principal parliamentary clerks for their services. Compensation is waived if the clerk holds another office under the King through which he receives support. The language is significant because it enables the clerk to act independently of support from “justices” with an interest in the outcome of the proceedings.

“The clerks of the Parliament shall not refuse to any one a copy of his proceeding, but shall deliver it to everyone who demands it ...”

The *Modus* conveys two important points in this passage; namely, that *anyone* is entitled to a copy of the record of the proceedings of Parliament and that the clerk shall be responsible for furnishing copies of official records. It also describes the clerk as the agent of the Parliament responsible for public distribution of its actions.

A further point should be made regarding the record itself. One may conclude from this passage that the official (presumably approved) record of its proceedings is public even though its actual proceedings are secret.

The *Modus* goes on to describe the procedures followed by Parliament for consideration of policy questions as follows:

“(A)<sup>43</sup> When any dispute, question, or difficult case, whether of peace or war, shall arise in or out of the kingdom, (B) the case shall be related and recited in writing in full Parliament, (C) and shall be treated of and debated on there among the peers of the Parliament, (D) and if it be necessary it shall be enjoined by the King, ..., and (E) the case shall be delivered in writing to its clerk, and (F) in an appointed place they shall cause him to recite the case before them .....” (Lettering added)

Since this difficult paragraph describes the formal means by which petitions were considered, its elements will be parsed.

Part A describes the scope of Parliament's jurisdiction. It is grounded in the ancient principle that subjects have a right to petition their sovereign for relief. The phrase “...dispute, question, or difficult case...” implies that such relief has a quasi-

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<sup>37</sup> “As to the carrying on of the proceedings, the method of bringing forward motions, the introduction of amendments, as to the debates which no doubt took place there is little or nothing handed down. Only here and there we gather from the Rolls of Parliament that long and set deliberations of the Commons took place.” Redlich, p. 20.

<sup>38</sup> *Black's Law Dictionary*, Sixth Edition. 1990. St. Paul, MN.

<sup>39</sup> The rolls were literally “rolls” of vellum-like scrolls with pages stitched together from the bottom of a page to the top of the next page. Redlich, Vol 1. p. 14. This may be an antecedent to the practice followed until recently in some legislatures of requiring bills to be submitted in the form of rolls. According to *The History of Parliament and the Evolution of Parliamentary Procedure*, the use of rolls for official records was abolished in 1850.

<sup>40</sup> At the time the *Modus* was written, legislative enactments in the form of bills did not exist. Parliament, from a clearly inferior position, would urge (i.e., petition) the King to make law of a policy it proposed. One hundred fifty years later the Parliament asserted its powers more fully and began enacting bills. Enactment by bill rather than petition began during the reign of Henry VII (1485-1509). Scholars consider this the point at which parliament was transformed from a “... mere assembly of Estates to a new and unique organization for expressing the will of the whole state...” Redlich, p. 3-4.

<sup>41</sup> Bond, Part II, Section I.

<sup>42</sup> Agreement of the ruling monarch to a law proposed by the Parliament.

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<sup>43</sup> The lettering is not a part of the original text but was added to clarify references to the various components of this passage.

judicial character that extends beyond the modern connotation of “lawmaking” and that therefore, the role of Parliament had yet to evolve into its final form.

parliamentary clerks Henry Scobell, Henry Elsynge, and John Hatsell should provide ample material for this purpose.

Part *B* provides that such matters as may arise within its jurisdiction shall be reduced to writing and read to the full Parliament. Even as early as the fourteenth century, the importance of “written” petitions and formal record keeping is suggested by this segment of the text.

Part *C* provides that once read, a petition will be considered and debated by the justices. Here, first stated, are principles of formal introduction by reading and resolution and consideration through debate.

After debate, part *D* indicates that, if necessary, the matter will be brought before the King, presumably for a decision that goes beyond the powers of Parliament to respond or which has so divided the Parliament that the King must settle the matter. This passage may also be a precursor of the procedure that will evolve into the principle of Royal Assent.

Importantly, for our purposes, part *E* requires that petitions shall be delivered in writing to a clerk who shall recite the case before the assembly at an appointed place. Acting as the agent of Parliament, a clerk is entrusted with the task of receiving cases (or petitions). This process may be describing an early form of the clerk’s current function as receiver of bills for filing. A further responsibility is placed upon the clerk in this part to recite (read) the cases received (part *F*), a responsibility that clerks fulfill to this day.

A more complete record of the clerk’s role in the Parliament evolves from this point and should be the subject of a more detailed paper at a later date.

### ***Final Thoughts***

This sketch is a bare beginning point that begs for more research and commentary. Of particular concern is Josef Redlich’s dissent over the clerk’s characterization in the *Modus Tenendi Parliamentum*. Further study will be required to reconcile these differing views.

At a minimum, this subject should be expanded to include the evolution of the clerk’s role after the *Modus*. An intermediate period from the fourteenth to eighteenth centuries including the works of

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# **MY ROOMMATE HAS A MOHAWK AND A SPIKE COLLAR: Legislative Procedure in the Age of Term Limits**

By State Representative Matthew Dunlap,  
D-Old Town, Maine

It's easy to forget that the legislative process, when smoothly executed, is awe-inspiring. After all, we do this every day; it's how we work, as a weaver skillfully runs several looms at once, using intricate knowledge gained with much experience. However, for a citizen attending a session of their legislature for the first time, a well-run chamber can appear both baffling and awesome. Arcane in its nature, parliamentary procedure is truly the sum of its parts, appearing to the newly initiated as a textile loom -- noisy, a flurry of action, and yet producing a smooth, flawless product. Parliamentary procedure has accomplished this end for centuries, but the expert routine of the legislative process has been disrupted by an unwelcome guest: term limits.

