The Politics of Electoral Reform

by Peter Aucoin

The establishment of a Royal Commission on Electoral Reform and Party Financing in 1989 was fully in keeping with the traditional resort to royal commissions as an instrument of governance. It came as no surprise that the Commission was comprised of persons with partisan affiliation. The 1964 Committee on Election Expenses (the Barbeau Committee) had just such a composition, although it did include an independent, the late Professor Norman Ward. The Lortie Commission, in addition to its Chair, included two members from the Progressive Conservative Party (Pierre Fortier and Donald Oliver, later replaced by Robert Gabor), one from the Liberal Party (Lucie Pepin) and one from the New Democratic Party (Elwood Cowley, later replaced by Bill Knight).

Commenting on the Barbeau Committee on Election Expenses, the late Professor K.Z. Paltiel described the work of that committee as "the most detailed exploration of party finance undertaken by any public body in the democratic world"[1]. For its part, the Lortie Commission decided at the outset to interpret its general mandate broadly and to engage in a comprehensive study of election law, election and party finance, and electoral democracy generally in both Canada and elsewhere in the major Western democracies. This decision was based on four strategic objectives.

Strategic Objectives

First, the commissioners were committed to a practical approach to electoral reform; their reforms were to be workable. For this reason, they wanted information and analysis on "best practices" elsewhere in Canada and abroad. The operative assumption here was that numerous practices in the Canadian provinces as well as elsewhere had moved beyond the federal Canadian experience and had proven to be effective, efficient and economical in advancing the cause of electoral democracy. To the extent that best practices elsewhere could be shown to work, Canadians could demand that their rights be secured under law with the knowledge that any purported practical objections from law-makers, administrators or other players could be met by reference to the experiences of other regimes in Canada and/or other comparable democratic systems.

> ***An explicitly comparative approach was to characterize the extensive research program of the Commission.***

Second, commissioners committed themselves to extensive consultations in order to foster consensus among themselves, representing as they did different partisan perspectives, as well as among practitioners from the registered parties, election offices, the media and those with particular interests in Canadian electoral democracy. It was agreed at the outset that this should entail a pro-active approach to the commission's public hearings, on-going relationships with the major stakeholders (including a Committee of Aboriginal Electoral Reform) and, in addition, a series of organized symposia to bring together Commissioners, researchers and representatives from these several quarters. Although it was recognized that this approach could not in itself produce consensus, it was hoped that those so engaged would at least share a common understanding of the issues at hand, a knowledge of the options available from comparative experience and appreciation of the conundrums faced by the commissioners themselves in the pursuit of electoral reform.

Third, at an early stage in their work Commissioners decided that their responsibilities would be best

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discharged if they (i) formulated general reform objectives based on a commitment to what they perceived to be the 'ideal characteristics of electoral democracy' and (ii) proceeded to reforms that research and analysis indicated would best realize them. This approach was considered decidedly preferable to engaging exclusively in a 'plumbing exercise', given that more was at stake than simply administrative reforms. In accepting this approach, commissioners acknowledged explicitly that their recommendations would have to be formulated with 'the best interests of Canadians' in mind. As was the case with the Barbeau Committee, this required that commissioners adopt a "non-partisan" perspective, that is to regard themselves as other than "representatives" of their respective political parties.[2] This did not make their task any easier, of course, but it did promote reasoned argument and decisions flowing from the evidence.

Finally, the Commission wanted to present a report whose recommendations could largely, if not entirely, be implemented prior to the next election. This meant not only commitment to a schedule of work that was demanding, to say the least, but also the preparation for Government and Parliament of a complete draft of a new elections law. This undertaking was unique to a Royal Commission. In the case of the electoral law this task was a substantial one in two respects. First, election law is thorough in its coverage of its subject matter and detailed in its provisions. Although it necessarily contains some degree of administrative discretion for principal election officers, it does not provide for delegated executive authority vested in the Crown to make regulations pursuant to general provisions. Virtually all the rules are contained in the election statute. Second, the election act must be read, at least in part, by large numbers of Canadian citizens in their capacity as volunteers within the parties. The challenge was thus to draft a law in plain and clear language so that it could be used easily by lay persons.

