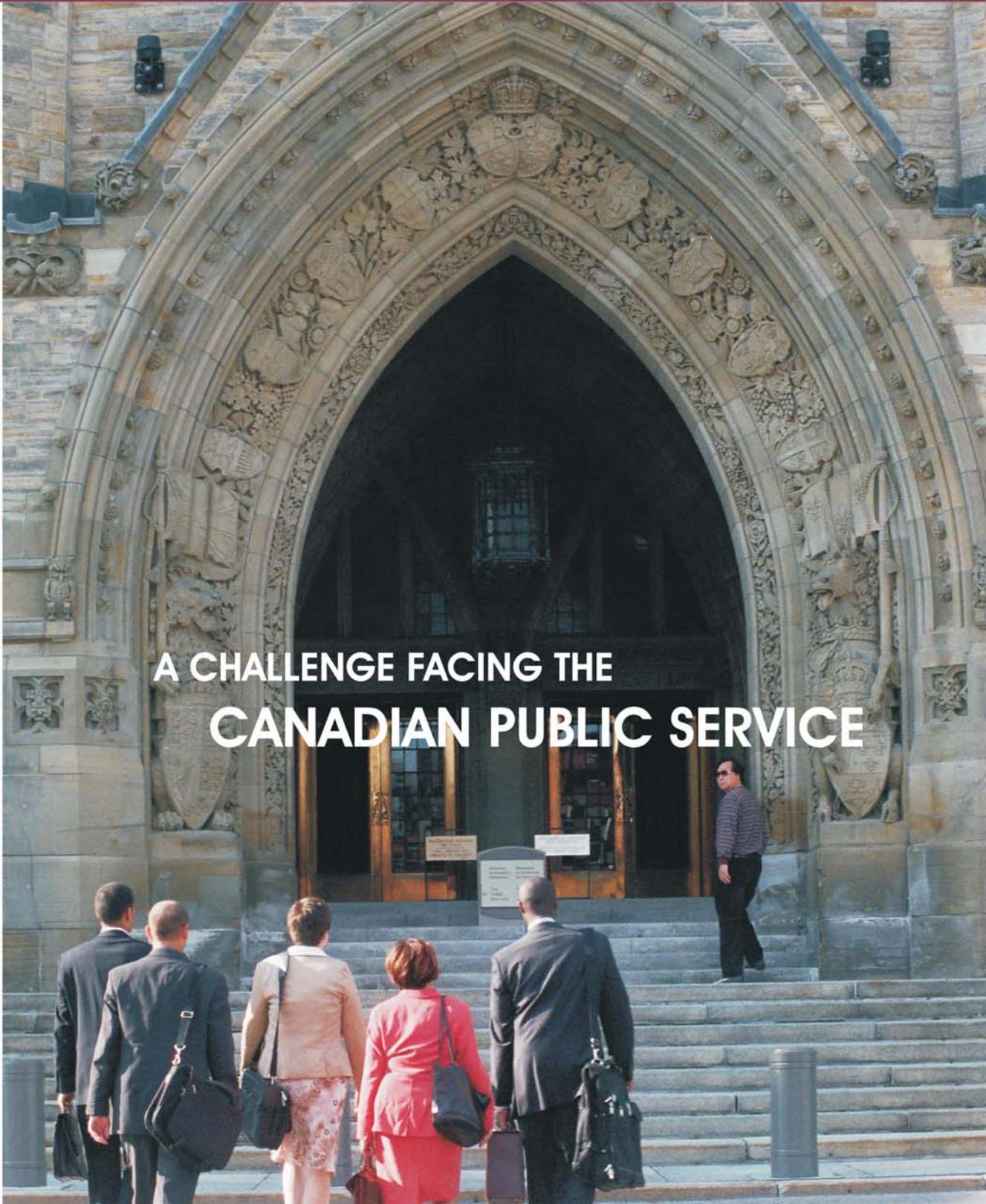


OCCASIONAL PAPERS ON

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**A CHALLENGE FACING THE
CANADIAN PUBLIC SERVICE**

Occasional Papers on Parliamentary Government

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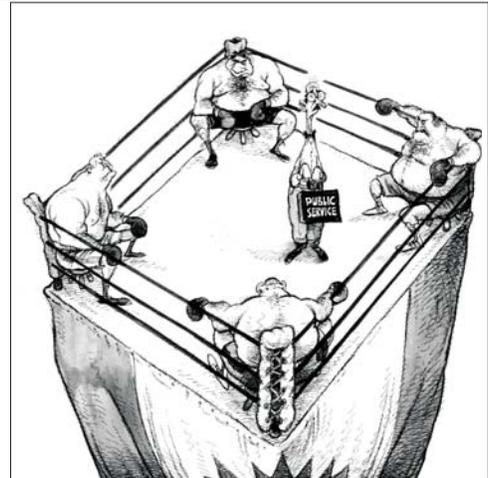
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A CHALLENGE FACING THE CANADIAN PUBLIC SERVICE

The Public Servants' Dilemma

The election that produced the 38th Parliament has created a situation unique in Canadian political experience: a government whose minority is of such a size that to secure a majority the support of one or other of the two major opposition parties—the Conservative Party and the Bloc Québécois—is required. But neither of them are prepared to vote with the government, save on specific measures which they support. Accordingly, the party standings resulting from the 2004 election mean that practices developed and applied in five earlier minority Parliaments (1922/1925/1963/1965/1972) that provided a relatively reliable basis for decision-making in the House of Commons cannot be relied upon in this Parliament.



In effect, the outcome of virtually every item of parliamentary business—legislation, supply day motions, consideration of estimates and private Members' bills—is uncertain, dependent on the result of negotiations and discussions among House leaders, between responsible ministers and opposition critics and in committees, as well as on the political position of each of the parties. The government can only prevail if one or other of the two principal opposition parties decides to give their support on a specific measure.

Notwithstanding the fact that no party currently appears to want an election, the risk of one occurring accidentally is sufficiently great that, instinctively, Members of all parties often act in a partisan manner. These exchanges aggravate inter-

party rivalry and foment mutual suspicion. The atmosphere generated by these reactions makes it more difficult to achieve compromises and accommodations, adding to the uncertainty and unpredictability of this Parliament.

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Although the overall state of relations in Parliament is substantially influenced by discussions among party and House leaders, parliamentary committees could become important for finding accommodations, as they occasionally did in the 1972 Parliament. For this reason the decision to refer most bills to committee after first reading makes sense, since it allows for testing in a more deliberate environment the reaction of opposition parties to their underlying principles.