When procedures are poorly understood, they are almost always poorly executed. In the legislature, nothing is more agonizing than watching a member tentatively rise, then stutter and stammer their way through a parliamentary motion. Before the age of term limits, a presiding officer would mercilessly ignore a member who bungled a procedure, and the opposition would pounce like a hungry cat. Senior members would smile at their colleague's learning experience, and the subject member would find out all they needed to know to avoid future humiliation.

## ***Time's Up***

Term limits have left little time for that luxury. In Maine, legislators are limited to no more than four consecutive two-year terms. While historically legislators spent two or three terms learning the ropes, they must now gain the same knowledge in two or three months. Exacerbating this problem is the sheer variety and volume of work. A new legislator, already coping with constituent work, the media and a topsy-turvy schedule that makes family life a nightmare, wades full-bore into the untamed wilderness of busy committee hearings, work sessions and floor action. In a very short time a freshman is, possibly without knowing it, exposed to Robert's Rules, individual committee rules, House rules, Senate rules, Joint rules, Mason's Rules,

Hughes' Rules, Reed's Rules, and traditional rules of order and decorum. Like baseball, there's a rule to cover everything. While anyone can watch, and many can play, few can master enough skills to become an umpire in such a short time.

The greatest exposure of the folly of term limits is the crisis that is immediately placed upon a newly elected legislator. For someone with an eye to the future and maximization of their limited allowance of tenure, the question becomes less of skill acquisition than of political strength training, which boils down to getting a key committee assignment, sponsoring and cosponsoring important legislation, and helping get important legislation passed into law by coalition building. From this platform a promising freshman can begin their catapult into leadership. In Maine, the word on the street is that you have to be a committee chair by your second term or any hope you have for advancement is futile. Even better is attaining the status of a floor leader position by the second term. But is two years long enough to understand the political chemistry and floor procedure necessary to serve effectively as a member of party leadership?

It's important to remember that term limits and parliamentary law are, through circumstances, thoroughly incompatible. In-depth knowledge of the mechanics of legislative procedures requires deep focus, concentration and much experience over a considerable period of time. The purpose of term limits is to remove people from office in a timely fashion and without interference from the electorate. With a limited amount of time to serve and make an impact, intricate knowledge is generally foregone. For a rank and file member, who only wishes to serve their community well, a lack of such deep understanding probably isn't harmful. After all, there are many ways to serve the public while sitting as a member of the legislature. For an individual with an ambitious legislative agenda or who aspires to a position of leadership--from committee chair up to presiding officer--the rarified time schedule poses a daunting challenge in understanding parliamentary procedure and great vulnerability if that understanding is lacking.

### ***Welcome: You're In Charge***

Those legislators most exposed to harm to their political agendas from lack of proper knowledge of procedure are the new committee chairs. Not only are these individuals expected to maintain order in their committees, but also they must be prepared to lead the charge for their committees during floor debates. Complicating these roles in the era of term limits is the general hunger for advancement, so that a new chair almost always has in their train a host of jealous rivals who are only too happy to assist in tripping up the new chair in matters of procedure.

In Maine, chairs of committees have been selected more for expertise in policy areas than for political loyalty. This may be a happier side effect of term limits, as new presiding officers (who themselves are usually always new and elected for one term -- another effect of term limits) rarely have time to cope with the delicate balance of maintaining a strong political ally in a chair where the individual chair endures the public scrutiny of learning by example. Strong knowledge of policy, however, is seldom a substitute for parliamentary skill during floor debate. Knowing about all of the implications of a bill before the legislature doesn't make a chair more credible when they don't know to move acceptance of an ought-to-pass report rather than a recede and concur motion. If one is relying on their expertise on a subject to try to indefinitely postpone a bill, that aura of expertise is dimmed when the aforementioned motion is made pending adoption of a floor amendment and thus out of order. The appearance of incompetence while wrestling the live animal of floor action can be the same as real incompetence. A casual acquaintance with the rules can get one in as much trouble as no acquaintance at all if the user doesn't have the horse sense to know when to make a motion and when not to.

In 1998, I found myself in just such a position. As a new House chair of the Committee on Inland Fisheries and Wildlife (which has jurisdiction over laws regulating hunting, fishing, etc.), I had largely achieved chairmanship through almost monomaniacal focus on policy issues and problem resolutions during my first term. Being named chair seemed an affirmation of my hard work. I knew little of procedures, however, and after a particularly ugly committee hearing where several committee members successfully embarrassed me with points of order, I resolved never to be so undone again. But my education had just begun.