Competing Traditions of Electoral Reform

The politics of electoral reform will obviously pit reformers against those who favour the status quo. All those who favour reform, however, do not necessarily subscribe to the kind of regime advocated by the Lortie Commission. Although the Lortie Commissions's recommendations fit within the major historical pattern of electoral reform in the Canadian experience, there is a contending Canadian political tradition. Moreover, this tradition has found new life in recent years. As a result, the politics of reform is likely to be as much about differences between the visions of these two reform traditions as between reformers and those who favour the status quo.

Janet Ajzenstat, in a recent paper on political reform in the 1830s, contends that there developed at the time "two sharply different political ideologies - two visions of good government" which find expression in contemporary Canadian politics[3]. These two "poles of modern political thought" she identifies as "constitutionalism" and "democracy"[4]. The former achieved supremacy in the great reform that saw the establishment of our constitutional system of responsible government in the 1840s. The latter, with its conception of a "true democracy, government by 'the people'", was never entirely extinguished however. It regained its status as a contending reform movement in the first part of this century, particularly on the prairies, and has once again re-emerged as a vital political force. As with the first wave of democratic populism earlier in this century, this pole of political thought extends across the partisan political spectrum, encompassing elements of what otherwise would be considered both the left and right spectrums of Canadian politics. It derives strength in part from the particular Canadian fact that our major political parties, especially the two parties that have governed nationally and in contrast to governing parties in other major parliamentary party systems, have been seen to be 'brokerage' parties that do not offer voters clear choices at elections and compromise on their election promises when in power[5].

The Lortie Commission's approach to electoral reform can be seen as firmly located within the "constitutionalist" tradition. It accepts and builds upon the institutional reforms that, among other things, put in place the independent and impartial electoral machinery headed by the Office of Chief Electoral Officer (1920), placed the drawing of constituency boundaries under the jurisdiction of independent electoral boundaries commissions (1964), and established the contemporary system of election and party finance (1974). In these and similar instances, reforms were based on an understanding of electoral democracy as essentially competitive and partisan and an appreciation of parties as the means to effective yet accountable representative government. Reforms have been required at times in order to address the negative consequences of competitive partisanship, such as a lack of integrity in the electoral process, partisan gerrymandering of electoral boundaries or the excessive influence of money in electoral competition, but the basic foundations of political freedoms and good government are seen to lie squarely upon a system in which competing partisanship is accepted as the principal political dynamic to best realize these objectives.

The Lortie Commission's recommendations concerning the integrity of the administration and enforcement of the electoral law, the regulation of the publication of public opinion polls, the registration and regulation of parties and their finances, spending limits in campaigns as well as in nomination and leadership contests, and the public funding of candidates and parties all accept the primacy of parties in electoral democracy both as a foundation and a consequence of our constitutional system of responsible government. Greater fairness between parties and their canadidates is meant to be secured by reforms to the regulation of partisan competition but these reforms are not meant to reduce such competition.

The constitutionalist tradition, says Ajzenstat, also "demands equality of right, but tolerates inequality of condition"[6]. The Lortie Commission conforms to this dimension of that tradition as well. Its recommendations concerning the franchise and its administration and exercise, the right to be a candidate, the proportionate representation of provinces in the House of Commons and the equality of the vote in drawing constituency boundaries all speak to the fundamental equality of voters enshrined in the Charter. Although its recommendations concerning spending limits, public funding and political tax credits serve to promote greater fairness in the electoral process, fairness in this context assumes not an equality of condition among participants but rather an equality of equal opportunity to participate.

The democracy tradition, on the other hand, regards parties with distrust and suspicion. They are too hierarchical, even oligarchical and elitist. They are divisive of political community and they run roughshod over the interests, opinions and participation of ordinary folk. More importantly, they design the electoral process to suit their narrowly partisan self-interests and ambitions for power over the people. Although a large majority of Canadians may agree that "without political parties, there can't be true democracy"[7], the democracy tradition has experienced a revival as a result in part of the declining public respect for parties. A large majority of Canadians think that parties engage in too much squabbling, confuse rather than clarify the issues and impose too much discipline on Members of Parliament[8]. These attitudes are reinforced by what are perceived to be undemocratic structures and practices within our major parties. Within the "democracy" tradition, true democracy, government by 'the people' demands direct forms of democracy in contrast to the form of indirect democracy achieved by party government. Referendums, citizen initiatives, recall, *financement populaire*, free voting by MPs and freedom for "non-partisan civic participation" in election campaigns by "citizen-based" interest group organizations[9] representing "common" or "ordinary" Canadians[10], are the principal themes around which "democracy" reformers, from across the political spectrum, make their case.

