CANADIAN INFLUENCES ON THE CONSTITUTIONAL AND PROCEDURAL DEVELOPMENT OF THE AUSTRALIAN HOUSE OF REPRESENTATIVES

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Ian Harris, Clerk of the House of Representatives, Australia[1]

Canadian links in Australia's origins

The first Canadian contribution to the Constitutional and procedural development of Australia and its House of Representatives could be described as the "big picture" contribution of the principle of responsible government. This happened both in the physical presence in Australia of some Canadians transported to Australia as a result of pursuing their political ideals and in engendering in the British Colonial Office the concept of responsible government.

French Canadian Patriotes

It is reasonably well known that Australia's first European settlement stemmed from the establishment in Sydney, New South Wales, of a penal colony. Even today, a common response to forms for temporary entry asking whether the applicant has prior criminal convictions is whether it is still necessary to have a criminal record to enter Australia! In the last decades of the 18th Century and the first half of the 19th Century, the vast sea on one side and the inhospitable bush on the other made a very effective prison. Many of those who made the long sea voyage would be regarded as felons today, although the concept of property was less inflated in those days. It was not uncommon for a death sentence to be commuted to transportation. In a time when property was supreme, some of the crimes punished were stealing a loaf of bread or a lace handkerchief. However, many convicts were what would now be regarded as political prisoners, and Canadians of this kind formed the first links with Australia's governmental systems.

Even today one of the local government areas around Sydney is Canada Bay, reflecting events in 1837 and 1838 in Canada, when French Canadian *Patriotes* revolted in then Lower Canada (now Quebec)[2]. The *Patriotes* had a number of grievances against British Government rule, particularly the need for greater participation in government and the introduction of the concept of government responsible to a lower house. In the shorter term the revolt was crushed, some of the *Patriotes* being executed and others sentenced to transportation. In 1840 the ship the *Buffalo* transported 91 English speaking rebels to Tasmania and 58 French speaking Canadians to New South Wales[3].

While being forcibly despatched to the Antipodes would for any reason be less than pleasant, and even more so as a punishment for political principles, the situation could have been worse. The exiles were originally bound for Norfolk Island. While this is a most pleasant destination today, and was regarded as a godsend later by the settlers following the mutiny on the *Bounty*, Norfolk Island was a very grim place in the first half of the 19th Century. However, following representations by Sydney's Roman Catholic Bishop, they were sent to Longbottom Stockade. Conditions were still harsh. Their work involved breaking stones for road construction and collecting oyster shells for crushing to obtain the lime. There were some consolations. Most were Catholic, and the Bishop and his secretary were both francophone. One prisoner made a set of bowls, providing the first recorded instance of the game in the area.

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[1] I am grateful for the suggestions and additional material for this paper offered by senior staff of the House of Representatives.

[2] See Sydney Inner West Virtual Library: Reading: Canada Bay and the Canadian Exiles, http://www.siwvl.nsw.gov.au/resources/reading/canadian_exiles.html

[3] A list of the French Canadians who were transported is contained in *Forgotten Patriots: Canadian rebels on Australian Shores*, Toronto, Ontario: Robin Brass Studio, 1999.

They did not remain prisoners long. In 1842 the Canadians were granted a ticket of leave, enabling them to work outside the stockade. Between November 1843 and November 1844 they were granted free pardons. Eventually all but three returned to Canada.

I am advised[4] that these events were related to a turning point in Canada's parliamentary history and formed the basis for genuine responsible government in Canada. The French Canadian rebels were joined by their counterparts in Upper Canada (today Ontario), gaining success in 1848, a seminal year for popular democracy around the world. After the 1837 and 1838 disturbances, Lord Durham, Governor-General and Lord High Commissioner to Canada, recommended responsible self government for the Union of Upper and Lower Canada. This was the principle of self-government that was granted to the Australian colonies in the 1850's, beginning with New South Wales in 1856.

