

Whipped Out of Shape: A Case Study in Partisanship and
Whipping in the Committee System

- First Draft -

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Introduction

“The government can write the Standing Orders any way it wants. We will find a way to exploit those Standing Orders. We will find a way to point out that the government is not quite perfect yet; that there are some things it could do that it has not done yet; that there are some ways it could spend money a little better than the way it is doing now.”

- Michael James Breugh, MPP Oshawa (1975-1990)

Parliamentary Democracy in Canada is not without its wrinkles, and while the business of the House seems to have borne the brunt of criticism there is ample cause to discuss the shortcomings of parliamentary committees. Committees receive a fraction of the public attention afforded to the proceedings of the House, and rarely receive their due attention even from the academic community. Nevertheless they perform a vital role in the scrutiny of legislation and the review of government policy. Given the overlap between their membership and activities it should not surprise us that committees suffer from some of the same notorious pathologies as the House; namely an overly partisan atmosphere and a lack of empowerment or significance. These stumbling blocks impede the ability of committees to effectively discharge their responsibilities to the House.

The House is not powerless to address these enduring deficiencies in the committee system, at least to the extent that the majority of the House perceives them as a negative. The most powerful means parliaments have at their disposal to minimize the less attractive features of the committee system is to amend the legislature’s Standing Orders. The Standing Orders are essentially the ‘Owner’s Manual’ of the legislature; they define the rules and procedures of parliaments and in so doing establish permissible conduct for members in the House and in committees. By writing the Standing Orders in a way that incentivizes constructive behaviours, it should in theory be possible to dampen partisanship and empower members to more meaningfully participate in the legislative process.

Or should it? The aim of this paper is to conduct an investigation into the history of the Ontario Legislature’s Standing Order 126; a measure put in place to mitigate the effects of partisanship and disenchantment in standing committees. It will explore the circumstances surrounding its adoption in 1989; follow its use through the 1990s; scrutinize its subsequent amendment in 1999; and investigate the results. It will conclude that such amendments to the Standing Orders are limited in their capacity to produce meaningful changes in the workings of parliament absent a moral commitment by party leaders to abide by the spirit of those changes. Party interests tend to overwhelm the interest of parliament in maintaining a robust committee system. Without support from the political leaders of the day, attempts to revitalize the committee system are likely to result in failure.

Committees: Duties, Responsibilities, and Pathologies

Before considering the matter of S.O. 126 it behooves us to take a moment to broadly consider the role of committees in Westminster-style parliaments and to discuss the effects of partisanship and whipping on their operations. The classic manifestation of the committee in a Westminster system is the Committee of the Whole; a body made up of all members of the legislative assembly whose mandate is to review and deliberate on legislation.¹ While there is no doubt that the Committee of the Whole is indeed a committee by the strictest definition (it operates under committee rules rather than House rules) it is of only tangential interest for the purposes of our discussion here. Our purpose in analyzing committees specifically relates to their being smaller and nimbler than the House, and potentially being more receptive to influence and incentive due to their relative distance from party leaders and the executive branch. These characteristics, along with their more collegial atmosphere and policy (rather than political) focus may help explain why many observers see committee reform as being an important element of a more effective legislature.² Therefore for the purposes of our analysis here we will exclude Committees of the Whole and proceed instead under a definition provided by the National Democratic Institute for International Affairs. Committees, under this definition are “small groups of legislators who are assigned, on either a temporary or a permanent basis, to examine matters more closely than could the full chamber.”³

In Ontario, committees can be divided into Standing Committees and Select committees. Standing committees are fixed features of the legislature; they are struck at the beginning of each parliament and exist for the duration of that parliament. Standing committees are given broad mandates within which they are given considerable powers of investigation and review. These mandates may relate to government policy (eg. Standing Committee on Social Policy) or they may relate to broader concerns affecting the legislature generally (eg. Standing Committee on the Legislative Assembly). Select committees are transitory elements of the committee system that are struck on an *ad hoc* basis to consider any matter referred to them by the House.⁴

Committees do the House’s detail work. Their responsibilities include reviewing and improving bills and overseeing the business of the executive branch through inquiry, consultation, and deliberation. Depending on the matter under consideration, committee outputs commonly take the form of either bill amendments or reports intended to convey the committee’s views for the House’s consideration and review.⁵ Committees are

¹ O'Brien, Audrey, and Marc Bosc. *House of Commons Procedure and Practice*. 2nd ed. Ottawa: House of Commons, 2009. pp. 914.