I found myself on the bottom end of a 12 to 1 committee report on a bill to loosen certain hunting regulations. Although I had educated myself thoroughly on the body of law in question, going back to Maine's point of admission to the Union, I failed to consider the socially inept demon I was unleashing by waging this fight against my committee. Parliamentary procedure implies but never expresses the social dynamic in the Legislature. One's colleagues, despite attitudes and appearances, are people, not hidebound (or idea bound) mules. Wanton use of procedure in spite of this truth can indicate intellectual arrogance. When the floor debate came, I pulled no punches, even going so far as to question the intelligence of my own committee members. I sought out parliamentary advice, gathered my weapons, and continued my headlong attack on the bill--again, again and again. While I had lost the first vote on acceptance of the committee report by only four votes, the margins grew wider and wider as I made more and more creative motions until I found myself nearly alone. When I stood up to make a motion or request a vote, the whole House would audibly groan. What became most talked about was not that the Legislature was ratcheting down hunting regulations in a potentially dangerous manner, but that I was annoying everyone in sight, and all I was left with were bridges to mend. Later I was interviewed by a national magazine about term limits and the experience of the hunting bill was held up as an example of why term limits are bad. When inexperienced legislators are thrust into important positions of leadership before they are ready, they jeopardize important policy, their own long-term credibility, or both. I found the newspaper and magazine reports offensive and insulting. They were also right.

### ***The Art Of War***

It's long been said that those who understand the rules of procedure are the rulers of the process. In Maine, where voters adopted term limits in 1993, that adage is more true than ever. Members who possess such knowledge are sought out during controversial debates like village shamans who hold great power over the supernatural world. Predictably enough, these members are usually those who have served several (or many) terms and then have returned after a hiatus. Understanding a sequence of motions as carefully taught by an expert is incredibly empowering for a new member, but more important is understanding when to take a stand. Gained seemingly only through experiences like the one related above is the simple truth that just because you can destroy the opposition doesn't mean you should

try if an opportunity presents itself. For a junior member of the legislature who is struggling to make a difference and demonstrate their credibility, rules of procedure can seem like tempting weapons to employ. While term limits have diminished the number of people who understand parliamentary procedure at all, virtually no one seems to understand that the purpose of the rules of procedure is to facilitate agreement, not to articulate vengeance.

This fundamental confusion is probably the most damaging effect of term limits. Lost with the removal of experienced members is not only vast institutional memory, but also the type of collegiality and respect for the institution that always would insist there is another day. It is this loss that has led to general disrespect among members for rules of decorum and procedure that force them to be civil to each other, even in the heat of battle. Complicating this loss is waning tolerance by leadership for members voting outside the bloc, especially on "procedural" motions. Depending on the circumstance, the term "procedural" becomes a catchall of main, incidental, subsidiary and privileged motions. Demanding support for the floor leaders when they make tabling motions is one thing; gripping the caucus tightly to stick together on defeating a substantive motion can eventually erode the individuality of the rank and file member and is quite something else. While either case can reflect a legitimate leadership style, it can further distance members from any respect for the procedural traditions of the institution if their leadership doesn't know the difference between a main and incidental motion. This situation is the great test and challenge of presiding officers and leadership in the era of term limits.

This challenge has largely been well met. Leadership and the presiding officers have done a remarkable job at keeping the work of the legislature before it and not shunted away by sideshow distractions. However, the gap between legislators' energy and abilities continues to widen, even if incrementally. With this incremental change comes the pressing demand upon members of leadership not only to be fluent in procedure, but also to provide the type of example that imbues rank and file membership with the confidence to use discretion and judiciousness when making floor motions.

### ***Can I Borrow Your Toothbrush?***

While an obvious solution to this matrix of problems would be to abolish term limits altogether, legislatures around the country--not excepting Maine--are reluctant to do so. Citizen initiated referenda

carry with them a certain sacredness that betide woe to the politician who would seek to repeal them, so such statutes are preternaturally resistant to revision or repeal. For better or worse, term limits are here to stay--for a while at any rate. Given the anti-institutional nature of term limits, in order to prevent infection of the lifeblood of the legislative institution--parliamentary law--officers and staff of the legislature will have to work with senior legislative members to foster more rapid development of legislative ball-handling skills in junior members. In the future, presiding officers might feel obliged to encourage junior members to enter mentorships not only with senior members, but also with highly skilled legislative alumni. Informal debate societies--dull as the idea sounds--could also prove to be antidotes to clumsiness and social bruising on the legislative floor.

Term limits can only do so much damage to the institution of the legislature. Proper understanding of procedure can mitigate the nasty habit of term limits to whisk away our most able--along with our least able--friends and colleagues. For a newly arrived presiding officer, constant attention to matters of procedure and decorum can gain one lasting respect and admiration as a capable leader. Parliamentary procedure remains the best tool to carry from point to point in the journey of problem to solution; like a magnetic compass in the age of global positioning systems, it has too much real value to compromise or discard. We need not prove the value of parliamentary procedure. It does that well enough on its own each time an idea translates into better policy, whether that be one less hungry child, a piece of wildlife habitat protected, or a tax law streamlined. The problem is how best to utilize an agile and complex tool in an age when those who most desperately need to use it are able to do so for such a short time. Term limits, pursued by an angry and frustrated public as the trend of the day, should not disrupt the calm deliberation afforded by the traditions and structures of parliamentary procedure. If such upheaval of public policy is avoided, then term limits can rest comfortably in our state capitols. Whether term limits and procedure can ever be compatible as roommates in our capitols, however, remains to be seen.