Canada's influence in the formation period of the Commonwealth of Australia

Australia was fortunate in that a war with Britain was not necessary to establish the country's union, although relations did become strained from time to time. The Australian Constitution and the concepts underlying it were established at a series of discussion groups, called conventions, and plebiscites of the Australian people. At the Adelaide Convention on 23 March 1897, there were many references to the impact international influence had on the minds of those drafting the Constitution. Foreshadowing the adoption of the phraseology in the Constitution recognising the concept of responsible government, the person who was to become Australia's first Prime Minister, Edmond Barton, compared governmental systems to footwear. He indicated that he did not want his boots made in Germany, and that he did not want his Constitution made in Switzerland[5]. He thought that British forms of government, as adopted and adapted, were the best fitting. His boots clearly had always been made in Britain.[6] Yet, Sir Richard Baker, who was to become the first President of the Senate, responded: 'I want my boots made where I find they fit me best'. He believed that it was possible to learn lessons from other countries, and pointed to federations in Germany, Switzerland and America, and to a limited extent in Canada[7]. Baker saw Canada as a partial federation because the Senate was appointed by a partisan leader. Nonetheless, the Canadian model was present in the psyche of the founding fathers.

Nowhere is this more evident in what I understand is known in Canada as the "POGG clause". The Act 31 Geo.III c.31 established legislatures for Upper Canada and Lower Canada, respectively, with power to make laws for the territories' peace, welfare and good government. When the Upper and Lower Provinces were united[8] , a parliament of two Houses was established with similar legislative powers for Canada. This was repeated in section 91 of the *Constitution Act 1867* (the *British North America Act 1867).* Section 51 of the Australian Constitution, specifies that the [Commonwealth] Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to specified powers. This was directly inspired by section 91 of the Canadian Constitution[9]. (The American Civil War was fresh in the minds of the framers of the Constitution. Canadians had federated in 1867, with a Senate and a House of Commons. For example, residual powers in Australia are left with the States whereas in Canada they are allocated to the federal level. I understand that those framing the Canadian Constitution were wary of creating conditions further down the track similar to those that had led to the American Civil War. The adopted formula in Australia included a Senate designed to preserve more strongly the rights of the States. However, the House of the people was called the House of Representatives rather than the House of Commons).[10]

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[4] Dr François Beaulne, Senior UNDP Parliamentary Adviser, Cambodia, former Deputy Speaker, National Assembly of Québec, and François Côté, Secretary-General, National Assembly of Québec.
[5] Barton subsequently expressed the opinion that the Swiss method provided the best model for appointing the Senate. He recognised the irony in this. *Official Report of the National Australasian Federal Convention Debates, Adelaide, March 22 to M*ay *5 1*897 (1897) 26.
[6] Ibid 24.
[7] Ibid 29-30.
[8] 3 and 4 Vic c.35
[9] Communication with Dr Jim Maher, School of Social Sciences, University of New England, Armidale, Australia; Quick & Garran "The Annotated Constitution of the Australian Commonwealth", 1901, pp512-3.
[10] Ibid.

Canadian entrepreneurialism in first sittings in Canberra

The Commonwealth of Australia came in to being on the first day of the 20th Century. Inter-colonial rivalry was rife in the federation movement. The Constitution as finally adopted provided that the capital of the new nation was to be in New South Wales, but at least 100 miles from Sydney. Until a site was chosen, the Parliament was to meet in Melbourne[11], and the shift from Melbourne did not occur until 1927. In that year, Canadian Pacific ran advertisements in the *London Times* offering the trip of a lifetime: a steamer from various locations in the United Kingdom to New Brunswick, Canada, and then a train trip across Canada to connect with the ship *Aorangi*, which was to arrive in Sydney on April 30, and then on to Canberra by train for the opening by the then Duke of York on 9 May. The offer was extended for those who could not make the 9 May experience. There is no readily available record of those who availed themselves of this offer.

Canadian influence on Australian procedural development

The first of the standing orders of the House of Representatives until recently contained a provision that resort was to be had to the United Kingdom House of Commons in cases not provided for in the standing or sessional orders of the House. This has recently been removed, on the basis that the House had established its own practice over 100 years. It was also recognition that the House was gaining procedural inspiration from other legislatures, particularly the national and provincial legislatures of Canada.