² Docherty, David C. *Legislatures*. Vancouver: UBC Press, 2005. pp. 165.

³ "Committees in Legislatures: a Division of Labor." *National Democratic Institute for International Affairs - Legislative Research Series* (1996). pp. 3.

⁴ Clerk of the Legislative Assembly. “Standing Orders of the Legislative Assembly of Ontario” January 2009. S.O. 112 A.

⁵ O'Brien, Audrey, and Marc Bosc. pp. 950

beholden to the legislature; their mandate is not to legitimize the views of the sitting government, nor necessarily to represent party interests, but to maximize the effectiveness of government policy.

One might argue that committees are not well placed to perform that role and instead effectively mirror the work of the House, which deals in more in generalities. Committees, as defined in our discussion here, evolved from the Committee of the Whole in order to allow parliament to more efficiently discharge its legislative duties. The work of the legislature was not always as comprehensive as it tends to be today; it was once more feasible for bills to be presented to the Committee of the Whole without compromising the efficiency of parliament's work. As the workload of the legislature increased, however, it became more efficient for smaller committees to take up the House's larger burden.⁶ Indeed committees look very much like the House since party representation in committee is almost always proportional to party strength in the House.⁷⁸ Perhaps as a result committees can sometimes behave as though they were mere delegates of the House's responsibilities, baffling the observer as to the effective difference between the two units.

Nevertheless, committees are not designed to be mini-houses. The House examines legislation in broad strokes but has little role in the details of legislative development where committees are intended to be more active. The smaller size and less formal atmosphere of the committee setting permit committees to more effectively study, scrutinize and amend legislation than could the whole House. While House proceedings in Second or Third Reading will tend to either pass or defeat laws, committees are better empowered to develop and amend them. As a result, the House tends to be more politically oriented while, in theory, committees ought to be more policy-oriented.

Though the size and party representation of the membership of Ontario's committees is regulated under the Standing Orders, the specifics of committee membership are overseen by the House at the beginning of a new parliament, or the striking of a new committee. Committee membership is subject to change only with the agreement of the House, though in practice the matter is typically agreed upon by the party House leaders.⁹ This system tends to produce a fairly stable committee membership, which has a salutary effect on committee work, since consistent member attendance on a committee of a given mandate promotes member specialization. Consistent attendance will tend to develop expertise in committee members, permitting them to grow more comfortable with the framework of issues surrounding their

⁶ Barnhart, Gordon. *Parliamentary Committees: Enhancing Democratic Governance*. London, England: Cavendish Publishing Ltd., 1999. pp. 13.

⁷ S.O.113 A.

⁸ O'Brien, Audrey and Marc Bosc. pp. 1019.

⁹ Ibid.

committee mandate.¹⁰ The effect of committee specialization allows members to more meaningfully participate in the formation of public policy.

In light of these features, committees are promising tools for parliaments that would improve upon the quality of the laws they pass. In fact, legislators at the federal level have consistently remarked that they do some of their best work as members in committee away from the partisan theatrics of the House.¹¹ However the model of committee effectiveness depends on their working in an environment where they are encouraged to behave as independent, policy-focused entities. While committees may serve as a beacon of hope for members hoping to engage in the policy process it seems a dim one at present, as members themselves readily attest.¹² Committee members contend with a bevy of obstacles blocking their capacity to engage in productive policy discussion and formation; namely partisanship and whipping.

A productive discussion of partisanship in committee should begin by acknowledging that committee members, unless they are independent members as is rarely the case, are partisans. Committee membership is drawn from the House, which is populated almost exclusively by politicians elected under a party banner. It would be unrealistic to suppose that committee members could discard their partisan beliefs when they sit down for committee meetings.¹³ Nor is partisanship necessarily detrimental to committee effectiveness. Partisanship is only an obstacle to effective committee functioning insofar as it renders members unable to accept or consider policy proposals from members of other parties. Slavish adherence to the party line arising from distaste for the political leanings of one's colleagues, or a pursuit of one's partisan objectives will tend to shut down productive policy discussion and debate with suboptimal policy outputs as the result.

