
Determining the Official Opposition in New Brunswick and the House of Commons

by Stewart Hyson

Normally the question of who forms the official opposition does not arise because the party winning the second largest number of seats automatically assumes the role. The solution is less clear when opposition parties are tied or are of nearly equal standing. Since 1994 there have been two cases, one in Ottawa and one in New Brunswick where the Speaker was called upon to settle a dispute over who should be the official opposition. This article looks at the two rulings.

Deciding the official opposition is not an issue that can fully be grasped in isolation. No matter how interesting or bizarre the facts of each individual case may be, they all stem from the broader, underlying issue of recognizing political parties in a parliamentary forum.

The gist of the matter, of parliamentary government given our focus, is that the Westminster model developed long before the advent of political parties. This contributed to the tradition and myth of the MP as an individual representative, which was especially apparent prior to the mid-1960s in terms of parliamentary rules and procedures. According to John Courtney, this "non-existence" of parties rested on three ideas:

(a) a view of representation that was inherently individualistic; (b) a belief that the collective wisdom of individual members was to be preferred to the necessarily narrower and more particular points of view of political parties; and (c) a notion that a greater loyalty was owed to Parliament than to any political party.¹

It would be impossible in a short article to examine the whole subject of party recognition. So we will zero-in on the specific issue of deciding the official opposition.

In originally recognizing the position of the Leader of the Opposition, "it was not the Opposition party, but the

Leader, who was being recognized."² The formal recognition of parties in the early 1960s thus constituted a major change. The Opposition Leader has since been formally viewed in his/her capacity as leader of the main opposition party in the House. This reality is reflected in both parliamentary practices as well as in the provision of funding, services and facilities made available to opposition parties.

It is in this context, therefore, that deciding the opposition party when parties are tied takes on critical importance. Moreover, in most jurisdictions, there are no Standing Orders or statutes to cover the situation should it arise.³ Speakers, for the most part, are called upon to settle the matter.

Political Background to the Two Rulings

The genesis of the New Brunswick ruling was the 1991 general election when the Confederation of Regions party (CoR) won 8 seats to become the official opposition. The Conservatives won 3 seats and the NDP 1 seat. Over the next three years, CoR was racked by internal leadership squabbles and two of its MLAs left to sit as independents. Meanwhile, the Conservatives won three successive by-elections. Consequently, by December 1994, the CoR and Conservative parties were of equal standing in the legislature with 6 MLAs each. At that time, the Conservative leader, Dennis Cochrane, raised a point of order requesting Speaker Shirley Dysart to rule on the question of official opposition status.⁴

The New Brunswick Speaker followed what could be called standard practice. After hearing the opinions of

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the Leader of the Opposition, Conservative party leader, and Liberal Government House Leader, Speaker Dysart then consulted authoritative written sources, examined parliamentary precedence elsewhere in Canada, and considered the arguments that had been presented in the Assembly.

She declined to receive any supplemental briefs in private to preserve the impartiality of the process and made the decision-making criteria part of the public record. Just the same, a lot can be said for allowing legislators the opportunity to supplement their verbal comments with formal briefs – as long as the briefs are also made part of the public record. A written brief allows the opportunity to present arguments that are better researched and more cogently articulated than the spotty verbal comments usually delivered in the chamber.

In the federal case the near equal showing of the Reform party which won 52 seats and the BQ which took 54 seats in the 1993 election was central to the issue at hand. At that time, some objections were heard to the BQ becoming the official opposition and its leader Lucien Bouchard being recognized as Her Majesty's Loyal Opposition Leader. Should a party with its MPs elected solely from one province and committed to that province's separation from the country be recognized as the chief opposition party? As the main alternative, the Reform party's legitimacy was not much greater because most of its MPs and electoral support was restricted to the four western provinces. Nevertheless, tradition was followed from the start when the BQ, as the second largest party, was recognized as the official opposition.

The issue was renewed two years later when Ray Speaker of the Reform party raised a point of order on December 14, 1995, calling upon the Speaker of the House of Commons to rule on the issue. This was brought about by the speculation, and later fact, that Lucien Bouchard would leave federal politics in order to become leader of the Parti Quebecois and Premier of Quebec. Both Reform and BQ would then find themselves tied with 52 MPs each.⁵ This proved to be the case for a brief period following Mr. Bouchard's resignation on January 15, 1996. Speaker Gilbert Parent issued his decision on February 27, 1996, confirming the BQ's status as the official opposition and the party's new leader Michel Gauthier as Leader of Her Majesty's Loyal Opposition.

The by-election results of March 25, 1996, laid the issue to rest because the BQ won one seat to increase its standing to 53 while the Reform party failed to increase its representation. If Reform had increased its representation over that of the BQ, Speaker Parent would probably have been called upon to make another

decision. But that gets into the realm of speculation which is beyond our scope of interest.