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This situation presents challenges for all actors: party and House leaders, ministers and opposition critics, private members and, indirectly, the public service. Each group is confronted with situations where there are no reliable precedents that have worked in the past. Everyone is seeking to find a path in the dark.

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All of the actors noted above, save for public servants, have been elected to Parliament and accordingly expect to work in a political environment. They recognize that being elected to an unpredictable minority Parliament obliges them to adjust their working practices. Public servants, by

contrast, are members of a service whose function is to advise governments. To carry out this responsibility they are required to be politically non-partisan. If they have been called to appear before a committee and are asked questions with a political dimension, they are directed to refrain from answering and to defer to their Minister.

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Public servants face a dilemma in this minority Parliament that is a novel experience for them. In the past when they appeared before a committee, they could anticipate that no matter what impression they had conveyed to the MPs they were addressing, they knew that the government party majority on each committee—arranged by the government whip—could assure passage of the draft bill on which they were being questioned and of the estimates supporting the operation of their department and of the programs for which they were responsible.

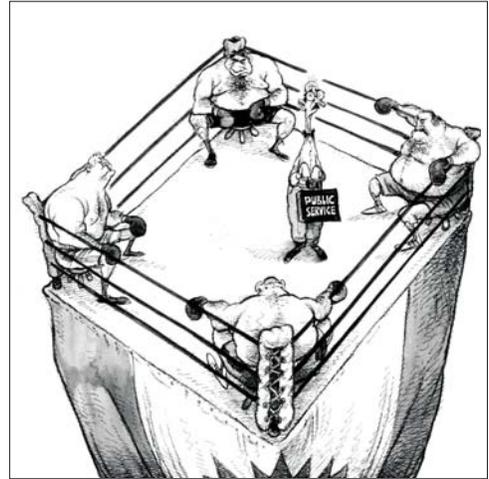
In the 38th Parliament they can no longer rely on the government majority approving draft bills or passing the departmental estimates. If at a committee hearing it becomes clear to public servants who are testifying that Members are discussing amending a draft bill based on perceptions that officials believe may be ill-informed or are proposing to cut an item

in the departmental estimates that may gut an important program, possibly without realizing the full consequences of their proposed action, this can disturb them. True, they can and should alert their Minister or parliamentary secretary and suggest arguments to refute the—in their judgment—ill-informed conclusions. It would also be wise to carefully assess the

opinions of the critics, some of whom may have had long experience on the committee and know the subject well. But should they also use the opportunity to draw attention to the possible consequences of what Members were contemplating? If so, to what extent should they do so?