While rejecting the basic premises of the "democracy" pole of thought, the Lortie Commission did recognize the legitimacy of certain aspects of its critique of the existing regime and current practices. Recommendations to alter the voter registration and voting process, for instance, were designed to make the electoral process more responsive and voter-friendly. Greater fairness was to be promoted in relation to small or emerging parties as against the larger and established parties in terms of reimbursement, access to paid and free time broadcasting, party identification on the ballot as well as the treatment accorded independent MPs with regard to election financing. More generally, recommendations concerning the constitutions, structures and operations of political parties speak to greater participation by members in the life of parties and the role of parties in political education and the development of party policies. Although some of these recommendations may find favour with those from the democratic tradition, some obviously do not to the lengths desired by them while others go in the wrong direction.

The Commission, moreover, explicitly rejected both the idea of conducting referendum (or citizen initiatives) concurrently with elections and the inclusion of a recall mechanism in the electoral law - two of the principal instruments of direct democracy[11]. Referendums at elections were rejected on the grounds that they would invariably be partisan in any event (and thus strip the referendum device of its major purpose), that the spending limit regime could not be effectively applied if there had to be separate provisions for the election and referendum votes, and that referendums at elections would detract from the fundamental purpose of elections, namely the choice of who should govern. Recall was rejected on the grounds that turnover in the House of Commons is already substantial (indicating that voters have ample opportunity to reject those not responsive to their constituents), that ministers, as MPs, could be subject to recall petitions organized by interest groups not confined to their individual constituencies, and, more generally, that the experience elsewhere, particularly in the United States at the state and local levels, does not indicate that the responsiveness of elected representatives to voters is improved by virtue of the availability of this device.

The Commission also rejected *financement populaire*, that is limits on the sources of political contributions so that only voters may make contributions. It did so on the

grounds that competitive parties and their candidates are more effectively restrained by spending limits, that undue influence is equally likely to arise with contributions from individuals as it is from groups such as business or unions, that tax credits have substantially increased candidate and party reliance on small contributions from many individuals, that comparative experience suggests that corrupt behaviour is more likely to result from limits on legal contributions and, finally, that restrictions on the flow of money to candidates and especially parties merely results in a redirection of where, how and by whom political money is spent in elections.

The Commission recommendation that perhaps best represents the rejection of the democracy pole of thought, however, is that which would limit independent expenditures by individuals or groups who are not candidates or parties. Although the Commission opposed the idea of a ban of such independent expenditures as being both unconstitutional and undesirable, its recommendation strikes at the heart of the democratic model of elections. This model, as articulated by liberatarians on the one hand and populists on the other, regards any restriction on independent individual or group action during campaigns as a threat to democracy contrived by self-serving established parties in order to thwart challenges to their supremacy in political life. These democrats base their objections to restrictions on one or more of the following: (i) free speech must have paramountcy over all other political values in elections (especially anything as vague as 'fairness'); (ii) money and advertising in campaigns have no significant effect on voter behaviour and therefore election outcomes; and, (iii) elections are not essentially and ultimately a process in which voters make partisan choices for which party's candidates will be elected and which party will form the government. Political equality for these democrats means the equal right of all to free speech during an election (assuming they can pay for it) and the equal right to cast a ballot. Voters, moreover, have no difficulty in hearing the various sides, however much one or more sides is able to dominate election discourse; when David and Goliath meet head on, it cannot be assumed that the latter has any real advantage. If there is to be a concern for equality as fairness then it ought to take the forms of spending limits and/or limits on the size and/or source of political contributions for partisans only, namely candidates and parties. Ordinary citizens and civic groups, on the other hand, should not be restricted in their spending; indeed, it has been suggested that access to free broadcasting time should be made available to such independents so that they might enrich election debate with their non-partisan and issue-oriented advertising.