Another aspect to the federal ruling is that the Reform party was apparently not content with the traditional practice of allowing the Speaker to decide the question on the basis of arguments made in the House. Instead, Reform made it a campaign issue during the March by-elections, and placed a portable billboard next to Mr. Parent's constituency office in an attempt to influence his decision. It is not clear what the Reform party hoped to gain by such actions, but the tactics had little if any effect because Mr. Parent's ruling was the expected one based on precedence.

The Dysart Ruling

Speaker Dysart's ruling was perhaps the more interesting of the two as she reviewed and commented on several other Canadian precedents in reaching her decision. Speaker Parent, restricted his ruling mainly to addressing the specific comments raised by spokespersons of the Reform party.

The accompanying table has been constructed from an analysis of Speaker Dysart's ruling. The table first indicates two situations when the issue of tied opposition parties may arise: (1) at the start of a new legislature following a general election; and (2) during a legislature where party standings change as the result of resignations, defections, deaths, and by-elections. Five factors affecting a Speaker's ruling have also been identified, and their applicability varies with the situation.

We must keep in mind that the role of the official opposition takes on its intended meaning in the context of the parliamentary setting. This fact is most readily evident in terms of status, privileges, and responsibilities in the legislative chamber, as well as in terms of support funding, facilities, and services. Thus, party standings in the legislature are what count in determining the official opposition. Speaker Dysart observed that "basing a decision on factors outside Parliament opens the door or invites future decisions with no basis in parliamentary precedents or practice."⁶

In this light, Speaker Dysart saw incumbency as the key factor in determining the official opposition party when parties are tied. This is first evident after a general election at the start of a new legislature. The official opposition party in the previous legislature, if it finds itself tied with another party as the second largest party, retains its position in the new legislature. The same convention holds between general elections. That is, during a legislature, if another party should achieve a tie in standing with the official opposition party, the latter

retains its position. Incumbency again is the rule. Speaker Dysart found this to have been the case in previous Canadian examples and thereby ruled in favour of CoR retaining its official opposition status in New Brunswick.

There still remains a cloudy area, however, in respect to incumbency during a legislature. Specifically, what happens when the official opposition party falls into third place behind another party in terms of standing? In the absence of a clear convention on this point, convenience seems to be the key factor. That is, if the official opposition party falls behind late during the term of a legislature, it will most likely be permitted to continue in that role. The same applies if the official opposition party falls behind by only one member. This was the case in British Columbia in 1940 and in Alberta in 1984. As Speaker Dysart noted in her review of the latter case, Alberta Speaker Amerongen "emphasized that disruption in the House, in staffing and funding arrangements, should be minimized to the extent possible."⁷

But how far can this convenience factor be taken? What if the official opposition party should fall behind by two, three, or more members? Or it is early in the term of the legislature? The uncertainty makes the advantages of the Saskatchewan model all the more apparent.⁸

The third factor, popular vote, has a democratic or populist appeal. But popular vote is limited at best to the start of a legislature following a general election and then only as a supplemental factor. That is, if two or more parties are tied in standing, the Speaker may turn to the popular vote as the tie-breaker. Speaker Dysart observed

that this was what originally happened in Alberta following the 1982 election. However, during a legislature, the popular vote factor is inapplicable. After all, a tied opposition in this situation arises because of defections or by-elections. Thus how does one interpret, or even conceptualize, the popular vote for each party? Does a party retain the share of the popular vote won by a member who has resigned or joined another party? Does the popular vote cast in a by-election carry the same weight as that in a general election vote? The machinations are so great that they undermine the utility of the popular vote factor during a legislature.

Party status is applicable both at the start of a legislature and during a legislature. Speaker Dysart noted that an organized group of MPs or MLAs (i.e. a party) will receive the nod over a loose collection of independents of the same number. Party status counts because it implies an ability to fulfill the expected role of the official opposition.

But while party status is relevant, party policies are inapplicable as a factor. Party politicians may use this factor to support their claims to be recognized as the official opposition, and to challenge the credibility of another party. This was certainly true with the recent Parliament case. Reform spokespersons attacked the BQ's credibility to be the official opposition in part because of its advocacy of Quebec's separation from Canada. The issue of party policies was not a critical part of the New Brunswick case, and apparently had never been a major factor in previous cases. Speaker Dysart thus never commented on the matter. It is implicit in her other comments, however, that she would not have

Synopsis of Deciding the Official Opposition when Parties are Tied

Factors	Start of a Legislature	During Legislature
Incumbency	+	+
Convenience	-	+
Popular Vote	+	-
Party Status	+	+
Policies	-	-

Legend: + = applicable
 - = inapplicable

considered party policies a valid factor in determining the official opposition. Positions on public policy are too subjective or value-laden, so that it would be anti-democratic for the Speaker or other members of the House to cast judgement on the public's electoral choices.