Opportunities for private Members – Burst of procedural plagiarism

In the 1980's, Australia gained procedural inspiration from Canada in actions described by one of my colleagues as a burst of procedural plagiarism. Most of this 'borrowing' – in the same sense as linguistic borrowing, where there is no real intention of returning the words incorporated into the language -occurred to provide greater opportunity to participate in House proceedings by private Members.

Members' statements

One practice changed on the Canadian model resulted from the previous practice of openly giving notices of motion. Members of the House of Representatives previously had the option of handing a notice in writing, or of accompanying the written notice with an oral statement of its terms. Many Members stated the terms of a putative notice, with no expectation or prospect of the notice being called on for debate[12]. Notices of this kind were usually either complimentary of some group or other aspect of a Member's electorate, for example, congratulating a football or netball team on its success etc, or highly critical of the government of the day. All this took place to a packed House waiting to start Question Time, yet, technically there was no limit to the number of notices that could be given. The frustration of Government leaders in particular can be imagined – and it was often shared by Speakers! The House finally suspended the procedure by sessional order effective from 1985 until 1988, and Canada came to the aid of Australia's private members. The Procedure Committee of the House, impressed by the Canadian practice of Members' statements, recommended that Members be given the option of giving a notice openly, or instead making a 90-second statement to the House. The government did not accept the recommendation in isolation without further reform[13].

The committee repeated the recommendation subsequently, and in 1992, the House adopted a procedure whereby once a week, just before question time, a fifteen minute period was set aside for the making of Members' statements, on the Canadian model. Subsequently, the practice was extended to the second chamber of the House, called the Main Committee. However, in the Main Committee, Members may speak for up to three minutes, and unlike the House of Representatives Chamber, Parliamentary Secretaries, who are members of the Executive, may make statements. Members are able to make a statement per se, or they give a notice of motion orally (in the Chamber only) – the only opportunity for a Member to give a notice of motion openly – and they may present petitions, again the only way that a Member can personally present a petition to the House.

Private Members' Business

[11] Constitution, section 125.
[12] *A History of the Procedure Committee on its 20th Anniversary*, p.41.
[13] Ibid, p.42.

At the same time as the introduction of Members' statements, the House, inspired by the Canadian model, introduced a system attempting to ensure that private members had substantial opportunities and the debates could be timely and topical. Rather than a ballot system to decide matters for debate, the House of Representatives chose an all-party committee to allocate times for debates within a substantial block of time set aside each week for private Members' business.

Televising of proceedings

While special events, such as Treasurers' budget speeches and responses by Leaders of the Opposition and the joint sittings with the Senate in 1974, had been televised "live", access to proceedings for televising did not occur until 1991. The then Speaker of the House, as Chairman of the Joint Committee on the Broadcasting of Parliamentary Proceedings, visited Ottawa and Regina in November 1983 in connection with the Committee's inquiry into television and radio broadcasting of both Houses and their committees. The committee's report[14] drew heavily on the Canadian experience, and discussions with members of the federal and provincial legislatures. As well as assisting the committee however, there were suggestions that the Government of the day was influenced by Canadian experience in its response: despite recommendations to introduce televising, and action to do so by the Senate, the Government moved very slowly in respect of the House of Representatives. Observers were a little puzzled by this until they heard that the Government had been told that for several years after televising had been introduced in Canada's House of Commons no incumbent government had been returned!

The 'sin bin'

Another procedure of the House was adopted from Canadian sport, the concept of a 'sin bin'. Australians first became aware of the concept of a sin bin in relation to what we call ice hockey, and for which Canada is famous. It was adopted in both major forms of rugby in Australia, and meant that a misbehaving player could be sent from the field of play for the remainder of the game, and subsequently faced the judiciary, or the referee could administer a ten-minute period in the sin bin. It is usually employed for a technical (known as a 'professional') foul, while serious offences still warranted dismissal from the field of play for the remainder of the match.