*Representative Matthew Dunlap (D-Old Town) represents Maine's 121st House District. He serves as House Chair of the Joint Standing Committee on Inland Fisheries and Wildlife, as Democratic Chair of the Legislative Apportionment Commission, as House Chair of the Committee on Governmental Oversight, and as a member of the House Standing Committee on Elections. He is employed in the private sector as a waiter and bartender. He is serving his fourth two-year term and is prohibited from seeking election in 2004 pursuant to Maine's term limits law.*



## THE POWER OF THE EXECUTIVE VS. LEGISLATURE – COURT CASES AND PARLIAMENTARY PRIVILEGE

### “Control or Rubber Stamp”

By Steven T. James

Chief Clerk and Parliamentarian, Massachusetts House of Representatives  
(edited by Massachusetts House Counsel Louis Rizoli and former House Clerk Robert E. MacQueen)

This paper was presented to the Joint Meeting of ASLCS and the Clerks-at-the-Table,  
on October 10, 2003, in Dover, Delaware.

Under Massachusetts law, appropriation bills are supposed to be just that – bills that make appropriations and that is all. As a matter of fact, Massachusetts General Law Chapter 29 Section 7L reads, in part, “A law making an appropriation for expenses of the commonwealth shall not contain provisions on any other subject.” Notwithstanding the prohibition by law, outside sections containing subjects other than appropriations have regularly been added to appropriation bills, and between 1976 and 2001 their numbers increased every year. This apparent violation of law is permissible because, under the interpretation of statutes, a later enactment takes precedent over an established law. The mere enactment of an “outside section” in a budget therefore overruled the previous statute. So, members of the House or Senate, frustrated that legislation they favored was stuck in committee, used the outside section process as a mechanism to get the text of the stalled legislation included in the budget. The budget is, after all, guaranteed to make it to the Governor’s desk. The sense of the frustration of the members became particularly acute in the year 2000 when 1434 budget amendments (many adding outside sections) were offered by House members alone.

The Governor of the Commonwealth of Massachusetts had always had the authority to return regular bills (those not making appropriations) to the Legislature with recommendation of amendment (Mass. Constitution Art. 56). Until the 1996 court decision (*Sutton v Metropolitan District Commission* 423Mass.200 - 1996), it was the belief that the Governor was not granted the same authority as it pertained to appropriation bills. It was felt that the Governor could not sign a bill and also return portions of it to the Legislature with an amendment.

This Constitutional question arose when the Governor squared off with the House and Senate regarding the Legislature’s practice of placing the text of regular legislation in outside sections of appropriation bills and his authority to offer amendments to that text.

In order for the Commonwealth to continue to pay its bills, punctual approval of appropriation bills is essential. If the Governor, instead of promptly signing appropriation bills, is forced to return them unsigned to the Legislature with recommendation of amendment, the funding of essential programs would be delayed until the Legislature acts on the Governor’s amendment and returns the appropriation bill to his desk.

The position of the Executive was that the practice of placing text not pertaining to appropriations in appropriation bills diluted the authority of the Executive because it by-passed the Governor’s power to recommend amendments to bills. This practice effectively left the Governor with only two viable options regarding the text of “outside sections” . . . approval or veto.

The Governor’s budget veto authority is granted in Article LXIII (63) (as amended by Section 4 of Article XC [90]) of the Massachusetts Constitution, which gives the Governor the power to “redline” veto or reduce portions of appropriation bills. The Constitution also provides an opportunity for the Legislature to override those vetoes or reductions [see Art. II, Section 1, Chapter 1, Part the Second]. However, until an interpretation of the 1996 ruling, it did not appear that the Governor had any authority to return outside sections individually with recommendation of amendments.

Unlike regular pieces of legislation where the Governor has 4 choices when a bill reaches his desk, the Governor's choices in relation to budgets were limited to his powers under Article 63.

The choices that a Governor has for regular legislation are as follows:

1. He can sign the bill (which must be done in 10 days);
2. He can allow the bill to become law without his approval on the 11<sup>th</sup> day (by taking no action);
3. He can return the bill to the branch of origin with an amendment (under Article 56 of the amendments to the Constitution); or
4. He can veto the bill by returning it, unsigned, to the branch of origin.

When it came to outside sections of appropriation bills, however, the Governor was, until the 1996 ruling, precluded from the third option.

As with regular bills, the Governor has ten days to act on appropriation bills. Here's where the process differs -- Article 63 provides that the Governor may return certain of the budgetary items making appropriations with reductions or vetoes and the outside sections of budgets with disapproval. It had, until the *Sutton v M.D.C.* ruling, been assumed that (except for appropriation items returned under Art. 63) once the Governor signed a bill, all of the text of the bill became law and had the force of law on its effective date. This statement is no longer true because now not only may the Governor approve acceptable portions of a budget, but also the Governor may return portions of the same appropriation bill that do not make appropriations (outside sections) to the Legislature under Article 56. Those sections are then held in abeyance until they are finally signed into law. If the Legislature places the section back on his desk, the Governor may sign it, let it become law without his signature, or return it unsigned with a veto, which is identical to the procedures followed for regular legislation.

It is significant to the court case to be discussed later that I briefly explain effective dates. A bill normally takes effect 90 days after becoming law unless it contains an emergency declaration in the form of an "Emergency Preamble" (see Constitution Art. 48), which allows it to take effect sooner.