The Parent Ruling

As mentioned above, Speaker Parent limited his ruling mainly to addressing the specific points raised by the Reform MPs, especially by Ray Speaker. But that only constitutes roughly the last two-thirds of Mr. Parent's ruling. The first portion deals more generally with the Speaker's role in the House. Here Speaker Parent drew heavily on former Speaker MacNaughton's 1963 statement to the effect that as the representative of the House the Speaker needs to be impartial and objective. Speaker Parent observed that this is especially true now that the Speaker is elected by secret ballot and no longer attends party caucus. Speaker Parent held that:

The designation of the official opposition has never been decided on the floor of the House of Commons. As Speaker, I am entrusted with the responsibility of ensuring the orderly conduct of business in the House. To do so, I must now determine, in light of the tie situation and the point of order raised, which party shall form the official opposition.⁹

A substantial component of the Reform party's position had been that the Speaker should take an active role in deciding the official opposition. Much of the commentary advanced by the Reform's spokespersons had questioned the BQ's credibility given that party's separatist position. Thus Reform's strategy consisted of developing the case whereby an opposition party other than the largest one could be recognized as the official opposition. To support its case, Reform referred to the British election of 1919 and the Australian case of 1941 as precedents. Speaker Parent's examination of the facts of these two precedents, however, did not lead to the same conclusion. Apparently, Speaker Parent did not wish to become embroiled with the subjective matter of deciding which party would be the better official opposition. "By convention the number of seats held by a party in the House has been the determining factor."¹⁰

Reform also made use of the 1983 Alberta case where the NDP had been granted official opposition status in part on the basis of popular vote. But Speaker Parent relied upon Speaker Dysart's ruling to reject this position, namely that factors outside the legislature such as popular vote cannot be the determining factor. "I must conclude ... that in the case of a tie during the course of a Parliament incumbency should be the determining factor and the status quo should therefore be maintained."¹¹

We may bring this section to a close by considering Speaker Parent's ruling in the context of the table used in the discussion of Speaker Dysart's ruling. In doing so, we have to remind ourselves that Speaker Parent's ruling was neither as extensive in coverage nor as detailed in content as his counterpart's. Also, to a large extent, Speaker Parent accepted and relied upon the New Brunswick ruling in arriving at his decision.

For the most part, Speaker Parent's comments dealt with a tie occurring during a legislature. The last quotation makes it clear that he felt that incumbency should be the main determining factor. There is also a measure of the convenience factor implicit in the ruling. That is, the facts of the case were that the BQ and Reform were tied in standings and the former had been the official opposition since the 1993 election. The circumstances of the case had not changed to justify an alteration in recognition. When used in conjunction with incumbency, the convenience factor favours maintaining the status quo. We also need to recall Speaker Parent's earlier comments in regard to the Speaker's role. It is to maintain order based on precedence and not to impose a new direction.

As for the other three factors, Speaker Parent only made a specific comment on popular vote. Here he was consistent with Speaker Dysart whom he quoted to the effect that factors outside the legislature such as popular vote were inapplicable.

Conclusion

The Westminster model is based on two principles. The cabinet is responsible for the conduct of parliamentary business, but equally important is the opposition's right to be able to criticize the government effectively. The choice of the official opposition and its leader, therefore, is of critical importance.

As Speaker Dysart pointed out in her decision, incumbency has usually been the key factor used to settle cases where opposition parties have been tied. Party status is another standard factor, while both convenience and popular vote have more limited applicability. Party policies are inapplicable in deciding the official opposition.

But while incumbency is strongly based on precedence, is it still the best option? Just as the level of government intervention in the modern state has grown, so has the relative importance of the official opposition. This is especially evident in the advantages associated with the official opposition's responsibilities, as defined in terms of both parliamentary procedures and administrative supports. It is in this context that we should consider a more specific set of rules, to govern

situations when opposition parties are tied. The uncertainty and controversy usually associated with these cases would effectively be removed.

Notes

1. John C. Courtney, "Recognition of Canadian Political Parties in Parliament and in Law," *Canadian Journal of Political Science*, Vol. XI no. 1 (March 1978), pp. 33-34.
2. James R. Robertson, "Political Parties and Parliamentary Recognition," Background Paper BP-243E, Research Branch of the Library of Parliament (Ottawa: Minister of Supply and Services Canada, 1991), p. 3.
3. Saskatchewan is an exception in this regard in that there is a mechanism in place by which to resolve the matter. That is, legislation exists that covers the status and privileges of tied opposition parties in the Assembly, as well as the shared funding of these parties. The Speaker is thus not called upon in the heat of the moment to decide a most controversial issue, but only to enforce the existing rules. Both Speaker Dysart and Speaker Parent spoke approvingly of the Saskatchewan model.
4. Speaker's Ruling: Tie or Equal Number of Members in Two Opposition Parties. *Journals of the Legislative Assembly of the Province of New Brunswick*, Third Session of the Fifty-second Legislative Assembly, December 16, 1994, pp 330-335.
5. The BQ had previously lost one seat when its MP for Brome Missisquoi, Gaston Peloquin, died accidentally on September 1, 1994; the seat was then won in a by-election by the Liberal candidate (Denis Paradis) on February 13, 1995.
6. Speaker Dysart's ruling, p. 334.
7. *Ibid.*
8. See note 3.
9. House of Commons *Debates*, February 27, 1996, p. 17.
10. *Ibid.*, p. 20
11. *Ibid.*