Should Public Servants be Acting Differently?

The reactions of public servants from many departments and agencies participating in a large conference on the subject of the minority Parliament organized by the School for the Public Service in Gatineau in November, 2004, at which one of the authors was a speaker, revealed the extent of unease and uncertainty. It became evident that many of the officials participating in the meeting appear to be wondering how they should react if they perceive that Members of a committee who are discussing amending a bill or deleting an item in the estimates are basing their action on impressions they consider to be ill-informed. Should they speak up and try to explain the circumstances that the draft bill is intended to address or draw attention to the programs or groups of citizens who would be disadvantaged if the item in the estimates were cut?



Similar concerns and questions were expressed at a breakfast meeting organized in early December by the Deputy Minister of Justice for senior management of the department at which the same author had been asked to make a presentation on the minority Parliament and the way it operates.

The impact of these two meetings with public servants and the recent votes in the House where opposition parties modified or rejected government bills resonated at the Parliamentary Centre. We were reminded of a study we had undertaken four years ago to ascertain the state of relations in parliamentary committees between MPs and public servants and to explore how they might be improved. From interviews at that time with experienced MPs of all parties and with a cross section of senior officials, we had concluded that both sides were

dissatisfied with the relationship and felt that it was unproductive. Both groups showed interest in ameliorating it.

At that time, however, although public servants saw the merits of improved relations, there was little incentive for change. The environment has since changed significantly, leading some of them to wonder whether their traditional stance might be modified and specifically whether it would be beneficial if officials responded more fully when asked questions in committees.

Many MPs are persuaded that in this minority Parliament it is desirable and even necessary that officials respond more fully. The Deputy Speaker, Chuck Strahl, spoke for them when he wrote in a recent article in the *Canadian Parliamentary Review*:

“For the good of the country, let’s hope the bureaucracy realizes that everything is different. ...the independent and technically qualified bureaucracy needs to be bluntly honest with MPs about what is critically important and what is not.... Bureaucrats need to tell it like it is, and let the Committees and MPs benefit from their expertise”.



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Strahl’s strong statement suggests that if committees are not given more information and persuasive explanations as to why proposed legislation is required or estimates needed, opposition MPs may vote to defeat or amend draft bills and reduce departmental appropriations. The recent defeat of the bill to establish a Department of Trade illustrates the point. Several MPs have asserted that in the committee hearings the arguments for separating Foreign Affairs and Trade had not been presented persuasively. This experience demonstrates that the prospect that draft bills might gain some opposition support is greater if a convincing case for them has been made.

Taking account of our earlier study and the environment that prevails today as well as the strong advice offered by the Deputy Speaker, we at the Parliamentary Centre thought that it would be interesting and possibly helpful to think about how senior public servants might comport themselves in this 38th Parliament in their relations with MPs in committees and when meeting party caucuses. In preparation we interviewed some half dozen

deputy ministers to ascertain what views they held on relating to the minority Parliament, what experience they had already had with it, what approaches they were considering and what steps, if any, they had explored or were contemplating for addressing the situation. It was indicated that the results would be published in our magazine, *Occasional Papers on Parliamentary Government*, although it was understood that we would not identify the officials whom we had interviewed and the opinions they had expressed.

In those meetings it became clear that the approach taken by deputy ministers varied, depending in part on the past experience of each department with committees and with MPs. At the time of the interviews few deputy ministers had had to testify before a committee of this Parliament that was considering a politically sensitive issue and very few had yet to face questioning by committees on the estimates. When asked if they had thought about how they would comport themselves if they were being questioned about a politically sensitive bill or faced a move to cut departmental estimates, it was generally acknowledged that they would probably respond by providing more information. But they were clearly more comfortable testifying when committee approval could be secured with minimum engagement by them and showed little appreciation that an effort to meet selected opposition Members privately might facilitate subsequent testimony by them in committee.