Under Article 48 (the referendum), in order to suspend the operation of the law and place the question of repealing the law on the next state election ballot, citizens have 90 days to gather enough signatures -- one and one-half percent of the total vote for Governor at the previous election if the bill contained an emergency preamble or, if the bill did not contain an emergency preamble, two percent of the total vote for Governor at the previous election.

Budgets, until subsequent to the 1996 court case, did not contain "Emergency Preambles" because Article 48 excludes "matters making a specific appropriation of money from the Treasury of the Commonwealth" from the referendum. Appropriation bills contain a section or sections that specify when certain of the outside sections contained in the bill take effect. The majority of the General Appropriation Bill (G.A.B.), for example, takes effect on the first day of the fiscal year (July 1). Other sections of the G.A.B. have effective dates specified in sections appearing at or near the end of the document [this information is particularly significant to the case that I will discuss later].

Prior to 1996 it was the Legislature's opinion that, with the exception of items and sections returned with gubernatorial disapproval or reduction under Art. 63, the remainder of the budget, including the sections returned by the Governor with recommendation of amendment, stood approved upon the signature of the Governor. It was the opinion of House and Senate Counsels that the Governor had no Article 56 powers allowing him to return sections of the budget with recommendations of amendment. Consequently, we took no action on those amendments. The rationale was that the Governor's approval of a budget precluded his ability to return portions of that same bill with recommendation of amendment. House and Senate Counsels, who prepare the Official Edition of the General Laws, made a practice of including outside sections so returned in the Official Edition, insisting they were law.

All of the recent Governors of Massachusetts (starting with Michael Dukakis) have, however, considered the outside sections of budgets analogous to separate bills. Those Governors made a practice of returning outside sections of budgets with recommendation of amendment under the provisions of Article 56, just as if those sections were individual pieces of legislation that had reached their desks as separate bills. These Governors theorized that if the

Legislature was to be permitted to place the text of non-appropriation subjects in appropriation bills (disguising them as “outside sections”), it was the privilege of the executive (under Article 56) to return those subjects with recommendation of amendment. Although House and Senate Counsels included the sections in law, the Governors, as a matter of policy, instructed agencies not to implement the provisions contained in the language of the outside section. It should be noted that although the 1996 decision of the Massachusetts Supreme Judicial Court “*Sutton Corporation v. Metropolitan District Commission* 423Mass.200 (1996)” did not speak directly to the question of the Governor’s authority to return “outside sections” of appropriation bills with amendments, the decision was instrumental in convincing the House and Senate Counsels that the Governor in fact has such authority. In the *Sutton Corp. v. M.D.C.* case, the court was asked to rule on the effective date of a statute that was approved in outside sections 224 and 225 of Chapter 110 of the Acts of 1993 (the General Appropriation Bill for Fiscal Year 1994). Sections 224 and 225 pertained to the way that interest is calculated in judgments. The question before the court was the calculation of the payment of interest as the result of the settlement of a 1982 case in which final judgment was entered on August 16, 1993. Chapter 110 was signed by the Governor on July 19, 1993. Section 390 of Chapter 110 established the effective date for sections 224 and 225 as July 1, 1993. Chapter 110, however, being an “appropriation bill” did not contain an emergency preamble.

It was argued by Sutton that the 1993 amendment did not apply because, absent an emergency preamble, sections 224 and 225 could not have taken effect until October 18, the 90<sup>th</sup> day after the Governor’s approval and long after judgment was entered on August 16th. As discussed earlier, laws which are subject to referendum do not take effect until 90 days after passage, unless they are designated as “emergency laws” (Art. 48), and the G.A.B. for fiscal year 1994 did not contain an emergency preamble. Although the court “declined to determine the constitutionality of attaching provisions that do not appropriate funds (outside sections) to appropriation bills,” it ruled that the “practice, even if it is constitutional, *would not be effective to insulate a legislative enactment from the operation of art. 48* [emphasis added], when that enactment did not pertain to matters excluded from the referendum process by art. 48.” This landmark decision made it clear to Legislative legal scholars that the court considered that each outside section not making an appropriation contained in an enacted budget should

be treated, as it relates to procedure, as if it were a separate bill that had reached the Governor’s desk on its own.

Based on the decision of the court, House and Senate Counsels concluded that if a court challenge were brought, the court would unquestionably rule that any “outside section” that does not appropriate money *would not be effective to insulate a legislative enactment from the operation of Article 56* and, therefore, should not be exempt from the Governor’s authority to return it to the Legislature with recommendation of amendment under Article 56.

The result of that interpretation has been that since 1997, emergency preambles are routinely adopted to appropriation bills containing “outside sections” before they are sent to the Governor and that the Governor’s authority to return those outside sections under Article 56 with amendment is recognized and honored. Furthermore, the provisions of sections returned under Article 56 with recommendation of amendment are not implemented and are not considered law until the section is returned to the Governor and signed, or passed over a governor’s veto. Additionally, the “laws” that were added by “outside sections” that had been returned under Article 56 prior to the 1996 ruling have been invalidated and therefore have not been included in subsequent editions of the General Laws of the Commonwealth.

The ruling of the court in *Sutton v Metropolitan District Commission* and the opinion of the honorable House and Senate Counsels in relation to that ruling have, at least as they pertain to outside sections returned with amendment, leveled the parliamentary playing field and brought equality to the powers of the Executive and the Legislature regarding amendments to outside sections of appropriation bills.