The more pernicious issue may be the influence of political parties and their leaders in determining outcomes (also called whipping) in committee. Whipping undermines committees' ability to effectively scrutinize policy by placing the authority to make committee decisions in the hands of ministers and party leaders. In Ontario, the bulk of committee time is spent in consultation with concerned citizens and organizations in regards to a matter or bill being considered by the legislature.¹⁴ The intent of committee consultation is to give committee members a more sophisticated perspective

¹⁰ Docherty. *Legislatures*. pp. 165.

¹¹ Samara Canada. "'It's My Party': Parliamentary Dysfunction Reconsidered." pp. 3

¹² Kemp, Paul. "Ch. 7 The Fall of Committees: Caged Tigers Without Teeth" in *Does Your Vote Count*. Toronto: Breakout Educational Network, 2003.

¹³ Ontario Commission on the Legislature, 3rd *Report*. Toronto: Legislative Assembly of Ontario. pp. 66.

¹⁴ Bouliane, Valmond, Gaston Deschenes, Rejean Pelletier, and Matthieu Proulx. "Committee Systems in Quebec and Ontario - Part I: Structure and Organization." *Canadian Journal of Political Science* 19, no. 1 (1996): pp. 27.

on the issues the committee is investigating, many of which are complex and multifaceted. That perspective – in theory – enables committee members to make informed, intelligent recommendations to parliament or amendments to legislation. When forces outside of the committee intervene in the committee process that perspective is lost and members are stripped of meaningful input in policymaking. Moreover, the enduring effect of committee gerrymandering of this type is often to produce a climate of partisan rancor with no regard for previously maintained relationships or goodwill.¹⁵

Whipping – both for parties and committee members – is about leveraging incentives. Governments, particularly majority governments, have control over the legislative agenda and an interest in seeing its bills passed by parliament ideally with few or no amendments. Conversely, opposition parties have an interest in defeating or heavily amending government legislation in order to make the governing party appear frail or inadequate. A powerful and robust committee system steers power from the executive branch and dampens its ability to pass legislation while offering opposition parties a rare opportunity to embarrass the governing party. Thus both government and opposition parties have powerful incentives to influence committee proceedings to produce the desired political outcome.¹⁶ Meanwhile committee members, virtually all of whom represent one of the above, have a direct interest in maintaining a good relationship with party leaders, who can enforce party discipline by ejecting them from committees or even the party or by promoting them to desirable cabinet positions or critic portfolios.¹⁷ Party leaders are able to use these formidable incentives to influence and even control the actions of committee members. This tactic is especially effective when used applied to backbench government members, for whom the promise of cabinet is particularly enticing. Majority governments inevitably win this political tug-of-war because they hold the lion's share of seats on almost every committee. In this way the balance of incentives lines up in such a way as to transform committees from an organ designed for scrutiny and review into a legitimizing body for government legislation.

Having identified the functions and deficiencies of committees as they stand, the question becomes: can we make them better? If so, how? Given the immensity of the task it is helpful to take stock of attempts that have already been made and to take stock of what lessons we might learn from them.

¹⁵ Samara Canada. pp. 20.

¹⁶ Barnhart, Gordon. pp. 8.

¹⁷ Samara Canada. pp. 20.

The Origins of S.O. 126: A House Divided

On July 25th 1989 the sitting Liberal government's House Leader Sean Conway moved government resolution 9; a measure to substantially alter the House's Standing Orders to streamline legislative business. Amendments to the Standing Orders are far from unprecedented. The legislature often alters its Standing Orders in order to suit its evolving needs over time. Often these consist of so-called 'housekeeping' amendments, which minimally impact legislative business. The most recent changes to Ontario's Standing Orders provisionally adopted in 2008 provides a good example of such generally innocuous changes.¹⁸ These amendments reorganized the legislature's schedule for committee meetings and Question Period among other additions, but did not excite prolonged debate or disagreement. In fact, some of the reforms originated from concerns brought to the fore by an opposition MPP.