Finally, the recommendations of the Lortie Commission may be regarded as seeking to reduce those elements of the democratic pole of thought that have been incorporated into the Canadian experience. This is especially the case with the recommendations concerning the structure and management of political parties that appear to go against the grain of what David Smith refers to as the "localism" of our party system[12]. This localism is expressed in the relative autonomy of local constituency associations in nominating candidates, in managing their own affairs, particularly their financial affairs, and in selecting delegates to national conventions, including leadership selection conventions. The federal character of our national parties has reinforced this localism. The Lortie Commission's recommendations, in a number of respects, seek to nationalize the parties by, among other things, bringing local constituency associations under the umbrella of election and party finance law, requiring them to conform to national party standards for selecting candidates, national delegates and local officers, and, more generally, fostering the role of the national party in establishing codes of ethics for the management of the party. Although the Commission's recommendations in some of these regards actually address elements of the democracy model, particularly in so far as they seek to enhance the meaning of membership within parties, it will not be surprising if local party elites wrap themselves in the cloak of local democracy in resisting these recommendations. In this regard, the recent experience of the Reform Party in coping with the conundrum of being a grass-roots/populist movement as well as a national political party may well be replicated in some ways in the more established parties.

In the contemporary context, the recommendations of the Royal Commission, based as they are on the constitutionalist pole of thought, cannot but suffer in comparison to the democratic model. As Ajzenstat puts it, the constitutionalist pole of thought, may well appear less attractive than its democracy counterpoint: "it does not ask for high-minded leadership, expects little from the populace in the way of citizenly virtue, and if we are to believe its [democracy] critics, fails to respect the human need for community....It stands on solid ground when it opposes the absolutism of the few, but its opposition to the absolutism of the many can easily appear like a betrayal of popular interests"[13].

The Prospects For Electoral Reform

The issue of electoral reform was almost immediately pushed off the political agenda by the constitutional question following the release of the Lortie Commission's report in early 1992. Even the House of Commons Special Committee on Electoral Reform, established after the release of the Lortie Commission report, was affected when it was transformed into the legislative committee for the government's bill that became the *Referendum Act*. In December 1992 the committee produced its first of what it intends to be three reports on this subject. This initial report deals with various administrative measures, to the right to vote and to be a candidate and limits on independent expenditures. Its legislative proposals on the first two sets of topics must be accepted within the next few months if Elections Canada is to have sufficient time to implement them for the coming election. Its second report is to focus on changes that could also be put in place before the next election but which will take less lead time to implement. These include election finance, broadcasting and enforcement measures. A third report will deal with matters that could not be implemented before the next election, including the assignment of seats to provinces, the drawing of constituency boundaries, the question of Aboriginal constituencies and the creation of a Canada Elections Commission.

At least three major sets of factors need to be considered in assessing the prospects for reform. The first of these is the impact of the Charter and courts in relation to constitutional rights, equality and fairness in the electoral process. The first report of the Committee on Electoral Reform reflects this fact directly in regard to the rights to vote and to be a candidate and indirectly in regard to the need to make the registration and voting processes more accessible. A pending court decision on the broadcasting provisions of the current elections act will serve to bring this facet of election law to the forefront of the political agenda. A recent decision on reimbursement under the current act will do likewise for this matter (*Barette and Payette v. Attorney General of Canada*, August 7, 1992, Superior Court of Québec).

There may well be a certain nervousness on the part of some legislators over the implications of the Charter for the question of limiting independent expenditures by individuals and groups. Contrary to the federal government's claim that its *Referendum Act* could not entail meaningful spending limits because they would unreasonably restrict the right to free speech, a Quebec Superior Court subsequently decided that the Quebec referendum law's limitation on independent expenditures during referendum campaigns met the several tests of the Charter (*Libman and Equality Party v. Attorney General of Quebec*, July 30, 1992, Superior Court of Quebec). Without limits on independent expenditures, moreover, limits on candidates and parties themselves will not only be rendered less meaningful (as demonstrated in the 1988 general election) but might very well result in a successful Charter challenge to the limits on candidates and parties themselves.