## THE WESTMINSTER SYSTEM: Does It Work in Canada?

By E. George MacMinn, Q.C.  
Clerk of the Legislative Assembly of British Columbia

This paper was delivered at Worcester College, Oxford on January 9, 2003 to the United Kingdom Study of Parliament Group which is comprised of Clerks from the Parliaments of England, Ireland, Scotland and Wales, academics from the United Kingdom and former Members of the UK Parliament.

Four Opinions vary as to Britain's most famous export – some say it is Gordon's gin, some say it is Stilton cheese, and others, the Beatles. I think one could argue that the Westminster system may rank near the top of the list. Now the topic of my remarks tonight is "the Westminster system – does it work in Canada?"

I need your help to see whether I have identified the salient features of the Westminster system. It seems to me the following characteristics are paramount:

1. A Cabinet Government which comes from the majority within Parliament.
2. A recognition of constitutional conventions.
3. A party system based on single member constituency.
4. The concept of Her Majesty's Loyal Opposition.
5. The doctrine of Parliamentary supremacy.
6. A ceremonial Head of State, different from the head of Government, who may possess reserve powers which are not normally exercised.
7. A Speaker whose responsibility is to preside over proceedings and maintain order.

At this point, could I pause for a moment and ask you whether I have missed any significant features of the Westminster system?

Tonight I am going to touch on the features of the Federal Government of Canada with an elected Lower House and an appointed Upper House and on the characteristics of a Provincial Legislature which is unicameral and elected.

We have a strange country which many observers suggest is ungovernable. I would like to know from any of you here tonight who have visited Canada and observed or studied any of our political institutions? The country is immense. From the province of Newfoundland-Labrador on the eastern Atlantic coast of Canada, to Victoria, the capital of British Columbia where I live, there are 4 ½ hours of time zones. Sometimes one wonders what an east coast fisherman in Newfoundland has in common with a west coast logger in the woods of British Columbia, and really the answer is nothing very much – except they are both Canadian.

In addition to the Federal House we have 10 provincial Legislative Assemblies and three northern Territory Assemblies, and all of these bodies have developed their own style, traditions and culture. An outside observer might well conclude that the consensus non-party style of government in some of our Territories bears absolutely no resemblance to the Westminster system. Such a conclusion, of course, would not be entirely accurate.

We have also the Province of Quebec, which is 85% Francophone and has for many years preoccupied itself with separating from Canada.

I have had the benefit of reading numerous articles in preparing my paper for tonight, and if I steal someone else's thought and fail to give proper attribution, it is not intentional. I did notice one extremely interesting quote in an article by Harry Evans, the distinguished Clerk of the Australian Senate, where he quoted Lord Hailsham from a 1976 BBC address on the British constitution as follows:

"We are sometimes unaware that our constitution is unique. There is nothing quite like it, even among nations to whom we have given independence. They believe of course that they have inherited the so-called Westminster model. In fact, the Westminster model

is something which we have seldom or never exported, and, if we had tried to do so, I doubt whether any nation would have been prepared to accept it.”

For a contrary view, Kate Ryan-Lloyd, a colleague of mine in the Committees Branch in British Columbia has observed, in a recent paper:

“The Westminster model has influenced many modern democracies, but particularly those with a history of British rule. It is the central legacy bequeathed by Britain to Canada. It provides for the foundation of government in our Federal parliament in Ottawa and operates in each of Canada’s 10 provinces and three northern territories with regional and cultural adaptations.”

In the face of those divergent views, whose opinion are we to accept? Lord Hailsham or Kate, my Committee Clerk?

Let me briefly outline the structure of our Federal Parliament. The Upper House is called the Senate (or in the vernacular, the Chamber of Sober, Second Look). It has 105 members appointed by the Governor General (Queen’s Representative in Canada) on the advice of the Prime Minister – in short – appointed solely by the Prime Minister.

The Senators remain in office until they are 75 years of age. Twenty-four are appointed from each of four Canadian regions, six from Newfoundland-Labrador and one from each of the Northern Territories. A President or Speaker is appointed by the Prime Minister and the powers of the Senate are broadly speaking the same as the Commons, except in financial or constitutional matters. The Senate can propose legislation, with the exception of legislation with financial implications, and they can amend proposed legislation but can move for reductions only.

That is a thumbnail sketch of our Senate. When I mentioned a few moments ago that the Senate of Canada is often referred to as the Chamber of a Sober, Second Look, this is not to imply, directly or indirectly, that the members of the Lower House are from time to time something less than sober.

Let me now take a look at the House of Commons of Canada which is composed of 301 members from single member constituencies. As is typical in

Federal systems, powers are divided between the central government in Ottawa and the Provinces. The *Constitution Act of Canada, 1867* describes this division as the Federal government having authority over policies and activities that affect all of Canada, such as banking, criminal law, national defence and citizenship. Provincial and Territorial Legislatures look after areas such as education, health care, social welfare, etc., and accordingly, legislate in such a way that they affect only people in their Province or Territory.

There is some overlap, referred to as areas of concurrent jurisdiction, such as taxation, agriculture and natural resources. If there is conflict in these overlap areas, the Federal law usually prevails.