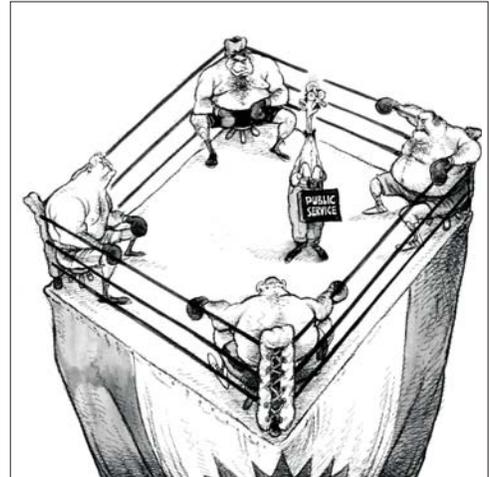
In relations with committees and if appearing before party caucuses, senior officials have traditionally been guided by the perception that their duty was to support their Ministers and Cabinet and assist them to achieve their policy objectives. But in the novel environment of the 38th Parliament some deputy ministers whom we

interviewed appeared to be wondering whether their Ministers would approve of their engaging in helping committee members to understand the nature of an issue facing the country and how a draft bill addressed that situation. A very few appeared to have taken steps to establish a relationship with select and influential MPs that could enhance their future credibility when they appeared before a committee. The past history of their department's relationship with the committee seemed to influence their reactions. Those heading departments that had had a generally cooperative relationship with MPs were more likely to have taken steps to establish personal links with the opposition critics.

It became evident at the breakfast meeting of senior management of the Department of Justice that it faced special problems. Being the legal adviser to the government means that its officials are frequently faced with requests to inform committees of the legal advice the Department had given. Their contact with committees was also greater than other departments since legal advisers assigned to other departments were frequently asked to join the team organized to represent that department before the committee. As a result the Department of Justice appears to have given much thought about how to present information to assist a committee to understand a legal situation while avoiding revealing the specific legal advice they had given.

Advice on how Public Servants might best Relate to Committees

As indicated above, although the reaction to the minority Parliament by deputy ministers whom we interviewed differed, they all recognized that in certain circumstances it might be effective to try to explain in some detail the conditions that a bill was intended to address. Their differing reactions may have reflected a variety of factors: the views of their Minister, the profile of the opposition critics on the committee they related to, the deputy minister's own relations with the Minister and their knowledge of the department. Based on observations they made and conclusions from our previous study of relations between public servants and MPs, we have formulated the following general propositions that officials should bear in mind in preparing for appearances before committees or if they are asked to address a party caucus.



- An essential factor is the state of personal relations of your Minister with the opposition critics. This can vary substantially, partly owing to your Minister's instincts and his or her knowledge of the portfolio, and partly owing to the posture and point-of-view of the opposition critics, who may respond to or resist efforts made by the Minister to establish a relationship. It must be borne in mind that, even though minority Parliaments are now quite firmly established in the Canadian political firmament, as Peter Harder noted in his MA thesis on the minority Parliament of 1972-4, Canada "has failed to develop multi-party politics". By this he meant that even in that Parliament where

there was what he described as "an embryonic form of 'support coalition'", there was no "fundamental shift towards a cooperative model." Indeed after six successive majority Parliaments, cross-party cooperation is not a habit in the House of Commons. Nevertheless, some Ministers have had a modest measure of success in establishing working links with their opposition critics. It is important that you inform yourselves on the nature and extent of any relationships that your Minister has developed. Has the Minister's executive staff actively built relations with opposition parties by following up and providing additional detailed information when opposition Members have asked questions?

- It is essential to ascertain your Minister's views on how you should relate to committees and to MPs on the committees of concern to your department and to govern yourselves accordingly. Similarly you should be guided by directions from your deputy minister in your contacts with parliamentary committees and MPs.



