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# Reflections on the Speakership

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*The effectiveness of the Speaker rests to a large extent on his or her perceived impartiality. The Speaker must be prepared to function as an adjudicator and even as a peacemaker. He or she must vigorously defend the rights and privileges of all Members, individually and collectively, without exception. He or she must listen actively and ensure that any decision is manifestly well-founded on the merits of the particular case and on the rules, jurisprudence and conventions. The rules must be applied to everyone, without exception. This article reflects on the key themes of a successful Speakership, particularly during a period of minority government.*

Although the House of Commons is no stranger to minority governments, most governments since Confederation have been majorities. Between 2004 and 2011, however, minority governments became the norm, and I had the opportunity to face the challenges of the Speakership in minority Parliaments, in particular that of ensuring the continuity in purpose and principal necessary in an institution such as the House of Commons. Indeed, the responsibility of the Speaker to act as the guardian of the rights and privileges of Members and of the House as an institution requires that he or she be seen to conform strictly to the highest standards of independence and impartiality.

What does impartiality in a minority Parliament mean? At all times, the Speaker functions as an adjudicator and even as a peacemaker, but this is particularly the case in a minority Parliament whose Speaker must vigorously defend the rights and privileges of all Members without exception. The Speaker must be respectful of the roles of leaders and whips and know how to deal with them. The Speaker of a minority Parliament should make particular efforts to remind the House regularly that he or she is there to serve all Members and the institution and to enforce only those rules decided upon by the Members themselves.

The ceremonial aspect of the Speakership is an important element of the Speaker's role in any legislature, but is again particularly important in a minority Parliament. The Speaker's parade, the mace, and the manner in which the Speaker enters the Chamber and conducts himself therein visually emphasize his or her impartiality.

As Speaker of the House of Commons, I made use of a variety of tools, not all of which are found in the Chamber, to allow me opportunities to reinforce the Members' perception that I was in office as Speaker to serve all regardless of party affiliation. For example, I instituted an ongoing series of dinners to which, in due course, every Member of the House was invited. Members from each of the parties represented in the House were invited to each dinner, always in different groupings. The effect of this was to encourage informal social contact between Members from the different parties with a view to fostering an atmosphere of greater collegiality and, by extension, greater civility in the House.

In May of 2005, I used my casting vote to break a tie on a confidence vote for the first time in Canada's history. I voted in favour of 2<sup>nd</sup> reading of the government's budget bill, allowing the minority government to survive by a single vote—a decision that I took great care to explain in detail to the House in order to ensure that all concerned understood that the decision was guided by established principles and not by politics. It is perhaps worthy of note that the use of the casting vote, once a rarity, became a more frequent occurrence. During my years as Speaker, I was obliged to resolve tied votes on five separate occasions, half of all such votes since 1867.

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*Prior to his retirement in 2011 Peter Milliken was the longest serving Speaker in the history of the Canadian House of Commons, having been first elected to that office on January 29, 2001. This is a revised version of a paper presented to the 49th Commonwealth Parliamentary Association Conference held in Charlottetown, Prince Edward Island on July 13-19, 2011.*

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During my Speakership, I was also faced with the fundamental issue of the ability of the House of Commons to hold the government to account for its policies and performance, and the special role of the Speaker in this regard.

Regardless of the makeup of the House of Commons, the principal tools of accountability remain the same—interventions during Question Period, written questions, the consideration of estimates in committee and the consideration of Opposition motions on Supply Days. In recent years, however, there was an increase in the use of questions of privilege related to issues of accountability when more traditional tools were felt to be ineffective. It will, I hope, be instructive to examine briefly the role of the Speaker during the daily Question Period and with regard to several pivotal Speakers' rulings in response to questions of privilege concerning the production of documents by the government during the late minority Parliament. In these exercises in accountability, the effectiveness of the Chair rested upon respect for its authority, its perceived respect for Members, individually and collectively, and, perhaps most importantly, on its perceived impartiality.