The 1989 changes were another matter entirely. By 1989 the opposition parties had given up the any pretense of working with the government and as a result the business of the House had denigrated to a profound level of incivility.¹⁹ The Progressive Conservative party had no shortage of incentive to apply the brakes to the government's legislative agenda. After all, until 1985 they had held power for over forty years uninterrupted. The NDP, without whom the 1985 election would have produced a Progressive Conservative minority government, had supported the Liberals from 1985 to 1987 and found itself shortchanged and humiliated in 1987 with 19 members in the legislature and deprived of its coveted voice in government policy. These feelings of resentment were likely exacerbated by the Liberals explosive 95 member majority in 1987, a number which even Mr. Conway has been willing to concede was "just far too large".²⁰ Whatever the reason, by the spring of 1989, opposition to government measures among the minority parties had grown hostile and vigorous. Members had become more willing to bend the Standing Orders and relationships between members became strained as a result. Matters reached a head on May 29th progress reached a standstill when the Speaker expelled Peter Kormos, the NDP member for Welland-Thorold (now Welland) from the House for charging the premier with uttering a deliberate falsehood - a practice forbidden under the Standing Orders.²¹ David Cooke, the NDP House Leader challenged the Speaker's ruling calling the matter before a vote of the House as mandated by the Standing Orders of the day.²²

¹⁸ Ontario Legislative Assembly, *Hansard: Official Report of Debates*, 39th Parliament, 1st Session (7 October 2008)

¹⁹ Sean Conway. Interview by author. Toronto ON, March 23rd 2011.

²⁰ Ibid.

²¹ Ontario Legislative Assembly, *Hansard: Official Report of Debates*, 34th Parliament, 2nd Session (May 29th 1989)

²² Clerk of the Legislative Assembly. "Standing Orders of the Legislative Assembly of Ontario". April 1986. S.O. 9.

What followed was a famously creative handling of Ontario's parliamentary conventions. According to a convention evolved from the parliament of the United Kingdom votes of the assembly occur only when the party whips arrive in the House, bow to the speaker, and take their seats.²³ Until the appearance of the whips, the legislature's bells would continue to ring to signal the upcoming vote. Knowing that his challenge would not be upheld by the Liberal-dominated House, Cooke opted not to attend the vote. The result was a rather noisy deadlock dominated by incessant bell-ringing much to the dismay of the legislature's staff, who reportedly stuffed the bells with tissue to dull the ringing.²⁴ Eventually the Speaker was forced to rule that there would be no vote and that the bells were to be "deemed to be ringing"²⁵ until such time as a vote could take place. The Speaker would echo the same ruling each day for four days during which the House's legislative work was effectively suspended.

Eventually Cooke returned and the House resumed its work, prompting Mr. Conway move notice of a package of amendments to the Standing Orders on June 8th to prevent the legislature's work from being similarly disrupted by the opposition parties. The new measures would provide for limitations on division bells and time allocated for petitions as well as the elimination of challenges to the Speaker's rulings and the creation of 'opposition days' on which the opposition parties could air their grievances in public without obstructing the work of the House. The amendments were not well received by the opposition and quickly became the subject of a flurry of Question Period queries and Member's Statements in which Conway was accused of imposing a majority dictatorship and of ignoring the suggestions of other parliamentarians as to appropriate amendments to the Standing Orders. When asked by Cooke whether he would defend what he called 'bad rules' being brought into to the legislature, Conway responded:

"I want members to recall that we have seen an honourable member stand up and call another member a liar just so he could trigger a bell-ringing. We have seen the opposition deny the Treasurer the right to read a budget. We have seen an opposition ring bells not for hours, but for days and weeks. We have seen the opposition debate a committee report through to the end of the day with no ability to adjourn that debate. We have seen an obstruction that we have never seen before and which, after these rules are changed, the taxpayers of Ontario and the Legislature of Ontario will never see again."²⁶

²³ McDonald, Adam D. "Evolution of the Ontario Standing Orders since 1985." *Canadian Parliamentary Review* 28, no. 3 (2005): pp. 35.

²⁴ Lisa Freedman, Clerk of Journals, Legislative Assembly of Ontario. Interview by author. Toronto ON, April 21st 2011.

²⁵ *Hansard: Official Report of Debates*, (May 29th 1989).

²⁶ Ontario Legislative Assembly, *Hansard: Official Report of Debates*, 34th Parliament, 2nd Session (June 8th 1989).