The second set of factors are those pertaining to the dynamics of party election strategy and internal party governance. What these mean for electoral reform is obviously more difficult to predict at this time. It may turn out that the pattern of electoral law reform that occurred in the early 1970s will be replayed in the 1990s. In 1971, the House of Commons Special Committee of Election Expenses recommended changes in a belated response to the 1966 Barbeau Committee report, only to have the bill incorporating its recommendation fail to reach second reading before Parliament was dissolved for the 1972 election. Although some legislative changes to the current elections act will occur before the 1993 election, it would not come as a major surprise if major changes related to election and party finance failed to see the light of day before the coming election.

> ***One way or the other, it is highly likely that this question of spending limits will at some point be before the courts again.***

On the one hand, consideration of changes relating to independent expenditures, as recommended by the House of Commons Special Committee may be delayed. There has already been opposition from the National Citizens Coalition that took the 1983 provision to the courts and from the *Globe and Mail*, the most persistent media critic of such limits. It should be noted, of course, that what the Committee has recommended does not conform to the recommendation of the Lortie Commission. The Committee's proposal is essentially the 1983 provision re-enacted, except that in place of a total ban on independent partisan advertising there would now be a limit of $1000 for each individual or group. All non-partisan or indirect 'advocacy advertising' would still be permitted. Such a provision would not have limited any of the major pro-free trade ads in the 1988 general election. The provision, in short, is about as meaningful as the spending limit provisions in the federal *Referendum Act*. On the other hand, all three parliamentary parties may be hesitant in the run-up to an election to impose a stricter and more comprehensive

election and party finance regime on their local constituency associations.

If the outcome of the 1993 election is anything like that of 1972, and there is ample evidence to suggest that it might, a minority government situation may again be the catalyst to reform. The 1972 election resulted in a minority Liberal government and the two major opposition parties, but not the Social Credit Party, were able to influence the legislative outcome that was the *Election Expenses Act* of 1974. A greater number of parliamentary parties may provide the political justification for limiting independent expenditures, on the grounds that a truly multi-party system itself provides for the expression of all sufficient diversity of views at elections. At the same time, greater competition between the parties may provide the intra-party justification for enhancing not only the roles of members within parties but also, and perhaps paradoxically, the capacity of party leaders to structure and manage their parties as nationally integrated institutions.

The third set of factors that needs to be considered entails demands for greater representativeness and inclusion in the political process. There exists a variety of demands here. They include the question of provincial representation in the House of Commons for those provinces now underrepresented as a consequence of the present formula for assigning seats to provinces. Although the Charlottetown Accord was rejected, it did serve to raise this issue and it is unlikely to go away as British Columbia, Alberta and Ontario would benefit from any new formula that secured greater proportionate representation. Recent court decisions relating to the drawing of constituency boundaries at the provincial level have likewise given a salience to the question of voter equality or representation by population. As both women and members of various ethno-cultural communities, especially visible minorities located primarily in urban areas, would be among the chief beneficiaries of changes in this regard[14], the momentum for reform may be maintained. Finally the democratic movement should give some thrust to demands, again especially in so far as women and members of visible minority communities are concerned, for internal party reforms that serve to promote greater access to political power and access to elected office, including those extending the electoral law to local constituency associations.

In all of this, what can be said of the potential influence of the Lortie Commission? I suggest that the commission will have an impact in at least three ways.

First, because it focused explicitly on constitutional rights and freedoms as they apply to the electoral process, the Commission's work will have an influence on the courts. This has already been the case in a decision concerning reimbursement and, indirectly, independent expenditures (indirectly because the case in question dealt with such expenditures in a referendum vote). Discussions leading to the failed Charlottetown Accord gave credibility to the Commission's recommendation for a new constitutional formula for assigning seats to provinces in the House of Commons, a constitutional change that falls exclusively within the jurisdiction of Parliament. Although the Accord assumed a reformed Senate, the Commission's proposed formula does not assume any change to the Senate or to the constitutional protection for the number of seats assigned to the smallest provinces. On these and other matters, the work of the Commission is pertinent for it provides a justification for reforms that meet the objectives and tests of the Charter.