Notwithstanding the interruptions and heckling so common in the Parliaments preceding the present one, the daily Question Period is actually highly-regulated. Parties are allowed only to ask a predetermined number of questions based on the size of their caucuses, and they must ask their questions in a specific order, predetermined by their party leadership for that day on a list given to the Speaker.

Questions and responses are all timed in order to prevent excessive speeches and to permit the maximum possible number of questions, and the Speaker of the House has the ability to cut off the microphones of Members speaking after their allotted time has elapsed. The parties may negotiate a maximum time limit for each question and answer; currently this limit is 35 seconds for each.

As with other parliamentary procedures in the House, Members must direct questions to the Speaker, thereby addressing them only indirectly to a Minister. Furthermore, there is no obligation for the Minister addressed in the question to respond. Ministers need receive no advance notice of the content of Oral Questions. Generally, the Speaker's challenge is to intervene only insofar as is necessary to ensure that both the questioner and the respondent are able to complete what they have to say and that they may be heard by the House.

The Speaker has the discretion and the authority to rule out of order any question posed during Question Period if he or she is satisfied that it is in contravention of House guidelines. He or she may suggest that a question be rephrased or may simply intervene immediately by recognizing another Member to ask the next question.

Ideally, questions should: deal with matters of sufficient urgency; be brief; seek information; and deal with matters within the administrative responsibility of the government or individual Ministers. In practice, this is often not the case. The extent to which the Speaker intervenes depends on whether a collective will exists among the Members and their parties to curb excesses and to seek to hold the government accountable in a disciplined and respectful manner.

Ultimately, the Speaker is left to attempt to curb the worst of any excesses, to uphold the rules insofar as this is possible—for example, to ensure that the time limits applicable to questions and answers are strictly adhered to—and to strive to do this in an unbiased and impartial fashion. The toleration of some indecorous behaviour is preferable to creating the impression that the Speaker is intervening in a partial or partisan fashion. Neither can the Speaker be seen to interfere with or arbitrarily to obstruct the legitimate questioning of government Ministers.

When intervening, the Speaker takes into account the tone, manner and intention of the Member speaking; the person to whom the words at issue were directed; the degree of provocation; and most importantly, whether or not the remarks created disorder in the Chamber. Members are asked to withdraw offensive or disorderly remarks. A Members' apology is generally considered to have been made in good faith and the matter is then considered closed. In those instances in which a Member refused to withdraw offending remarks, I found it very effective to decline to recognize him or her until an apology was forthcoming. This prevented him or her from using the Chamber as a venue for attracting further media attention.

The general rule is that it is not for the Speaker to judge the content of questions and answers. To do so, is to risk allegations of bias. Indeed, Members often rise after Question Period on points of order or questions of privilege on what the Speaker is obliged to dismiss as "matters of debate".

Because of the collegial character of the House of Commons and of the broad privileges enjoyed by its Members, particularly in the area of freedom of expression, no one — not even the Speaker — can act

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unilaterally to improve the level of discourse during Question Period. The Speaker's role in presiding over debate is clearly defined and is restricted to ensuring that the rules of order and procedure are respected.

When other means fail, Members will sometimes seek to hold the government to account by rising on questions of privilege. During the third session of the 40<sup>th</sup> Parliament, there were two questions of privilege in particular which represented successful attempts on the part of Members of the House to make the government accountable for its failure to release documents whose production had been ordered by committees of the House. In ruling that *prima facie* questions of privilege did indeed exist in these cases, my challenge was to place the rulings in their procedural context and to detail the reasons for my decision sufficiently to leave Members on both sides assured that it represented a careful weighing of the arguments advanced and careful application of the relevant precedents.