Some of Conway's comments were so divisive that the Speaker was forced to adjourn the house for ten minutes during the June 8th Question Period.²⁷ Sometime between the 8th of June and the 25th of July the government and opposition parties began negotiations toward a package of Standing Orders all parties could support. When asked why the government negotiated at all given its large majority, Conway answered simply: "I don't care what the rules are – if someone lies down in the middle of the street what are you going to do about it?"²⁸ Evidently the opposition parties would not let the issue lie, government majority or no – a position enforced by Cooke's June 8th comment that "If this place is going to work, these rules are not going to pass. If the government is insistent on passing these rules, then I can tell the government House leader now that we are not going to put up with this kind of arrogance. There will be a fight in this Legislature and we will not let this go through."²⁹

Although the rhetoric used by the opposition parties on the matter of the Standing Order amendments was rather toxic, they were probably not entirely wrong in suggesting that the matter deserved greater consultation and review than was embodied in the June 8th amendments. The assembly had struck a Commission on the Legislature (the Camp Commission) as early as 1972 to address such issues whose recommendations were largely set aside.³⁰ The Standing Committee on Procedural Affairs and Agencies, Boards and Commissions had also forwarded several reports to the legislature between 1982 and 1985 recommending changes to the Standing Orders that the opposition parties charged the government with rejecting wholesale.³¹ In light of the opposition's doggedness on the matter Conway became convinced that without genuine consultation between all parties there would be no end to the incivility. As a result the July 25th amendments, which contained a number of incentives for the opposition parties, including an elected speaker, were much better received in the legislature.³²

Among the 1989 changes to the Standing Orders was a measure that would upon official adoption become known as S.O. 123. Under S.O. 123 a member of each caucus represented in the four so-called 'policy committees' would be empowered once per year to compel the committee to undertake an independent investigation on a matter related to

²⁷ Ibid.

²⁸ Conway. Interview by author.

²⁹ *Hansard: Official Report of Debates*, 34th Parliament, 2nd Session (June 8th 1989).

³⁰ Ontario Commission on the Legislature. "3rd Report" Toronto: Legislative Assembly of Ontario.

³¹ For committee-specific recommendations, see: Standing Committee on Procedural Affairs and Agencies, Boards and Commissions. Report on the Standing Orders and Procedure (No. 4). 33rd Parliament, 1st session. pp. 62 – 97.

³² Ontario Legislative Assembly, *Hansard: Official Report of Debates*, 34th Parliament, 2nd Session (June 25th 1989).

the committee's policy mandate. These committees would also be permitted to produce reports and recommendations for the review of the House. The principle of S.O. 123 was simple: by permitting committees to undergo investigations without reference or interference from the House, committees would be better poised to perform their role as scrutinizers of public policy.

Though Mr. Conway was not able to provide details on the exact origins of the Order he traces his first thoughts on the matter to the minority parliament of 1975. Ontario, to that point, had a history of very weak legislatures leading to "pretty docile behaviour in standing committees most of the time."³³ "That whole rhythm changed in 1975", Conway notes.³⁴ With opposition parties suddenly holding a majority on legislative committees, Conway argues, the committee system became much more engaged in the subject matter at hand, producing higher quality investigations and reports and revitalizing the legislature as a whole. It deserves note that this contention is supported by the work of noted constitutional expert Peter H. Russell, who has convincingly argued the merits of minority governments in enhancing our parliamentary institutions.³⁵ Having experienced the salutary effects of an empowered committee system firsthand in the mid-70s, Conway saw no issue introducing a Standing Order imparting some of that vigor to the committee system during the liberal majority in the late 80s.

The origins of S.O. 123 should also be understood against the backdrop of parliamentary reform that was being felt in Ottawa at the time. The need for reform was drawn from two concerns. First, was the concern that the legislature had become a kind of 'legislative bottleneck', and that reform was needed to allow the legislature to become more efficient. Second however was the notion developed in the mid-70s that the legislature was more and more becoming an irrelevant construct in Canada's political framework and that its work was being marginalized as a result³⁶ This second problem was the focus of the Special Committee on the Reform of the House of Commons (The McGrath Committee) whose proposed reforms sought to "restore to private members an effective legislative function, to give them a meaningful role in the formation of public policy, and, in so doing, to restore the House of Commons to its rightful place in the Canadian political process."³⁷ The McGrath Committee concluded, among other things, that standing committees should be severally empowered to independently review and report on issues under their mandate. As a result the House of Commons adopted what is

³³ Conway. Interview by author.

³⁴ Ibid.

³⁵ Russell, Peter H. *Two Cheers for Minority Government*. Toronto: Emond Montgomery Publications Ltd., 2008.

³⁶ Stilborn, Jack. "Parliamentary Reform and the House of Commons". Library of Parliament, October 5th 2007. pp. 2.