In procedural terms, there is a standing order[15] of the House which provides that the Speaker may direct a Member whose conduct the Speaker considers to be disorderly to leave the Chamber for an hour. This action is seen as an alternative to naming the Member, which would normally be followed by a motion to suspend the Member from the service of the House. If a suspension of Member motion is agreed to, the Member incurs a penalty varying according to the Member's record in the calendar year in which the offence has occurred, but with a minimum suspension of 24 hours. The 'sin bin' procedure was introduced in 1994 following a recommendation from the Procedure Committee, which saw the mechanism as a means of removing a source of disorder rather than a punishment, enabling a situation to be defused before it deteriorated, and without disrupting proceedings more than necessary. A Member who is directed to leave the Chamber under this procedure may not enter the Chamber galleries or the room in which the Main Committee is meeting. The procedure has worked well. While being invoked more frequently in respect of Opposition Members, it has been used in respect of Members from both sides. It has been invoked in respect of Ministers, including on one occasion the Leader of the House. The provision has been introduced into the Main Committee on a trial basis for the remainder of 2006. In this instance the period of exclusion is 15 minutes, and the Member is not prevented from entering the main Chamber and its galleries[16].

Questioning Members about contents of second reading speeches

In 2003 the House Procedure Committee, acting on what was described in informal discussion with it as 'the Canadian model, recommended a period of 5 minutes of questions and answers following 15 minute maximum second reading speeches. The recommendation has not yet been adopted by the House but I am advised that the Procedure Committee has not given up on the idea.

Privilege

[14] Parliamentary Paper 1986/125.
[15] Standing order 94(a)
[16] Sessional order 187 (b) (i)

Australians find developments in parliamentary privilege in Canada extremely relevant to our situation. In the course of my duties, I frequently consult *Maingot*, and cases such as *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* are highly persuasive within Australian jurisdictions.

Staffing and professional development

The House of Representatives' schemes to involve university students on the floor of the House was inspired by the Canadian page system. We live in hope that one of those whom we describe as 'parliamentary assistants' may join our service and become members of the Executive Committee of the Association of Secretaries-General of Parliaments (as I understand has happened in Canada[17]). Similarly, the Inter-Parliamentary Study Program, which invited legislatures to send staff from parliaments around the world for a short period every year for formal presentations and the opportunity to work beside colleagues in the Australian Parliament exercising similar functions, was established on the Canadian model.

IT at the Table

Canada's leadership in the area of developing IT support for the Chamber, the Speaker and Clerks-at-the-Table has been carefully studied by many Australian House staff attending the Canadian *Parliamentary Officers' study Program*. The result is that the House of Representatives, like the House of Commons, has led developments in federal Chamber-based computing communications in Australia and has been heavily influenced by Canadian success in this area. Similarly our developments in the delivery of parliamentary information services have been undertaken with the benefit of knowledge of Canada's PRISM system.

Conclusion

There has been special interest in concepts that Canadian people hold so dear and in proceedings of the Canadian national and provincial legislatures from the time of the first constitutional awakenings in Australia that continues today. There has been contact between committees interested in parliamentary procedure at national and provincial levels. Publications such as *Marleau and Montpetit* and *Canadian Parliamentary Review* are eagerly awaited by parliamentary staff in Australia. Great interest is taken in such developments as British Columbia's Citizens' Assembly on Electoral Reform. There appears to be an awareness in Australia that both countries had similar beginnings (although until recently Australia did not enjoy the same diverse cultural mix as Canada), and proceeded down similar parallel paths. I am confident that this awareness by Australians will continue, and I look forward to the ongoing enrichment of Australian parliamentary thinking by the richness of the Canadian experience. May I also express the hope that the exchange will be continued, in both directions.

[17] *The House of Commons Page Programme: Then and Now*, Marc Bosc, former parliamentary page and current Deputy Clerk of the House of Commons, *Canadian Parliamentary Review*, Vol.12, No2, Summer 1989.