Before I comment further on the Afghan detainee documents case, I would like to explain the role of the Speaker with respect to questions of privilege raised in the House of Commons. *House of Commons Procedure and Practice*, 2nd Edition, page 141, states:

Great importance is attached to matters involving privilege. A Member wishing to raise a question of privilege in the House must first convince the Speaker that his or her concern is *prima facie* (on the first impression or at first glance) a question of privilege. The function of the Speaker is limited to deciding whether the matter is of such a character as to entitle the Member who has raised the question to move a motion which will have priority over Orders of the Day; that is, in the Speaker's opinion, there is a *prima facie* question of privilege. If there is, the House must take the matter into immediate consideration. Ultimately, it is the House which decides whether a breach of privilege or a contempt has been committed.

Strictly speaking, then, the Chair's role in a matter of privilege is not to make a finding of fact, but to determine whether, on first impression, the issue warrants priority for consideration over all other matters before the House. It remains up to the House to make any final determination on the substance of the question of privilege.

In 2008, the House established a Special Committee to monitor Canada's military mission in Afghanistan. In November 2009, the Committee reported to the House what it considered a breach of its privileges in relation to its inquiry and requests for documents. Because Parliament was prorogued at the end of December 2009, three Members of the House of Commons raised

questions of privilege in March 2010 with regard to the right of the House to order the production of documents, its nature and extent, and the manner in which it should be exercised.

There were many interventions on the question of privilege and I was left hoping that the parties might come to some resolution of the issues without the need for a ruling from the Chair. This, unfortunately, was not the case, and I delivered my ruling on April 27, 2010.

On the central issue raised, my ruling upheld the absolute right of the House to order the production of documents, and found that the Government's failure to comply with the Order of the House constituted, *prima facie*, a question of privilege. I was concerned that the issue had become highly politicized and I appealed to Members on both sides to respect the House of Commons' long record of collaboration and accommodation on matters involving national security.

Accordingly, I delayed allowing the Member who had raised the question of privilege the opportunity to propose a related motion to permit the parties two weeks to reach an agreement.

Over the ensuing seven weeks, during which the parties requested and were granted extensions, an agreement in principle was reached which did not compromise national security, but which respected the House Order.

It is my belief that by ruling in the manner that I did, I was able, while finding that a *prima facie* case of privilege did exist, to respect the legitimate concerns of the government for the confidentiality of sensitive documents. The question of privilege resulted in a compromise rather than a confrontation.

The second question of privilege to which I would like to make reference was raised in February of this year by MP Scott Brison. It concerned the alleged failure of the government to produce documents, on the ground of Cabinet confidence, which the Standing Committee on Finance had ordered it to produce, and was further to a report of the Committee to the House in this regard. The documents in question were concerned mainly with the projected costs of the government's "tough on crime" initiatives and those of the purchase of F-35 fighter aircraft. In response to the question of privilege, the government twice tabled documents which it claimed satisfied the Committee's requirements. Unsatisfied, on February 28, 2011, the House adopted an Opposition motion requiring the Government to "provide every document requested by the Standing Committee on Finance on November 17, 2010, by March 7, 2011."

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In my ruling, I quoted *House of Commons Procedure and Practice*, 2<sup>nd</sup> ed. (pp. 978-9) to the effect that:

The Standing Orders do not delimit the power to order the production of papers and records. The result is a broad, absolute power that on the surface appears to be without restriction. There is no limit on the type of papers likely to be requested, the only prerequisite is that the papers exist—in hard copy or electronic format—and that they are located in Canada.... No statute or practice diminishes the fullness of the power rooted in the House privileges unless there is an explicit legal provision to that effect, or unless the House adopts a specific resolution limiting the power. The House has never set a limit on its power to order the production of papers and records.

I reminded Members that the Standing Orders state that standing committees have the power to order the production of papers and records, and made reference to my ruling in the Afghan Detainee Documents ruling to the effect that:

...procedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of government documents...

To conclude, I would emphasize that for a legislature to function effectively and to hold the government to account for its policies and performance, it is essential that the Speaker enjoy the respect of Members from across the political spectrum and that the Members themselves feel that they are respected by the Chair.