³⁷ Special Committee on the Reform of the House of Commons, "Third Report". Canada: House of Commons. December 5, 1984. pp.1.

now known as S.O. 108 (2), which bestows upon committees essentially the same powers as those contained in 1989's S.O. 123. It is likely that the debate in Ottawa on the subject helped to inform the debates and negotiations as they progressed in the Ontario legislature, providing the intellectual origins of S.O. 123.

Use of the Order: 1989-1999

S.O. 123 changed two times throughout the 90s, first to S.O. 125 in 1992 and then to S.O. 124 in 1997 but any changes to the order between 1989 and 1999 were cosmetic. The powers conferred under the order did not change. What did vary somewhat – albeit not in a systematic way – was the way in which those powers were used. This is not the forum to provide an in-depth analysis of the full circumstances surrounding each consideration under the Standing Order; a table of the considerations under the Standing Order is provided in *Fig. 1*.³⁸ Nonetheless there is cause to briefly examine some of the more telling instances in the history of the Order's use.

Before we do, however; we should take note of a couple of trends. First, it deserves note that the Order was never used by a government member – every investigation under the Order was proposed on the initiative of a member of the opposition. As such it can be safely assumed that the government did not influence proceedings in such a way as to compel committees to produce 'feel-good' reports, in same way that government members are issued 'friendly' questions during Question Period. By the same token, the lack of considerations initiated by government members may suggest that the Order did not necessarily have the intended effect of having government members participate in committees' scrutiny function. Without a detailed analysis of committee proceedings – a difficult task given that many of the relevant interactions would have occurred in subcommittee (which is not recorded) – it is difficult to assess the effect of the Order in engaging the scrutiny of government members. Second, aside from the first consideration under the Order, every dissenting opinion was partisan in tone, sometimes startlingly so. Though the definition of 'partisan' may leave some room for interpretation, those reports labeled as such showed a distinct distain for the ideological beliefs or party affiliations of opposing members.³⁹

There is no evidence to suggest that the first consideration under S.O. 123 was excessively partisan in nature. The issue concerned the government's role in terms of the management of resources in an area subject to an aboriginal band's land claim. The resulting report suggests that committee members felt the issue was too complex to issue recommendations given the 12-hour allotment for investigation under the Standing

³⁸ The data presented in *Fig. 1* is drawn from the various standing committee reports. See works cited.

³⁹ A more in-depth study might contrast dissenting opinions filed with S.O. 123/125 reports with the dissenting opinions produced by investigations referred to committees by the House. Are there more dissenting opinions or fewer? Are they more or less partisan?

Fig. 1 – Standing Committee Considerations under S.O. 123/125

Year	Matter Under Consideration	Member / Committee	Recommendations	Dissenting Opinion	Was the Dissenting Opinion Partisan?
1989	Resource Management in the Temagami Area	Mr. Wildman (NDP) / Resources Development	No	Yes	No
1990	Food Banks	Mr. Allen (NDP) / Social Development	Yes	Yes	Yes
1991	Service Delivery at the Worker's Compensation Board	Mr. Walters (NDP) / Social Development	Yes	Yes	Yes
1991	Income Crisis in Ontario Agriculture	Mr. Ramsay (Liberal) / Resources Development	Yes	No	N/A
1991	Closure of Land Registry Offices	Mr. Turnbull (PC) / General Government	Yes (Partisan)	Yes (x2)	Yes
1991	Exotic Species	Mr. Arnott (PC) / Resources Development	Yes	No	N/A
1994	Children at Risk	Ms. O'Neil (Liberal) / Social Development	Yes	No	N/A
1994	Dialysis Treatment	Mr. Wilson (PC) / Social Development	Yes	Yes	Yes
1994	Victims of Crime and Justice System	Mr. Harnick (PC) / Justice	Yes	Yes	Yes
1997	The Impact of the Conservative Government Funding Cuts on Children	Mr. Gravelle (Liberal) / Social Development	No	N/A	N/A

Order.⁴⁰ The dissenting opinion filed by the committee's NDP members did not attack the other committee members but rather expressed that they believed "that a highly disturbing precedent would be set if a committee made no recommendations on a matter of considerable public interest and concern". The three recommendations appended to the dissenting opinion dealt with the need for continued consultation and a moratorium on further development until such a time as an agreement between parties was reached.