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- It is important to inform yourselves of the working environment in committees to which you relate. Specifically has the chair demonstrated a capacity to build a working relationship with the opposition members of the committee? If any opposition critics have shown a willingness to work to achieve a consensus, has the chair been successful in building common ground with them?
- Knowledgeable parliamentary secretaries can become an important instrument for transmitting serious concerns and useful information to a committee. If your departmental parliamentary secretary is a member of the committee, has he become an effective bridge to the department?
- Monitor carefully the work of the committees to which your department relates. Have opposition parties taken positions publicly on policies or programs of your department or on draft bills on which you are working? It is important that you be knowledgeable on the posture of the opposition parties, so that you can prepare

yourselves before testifying before the committee or meeting MPs in caucus or informally. What kind of impression have you or your colleagues formed during previous meetings with committee members? If relations had been difficult in the past, what were the determining factors: personalities on the committee (which may have changed) or policy differences?

- Inform yourselves of the personal interests and the constituency concerns of committee members.
- Be prepared for some government members behaving like opposition members.
- Expect that you and your colleagues will spend more time before parliamentary committees than in previous Parliaments.



**IT IS IMPORTANT TO INFORM YOURSELVES OF
THE WORKING ENVIRONMENT IN COMMITTEES
TO WHICH YOU RELATE**



- Has your deputy or senior ADM established informal relationships with opposition critics? If links have been developed, particularly in a social environment, your appearances as a witness before a committee may be more relaxed and your testimony more persuasive.
- Although you must decline if asked to disclose written advice provided to your Minister or to Cabinet, some deputy ministers whom we interviewed signaled that they had on occasions been able to explain successfully the need for legislation and describe the elements of legislation required to address the problem. They stressed that it was important to be as

informative as they could, thereby avoiding giving the impression that they were holding back relevant information. If a question is asked to which you cannot respond, their advice was to be quite candid as to the reasons why you could not reply and not to attempt to answer with irrelevant information.

If the advice just summarized were followed, officials appearing before committees would be well prepared. However, these propositions do not address a key question: how far should officials go in presenting information that would assist MPs to understand and appreciate the purposes of a draft bill and the conditions it was designed to correct? The challenge is to assess how and whether to present such information if it becomes evident that a majority on the committee may already have determined to amend or defeat it?

In the past this question would not have generated the same uncertainty, since the government majority on the committee would ultimately have prevailed, no matter what the opposition members of the committee thought. But in the 38th Parliament party standings have had such a profound impact on the dynamics of the House of Commons that government members no longer have the votes to determine outcomes in committee. Unless Members of one of the two major parties are persuaded to vote for a bill, the opposition will determine the result. Does this unprecedented situation justify 'bluntly honest' presentations by officials as called for by Deputy Speaker, Chuck Strahl?

To stimulate reflection on this question, drawing on our interviews with deputy ministers and our discussions with senior officials and experienced MPs of all parties when preparing our previous study, we propose for consideration four possible actions. In

each case, bear in mind, it would be prudent to act in conformity with the guidance provided by the Privy Council Office on relations with parliamentary committees. And it would be essential to have your Minister's approval and guidance.

- The simplest and easiest approach would be to accept that knowledgeable senior officials should be free to respond informatively to questions from members, explaining the situation that a bill was intended to address or the services that an appropriation funded. The hope would be, if committees had knowledgeable reports from officials, they might reach better informed decisions. It would, of course, be understood that they would not report advice given to their Minister or to Cabinet.
- The credibility of senior officials appearing before a committee could be enhanced if they had taken steps to develop a relationship with some opposition critics, either meeting them in their offices or socially over a meal. It stands to reason that if a relationship has been developed by an MP with a senior official, he or she is more likely to listen attentively and be less aggressive in questioning that person. Admittedly whether to make an effort to develop this contact would be influenced by the postures of the critics and their views about the position of the government in that policy area. And ultimately the Minister's approval would be required.
- If departments decide that it would be potentially beneficial to provide background information to MPs, offering to make a presentation to party caucuses – not only doing so when asked – has potential advantages. First, the meetings would be private, so that the MPs who participated should not feel the need to

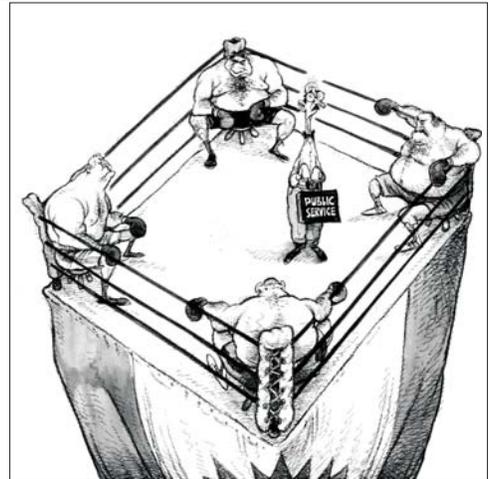
defend a personal or party position. Secondly, there would be no members of other parties present, which would greatly diminish the likelihood of debate. Of course, the offer must be made to all caucuses and, again, the Minister's authority would be required.