So the Commons in Canada functions in much the same way as the Commons in the United Kingdom, but there are, of course, significant differences. Firstly, the Federal Commons and the provincial Legislatures both rely heavily on the caucus system. This simply means that each political party within Parliament or a Legislature meets in camera with its own party members on almost a daily basis while the House is in session. It serves two main purposes: to let the backbench know in advance of government measures, and as a forum in which backbench can ventilate their own views or frustrations with the Cabinet present.

Bearing in mind the heavy emphasis on party discipline, the caucus meeting provides a safe venue for earnest disagreements or concerns to be expressed and tends to minimize public dissent within a party, either government or opposition.

As I mentioned earlier the Canadian Commons is comprised of 301 members, all with single member constituencies. The distribution of seats is roughly as follows:

- Province of Ontario - 103 seats
- Province of Quebec - 75 seats
- Maritime or Eastern Provinces - 32 seats
- Western Provinces - 88 seats
- Territories - 3 seats

It doesn’t take a rocket scientist to see that in Canada, Quebec and Ontario together can carry the country. In British Columbia (BC) there is a three hour time difference between my province and Ontario, so when the polls close in central Canada at 8:00

o'clock, it is 5:00 o'clock in the evening in British Columbia, and with eastern polls reporting early results, it is easy to see how at 7:00 o'clock pm on voting day, a BC voter might feel his or her vote can hardly make any difference if it is known at that time that Ontario and Quebec have elected 160 Liberals to the Federal Parliament. So in the past, the attitude in the west is why bother voting? – it has already been decided.

In an attempt to overcome this unhappy state of affairs the Canada Election Act has placed a prohibition on the media from announcing early results; however, at present, a clever invention called the Internet is not caught in this prohibition. The net result is that a BC voter tuning into the Internet could find out at 7:00 or 7:30 o'clock BC time whether it is worthwhile to vote at all.

This is one unique Canadian problem where the Westminster system is not of much assistance.

Let us take a look at the Legislative Assembly of British Columbia, and I fully appreciate the difficulty in comparing a 79 seat provincial Legislature with a 659-seat chamber, but while there are some striking similarities, there are some significant differences.

Let me outline the characteristics of the British Columbia House.

By the way, have any of you visited beautiful British Columbia and had a visit to our Legislature? May I recommend the spring, and I can guarantee you gardens second to none in the world. There is great salmon fishing, incredible forests and ocean views, and winter world class skiing at Whistler mountain. However, this was not intended to be a travel commercial, I just got momentarily carried away.

The British Columbia Legislature is unicameral and has 79 members elected from single member constituencies. The present composition of the House is 75 Liberal Members, two Independent Liberal Members and two New Democratic Party Members.

I might characterize the Liberal Government in BC as mid to left conservative, and the New Democratic Party equates roughly to the Labour Party in the United Kingdom.

Our Speaker is elected by secret ballot, and the House sits roughly six months of the year.

Our Standing Orders were originally fashioned on those of the United Kingdom. Even today many

Standing Orders have identical wording to those in Westminster. So what do we do in British Columbia that may be at variance with the Westminster system?

1. There is a heavy reliance on the caucus system which I mentioned earlier.
2. There is extensive use of committees composed of government members only (as opposed to standing committees and special committees composed of government and opposition members).
3. The spending estimates and the committee stage of legislation are considered in a Committee of the Whole House.
4. There are fixed election dates (every 4 years).
5. There is a Parliamentary calendar with fixed sitting days and times.
6. There are time limits on debates.
7. There are televised Cabinet meetings.
8. And, Private Members' Statements are made daily, immediately preceding Question Period.

One of the outstanding differences between Westminster and Canada is the status, tenure and public perception of the Speaker. In British Columbia after a general election, our Standing Orders state that all elected members (with the exception of cabinet ministers) are candidates for the Speakership and remain so unless they advise the Clerk in writing that they do not intend to let their name stand.

Once the withdrawing members have advised the Clerk, the remaining names are placed on a ballot and an election is conducted by the Clerk of the House. At the end of voting, which takes place in the Chamber, the Clerk removes the ballots from the Chamber, counts them and returns to the House to announce the name of the new Speaker.

Now begins the dilemma.

As I understand it, in the United Kingdom the Speaker is expected to drop all party affiliations and does not make public utterances on matters political. I understand also that at a general election the United

Kingdom Speaker is generally not opposed in his constituency by any of the major parties and runs as Speaker seeking re-election. Upon retirement he or she takes a seat in the House of Lords, although I am candidly not certain whether it is intended to continue this practice with the proposed changes to the Lords.

In short, the United Kingdom Speaker's tenure during a Parliament and at a general election and after retirement from the Commons is virtually assured. Such a Speaker can shed his or her "politics" quickly and take comfort in the established conventions, knowing they do not have to face an adversarial election.

This is not so in British Columbia. After a general election the new Speaker is elected by secret ballot and is expected to be transformed from a partisan political animal to a saintly, even-handed impartial judge in a highly partisan Assembly. It is this expectation that gives rise to the problem. So what does a British Columbia Speaker do? He doesn't go to caucus. He doesn't participate in debate in the House or any Committee thereof. He doesn't go to political fund raising events, and he doesn't make public utterances on partisan matters.

He may just have come from a general election where he or she was making public attacks on candidates from other parties, some of whom are members of the current Parliament.