By contrast, the 1991 report on the closure of land registry offices in Ontario was extremely partisan in tone. It explicitly defended government policies and denounced the attacks of the opposition. More than once, the committee even moved as though to speak for the government, with such musings as: "The Government is proud of its record and this is another example of its acting in a financially and socially responsible manner."⁴¹ Another passage read in part: "Day after day, [the Opposition members of the Committee] have harangued the government...they would rather the government spend an additional \$8 million to retrofit archaic workplaces..."⁴² The dissenting opinions were equally as partisan, particularly the submission from the committee's Progressive Conservative members, who concluded that:

"The government's decision to proceed with the closure of the provincial land registry offices despite the concurrent examination of the issue by a standing committee of the provincial legislature is an abrogation of the committee process and only further evidences the arrogance of this government with respect to the rights and privileges of the House and, indeed, the very institution of our provincial Parliament".⁴³

Perhaps the most direct example of manifest partisanship in committee proceedings designated under the Order can be found in the dissenting opinion regarding victims of the crime and justice system written by Mr. Cam Jackson on behalf of the Progressive Conservative members of the committee. The opinion, which is a rather whopping 22 pages long, accused the NDP and Liberal members of the committee of a number of malfeasances including strategically deleting relevant details from the committee's final report. The opinion also discussed four private members bills advanced in the legislature by Mr. Jackson himself and recommended their immediate adoption by the legislature. The most glaring element of partisanship in the piece is written in boldface in the preamble: "Only the Progressive Conservative Caucus under the leadership of Mike Harris is committed to entrenching a Victim's Bill of Rights in

⁴⁰ Standing Committee on Resources Development. "Resource Management in the Temagami Area" 34th Parliament, 2nd Session.

⁴¹ Standing Committee on General Government. "Report on the Closure of Land Registry Offices in Ontario" 35th Parliament, 1st Session. pp. 5.

⁴² *Ibid.* pp. 6

⁴³ Standing Committee on General Government. *Minority Opinion and Recommendations of the Progressive Conservative Party Members of the Standing Committee on General Government Report on the Closing of Provincial Land Registry Offices* in "Report on the Closure of Land Registry Offices in Ontario". pp. 5.

Ontario Law.”; ⁴⁴ this in spite of the fact that the committee’s report recommended that the province review the possibility of adopting such a bill.⁴⁵

There is ample evidence of unhealthy partisanship in S.O. 123/125 committee proceedings; however, we should take caution before generalizing those events to the full experience of committees under the Order. There are notable committee reports published under S.O. 123/125 that are essentially nonpartisan, containing recommendations devoid of partisan commentary absent dissenting opinions.⁴⁶ Moreover it should be noted that the presence of dissenting opinions – even those mired in partisan discourse – do not necessarily imply that the Standing Order was used to justify partisan behaviour. In the process of investigating an issue of public importance it should be expected that there be reasonable disagreements among committee members, and that those disagreements should be informed by members’ partisan affiliations. It would be dangerous to conclude from *fig. 1* that S.O. 123/125 produced a pattern of partisanship or whipping in committee investigations.

While it is unclear whether such a pattern existed throughout the life of S.O. 123/125 there is little doubt that the last matter addressed under the Order was dominated by partisanship. The Standing Committee on Social Development struck on November 2nd 1995, at which time Liberal MPP Michael Gravelle proposed a S.O. 125 investigation into “The Impact of the Conservative Government’s Funding Cuts on Children”. This was the first and only time in the lifetime of the Order that the title of the investigation itself presupposed a certain partisan outcome. The investigation began December 11th 1995, but was stymied until June of 1996 because the committee was forced to attend to its other duties for an extended period. On June 10th 1996, after the committee had considered the matter for less than half of the allotted twelve hours under the Order, the following motion was proposed by Rick Bartolucci, the Liberal member for Sudbury:

“Since debate and dialogue on children's services has been ongoing since December 1995 at the social development committee; therefore, in the view of the social development committee, the government's agenda for children's services has failed, since children are significantly affected in a negative, hurtful way by

⁴⁴ Standing Committee on Administration of Justice. *Dissenting Opinion to the “Report under Standing Order 124 on the Relationship Between Victims of Crime and the Justice System in Ontario: Current Status and Improvements”* in “Report Under Standing Order 125 on the Relationship Between Victims of Crime and the Justice System in Ontario: Current Status and Improvements.”³⁵ Parliament, 3rd Session. pp. 3.

⁴⁵ Standing Committee on Administration of Justice. “Report Under Standing Order 125 on the Relationship Between Victims of Crime and the Justice System in Ontario: Current Status and Improvements. pp. 31.