- Finally, it would be helpful to take a step to clarify for MPs the particular responsibility of public servants so that they would appreciate the

constraints under which officials function. At the same time the functions of MPs could be described. A particularly persuasive way of doing this would be to engage a select group of MPs and of senior officials to formulate a mutually agreed document that would set out their respective responsibilities. This could then be made available to all committees and officials appearing before them.

Improvements in Working Practices of Committee

It would only be fair to conclude this commentary by reporting that during our interviews with officials as to how they might conduct themselves when responding to questions from MPs, their strongly held view was expressed several times: parliamentary committees could benefit from strengthen their capabilities. This was no surprise. Similar views had been expressed by officials when we had interviewed them four years ago for our study on how to improve relations between MPs and public servants. MPs should recognize that this is not a one-way street.



Parliamentary Committees in the 38th Parliament will come under increasing pressure. MPs can be expected to devote more attention than they have in past years to a review of the estimates and consideration of amendments to draft bills will probably take more time than they did in a majority Parliament. To cope with these heavy demands committees will have to think about how to use their time more effectively. Apart from adopting arrangements practiced in other legislatures that would make it possible for meetings to start on time, thought needs to be given to ways of making the questioning of witnesses more productive. If committees were to decide to prepare annual reports of their activities, this could generate a healthy measure of self-evaluation and might promote grounds for reform.

If officials are to be more informative in their contacts with MPs, they thought it critically important that Members understand clearly the

constraints under which public servants testify. Formally speaking they do not work for Parliament. Rather they work for and advise whatever government is elected by the citizenry and are bound by an oath of secrecy not to divulge to anyone the advice that they have given to Ministers. If MPs recognized this obligation of public servants, officials felt there could be room for them to speak about conditions that a draft bill is designed to address and the legal environment in which it is situated, as well as to identify the beneficiaries of government programs.

Several deputy ministers pointed out that a major constraint on the effectiveness of committees is the small professional advisory staff provided by the Research Branch of the Library of Parliament. Its resources are limited and, no matter how competent the individuals assigned to a committee, a couple of professional advisers is no match for the thousands of officials working for government departments. Competent and knowledgeable committee staff,

providing they have the time, can improve the performance of committees by working with departmental staff to assure that departmental testimony effectively addresses matters of concern to Members. They are also able at times to elaborate with departmental officials accommodations that bridge the concerns of committee members and the objectives of the department. Rectification of the staffing deficiency lies, however, with the Board of Internal Economy and not with committees or with the Research Branch.

A successful experience of committees closely observed by one of the authors during the years 1980 to 1984 is of potential interest. During that short period several committees with orders of reference from the House used their substantial financial resources to cover the cost of an adviser chosen by each of the opposition parties. The combined staff invariably worked cooperatively and was frequently able to elaborate compromise proposals that satisfied the interests of all Members of the committee. Once cooperation at the staff level was demonstrated opposition members were prepared to place great confidence in the advice received from them. These committees (Parliamentary Task Forces as they were then called) all produced consensus reports that carried much weight with government. In this

minority Parliament it might be useful to test whether assigning advisers for the opposition parties would assist committees to reach constructive accommodations.

During the past 25 years there have been six successive majority governments. Inevitably public servants have become accustomed to practices that prevail in a majority Parliament, where outcomes are determined by the government. The transition to this minority Parliament with its unique characteristics and dynamics naturally presents officials with a challenge. We recognize that if it were expected that the next election was likely to return a majority government, accommodating to this new environment could be considered to have a low priority. But if the combination of a reunited Conservative Party and the persistence of regional or other parties with a mildly ideological orientation were to produce frequent minority Parliaments in future (6 between 1957 and 1972), public servants could regard the current situation as a useful opportunity to adapt to the kind of Parliament that might once again become common. And even if this Parliament were to be succeeded by a majority Parliament, a more informative stance by officials could contribute to greater parliamentary effectiveness.



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