Second, the Commission provides a comprehensive comparative perspective which enables reformers to assess the Canadian record against the best practices of electoral democracy elsewhere in Canada and abroad. Reformers are thus armed with evidence of what works in contexts comparable to the Canadian System. For example, the Committee on Electoral Reform recommends that Canadians living abroad be able to register and vote; it also accepts the Commission proposal for a "special ballot"as an alternative voting mechanism for those who cannot vote at a regular polling station either before or on election day. In each case, comparative experience rules out any objection based on practical administrative considerations. The Committee, on the other hand, does not propose election day registration and this may end up in the courts, given that experience elsewhere in Canada and abroad shows that it enhances access to voting and can work. Similar conclusions on the basis of comparative analysis can be reached on a wide variety of matters related to, among other things, election administration, the provision of free access to broadcasting, financial disclosure, the regulation of local constituency associations, election law enforcement and the drawing of constituency boundaries. A major limitation on the potential influence of the Commission in the political, as opposed to the judicial, arena derives not from the substantive character of the Commission's report but rather the disinclination of Canadian politicians and other political participants to read reports of the length produced by the Commission. Evidence is unlikely to have much effect in political debates when it is not digested by the intended audience!

Third, the Commission provides a contemporary "constitutionalist" case for those who favour reform from this perspective, as opposed to the direct democracy paradigm. Although party affiliation may be

simultaneously declining and fragmenting in Canada generally, as elsewhere, there is evidence that party systems can respond in innovative ways to be more inclusive and participatory. The recognition by the leadership of the Reform Party, in contrast to the Progressives in the 1920s, that even populist political reforms require more than a political movement illustrates the extent to which party has come to be accepted as the means to representative and responsible government. At issue, therefore, are the degree to which and the means by which the law should be used to promote equality and fairness in both the electoral system and the internal processes of parties themselves. The Commission's position is that Canadian and comparative experiences demonstrate that positive law can enhance equality of participation and fairness between competing forces without diminishing competition or requiring an equality of condition. Given the performance and behaviour of our major parties, however, the Commission's reforms to strengthen political parties as primary political organizations may well appear to be insufficiently 'democratic' to attract much in the way of broad public support.▲

Notes

1. Leslie F. Seidle. "The Election Expenses Act: The House of Commons and the Parties," in John Courtney (ed.) *The Canadian House of Commons* (Calgary: University of Calgary Press, (1985) p. 115.

2. *Ibid.*

3. Janet Ajzenstat. "The Constitutionalism of Etienne Parent and Joseph Howe", in Janet Ajzenstat (ed.) *Canadian Constitutionalism* : 1791-1991 (Ottawa: Canadian Study of Parliament Group, 1992) p. 159.

4. *Ibid.* p. 175.

5. Janine Brodie and Jane Jenson. "Piercing the Smokescreen: Brokerage Parties and Class Politics" in Alain Gagnon and A. Brian Tanguay (eds.) *Canadian Parties in Transition* (Scarborough: Nelson, 1989) pp. 24-44.

6. Janet Ajzenstat. *op. cit.* p. 175.

7. Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy* , Volume 1 (Ottawa: Minister of Supply and Service, 1992) p. 207.

8. See John Laschinger and Geoffrey Stevens. *Leaders and Lesser Mortals: Backroom Politics in Canada* (Toronto: Key Porter, 1992.

9. Jamie Cameron. "A Referendum Post Mortem", *Canada Watch* (Osgoode Hall Law School, North York, Ontario) November/December 1992, pp. 59-60.

10. David Johnson 1992. "The Advertising Campaign: Confounding Conventional Wisdom", *Canada Watch* (Osgoode Hall Law School, North York, Ontario) November/December 1992, pp. 55-56.

11. David MacDonald. "Referendums and Federal General Elections" in Michael Cassidy (ed.) *Democratic Rights and Electoral Reform in Canada* (Toronto, Dundurn, 1992).

12. David Smith. "Part Government, Representation and National Integration in Canada", in Peter Aucoin (ed.) *Party Government and Regional Representation in Canada* (Toronto: University of Toronto Press, 1985) pp. 1-68.

13. Janet Ajzenstat. *op. cit.* p. 175.

14. Andrew Sancton. "Canada as a Highly Urbanized Nation: New Implications for Government", *Canadian Public Administration* , Fall 1992, 35:1, pp. 281-298; and Gary Moncrief and Joel A. Thompson. "Urban and Rural Ridings and Women in Provincial Politics in Canada" *Canadian Journal of Political Science*, December 1991 XXIV:4, pp. 831-838.