What happens next? The first group he will likely hear from will be his constituency executive. It has not been unknown for the President of the new Speaker's constituency association to greet him with the following observation: "You have now been elected Speaker – great – now you can really attack that godless, heartless opposition." It is at this point that a newly elected Speaker must sit down with his supporters in his constituency and advise them of his new role.

On occasion there may be some prior notice to his supporters at home that he will be letting his name stand as Speaker, or there may not be any such notice, so his new status as Speaker may well be a total surprise to his constituency.

So how does this new Speaker assuage the anxiety in his constituency when they discover the partisan tiger they voted for has suddenly become a political eunuch?

It is a difficult selling job in the political culture that prevails in Canada.

There is, however, one saving grace. Because of the limitations placed on the Speaker by virtue of his or her position, a convention has grown in most parts of Canada permitting fast-track access to the levers of power for any problem which may arise in the Speaker's constituency. I emphasize that it is access only. There is no guarantee of a successful solution to the problem. However, a prompt audience to air the problem is expected and is almost always granted. Once the Speaker's constituents understand this convention, there is considerable relief in the community.

This does not overcome the problem a Speaker faces when the next general election arrives. On the assumption that the Speaker will be opposed in his constituency at a general election (and that is a reasonable assumption), he must put aside this even-handed fairness of the last four years and attack on the hustings some of the very members he may have been protecting during his term as Speaker.

In summary, while Canadian Speakers do their best to emulate the impartial fairness and even-handedness one normally associates with the Speakership in the United Kingdom, the difficulties are appreciable. I have a solution. I think that every Canadian Speaker, upon retirement, should be offered a seat in the House of Lords.

Let me add here something on a personal note. I have served 15 Speakers in British Columbia over the last 47 years and am pleased to report that without exception they all have shed their partisan characteristics once they put their first foot in the Speaker's office and have conducted themselves admirably in the chair. They do so, however, at considerable risk to their political careers.

Let me touch on something else that is currently unfolding in British Columbia and tell me if it has any remote connection to the Westminster system.

The current party in power in British Columbia (Liberal) promised a review of various models for electing members to the Assembly – and this review has taken the form of "A Citizens Assembly on Electoral Reform."

This Assembly is comprised of 160 members – two from each of the 79 constituencies in British Columbia and two aboriginal members.

Members are randomly selected from the provincial voters list with the intention that such membership

reflect the gender, age, ethnic background and regional composition of the province as a whole. In each constituency 200 randomly drawn individuals will receive a letter of invitation to attend a regional selection meeting to be advised about the process, at which time the name of one man and one woman will be drawn to represent their constituency as members of the Assembly.

The terms of reference of the Assembly require it to assess the models for electing members of the Legislative Assembly and issue a report recommending whether the current model for the elections (first past the post system) should be retained or another model adopted. If the Assembly recommends to the government that a new electoral system be adopted, that recommendation will be put to all voters at the next provincial general election to be held in May 2005. In carrying out its mandate, the Assembly is required to consult with British Columbians, and any recommendations to alter the electoral system must be consistent with the *Constitution of Canada* and the Westminster parliamentary system and must be described clearly and in detail in its report.

So again, we see the phrase “must be consistent with the Westminster parliamentary system.” To be perfectly candid I am not entirely certain what this means.

Finally, what else do we see in this strange outpost of empire? Or as my friend John Sweetman says – “what’s happening in the Colonies?”

We have in British Columbia a recent innovation called “public written questions.” This was an idea of the current Speaker in an attempt to alleviate the serious imbalance of membership of the Assembly – 77 to 2. What was seen as a difficulty was whether the two opposition members, plus the occasional soft lob from the government backbench, would truly test the Ministers at Question Time, the way they are supposed to be tested. The general view was no – so this device was adopted.

How does it work?

Any member of the public who is an elected member of any body – union, school board, municipal

council, etc., may submit a question in writing to the Speaker’s Office and if the question qualifies under the general rules applicable to questions, it becomes eligible to be printed on the Order Paper. Five questions are drawn weekly and remain on the Order Paper for two weeks. Once printed on the Order Paper, the question may be put orally to a Minister during Question Time, or a Minister may answer in writing, and such answer will be printed in the Votes and Proceedings.

Is this somewhat unusual offer to the public a keenly pursued option? Not really – we seldom have more than two public written questions on the Order Paper in any given week. I am sometimes surprised at the low level of interest in a device that allows direct access to a Minister by citizens of British Columbia who are not elected to the Assembly.

So there you have it, a somewhat limited sketch of the idiosyncrasies of the Parliament of Canada and the British Columbia Legislative Assembly. Do you see more of Canada than Westminster in what you heard? Probably a mix of both.

Some of the shortcomings of Cabinet government generally tend to show up in Canada, but there is nothing preventing Canada from making changes.

The enormous power of the Prime Minister or Premier in both our countries continues to worry many. The pre-eminence of the executive and the limited oversight by the legislative side confound reformers, because only the executive can effectively diminish their own power. It will require a saint as Prime Minister to take such initiative, and we don’t see many saints on the ballots these days at a general election.

I prefer to dwell on the incredible strength of our system. I remain in awe when I see the orderly transfer of power after a general election.

As a provincial Clerk from a Commonwealth country, I have considered it an honour to address such a distinguished audience, in what I consider the Mother country - it is one of the highlights of a quite lengthy parliamentary career.

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