⁴⁶ See *Fig. 1*

government cuts, and this agenda should cease immediately, and recommends to the government that this agenda against children be abolished."⁴⁷

The motion was defeated by the Conservative government majority on the committee, after which proceedings devolved into a flurry of personal attacks between committee members, specifically regarding the attendance of government members and the competence of the committee's Chair.⁴⁸

At this point the direction of the committee's proceedings on the matter becomes unclear. The Committee met again June 24th of 1996 to consider the matter after which its time was devoted to the consideration of a bill referred to it by the House. When the committee once again became free to consider matters on its own initiative in the fall of 1996, Mr. Gravelle proposed yet another controversial topic of investigation, this time regarding the impact of the Conservative government's funding and funding cuts on persons with disabilities and their families.⁴⁹ This second investigation persisted until February after which the committee's business was once again consumed with its regular duties to the House. On December the 1st of 1997, more than two years after the proposal of the original investigation, the committee turned to the business of writing reports on both matters.

In reading the committee Hansard, there is a strong sense of exasperation among committee members of all parties with the committee's laboured progress in dispensing with the matter.⁵⁰ That sense may have been exacerbated by the fact that by this time, Mr. Gravelle – who proposed both investigations – was no longer sitting on the committee.⁵¹ Moreover, members appear to have been aware that the House would soon prorogue and that committee business would thereafter be suspended, perhaps motivating them to finish the committee's consideration with some haste. On December 8th the committee finalized its report on the impact of the Conservative Government's funding cuts on children and children's services, which contained no recommendations and no dissenting opinion. The House prorogued ten days later and the committee's second report was never published.

⁴⁷ Ontario Legislative Assembly, Standing Committee on Social Development, *Hansard: Official Report of Debates*, 36th Parliament, 1st Session (June 10th 1996).

⁴⁸ Ibid.

⁴⁹ Ontario Legislative Assembly, Standing Committee on Social Development, *Hansard: Official Report of Debates*, 36th Parliament, 1st Session (November 26th 1996).

⁵⁰ Ontario Legislative Assembly, Standing Committee on Social Development, *Hansard: Official Report of Debates*, 36th Parliament, 1st Session (December 1st 1997).

⁵¹ Ontario Legislative Assembly, "Minutes of Proceedings, Standing and Select Committees Vol. 6" 36th Parliament, 1st Session.

S.O. 126: Committee Drafted Legislation

In the spring of 2000, the *Canadian Parliamentary Review* published an article written by Norman Sterling, Ontario's government House Leader, describing committee reforms in Ontario undertaken the previous year. Mr. Sterling made reference to S.O. 124 as it was then named, writing: "While the Standing Order was designed to facilitate careful debate where an issue needed thoughtful, multi-partisan study, the rule evolved into a tool for partisan "photo-opportunity" hearings and an additional forum to pursue a partisan agenda."⁵² Sterling spoke of the need to recalibrate the committee system by stripping the ability of members to pursue self-serving, partisan ends in committee while empowering them to more meaningfully contribute to the legislature as a whole. Sterling was essentially grappling with the same issue that the McGrath Committee had encountered in the mid-80s; namely, the relative insignificance of backbench members and the legislature as a whole in the political process.

The solution reached by the government of the day was what is today known as S.O. 126. The 1999 amendments changed S.O. 124 in two ways. First, it removed the ability of caucuses to propose topics for committee study. That power was moved under the jurisdiction of the private member. Concurrently, a limitation was placed on the power such that the committee could only be compelled to study a given matter with the consent of a two-thirds majority of the committee. This gave the government an effective veto over the use of the Standing Order. Second, committees were empowered to present their recommendations to the House in the form of draft legislation. The resulting legislation would be treated as a private member's bill sponsored by the Chair, but would allow other members of the committee to act as secondary sponsors. Sterling's article in the *Canadian Parliamentary Review* expressed optimism that the amended Standing Order would incentivize cooperation across party lines and that it would provide a vehicle for the empowerment of individual members in a system where parties, particularly the government, are the dominant actors.⁵³

To date two bills passed by the legislature have originated in committee under S.O. 126: *Ontario Association of Former Parliamentarians Act, 2000* and *Professional Foresters Act, 2000*. Neither was in any way contentious; in fact neither was referred to a committee after Second Reading or properly debated in Third Reading.⁵⁴ These bills, while not particularly interesting, brought exactly the kind of non-partisan flavour to the legislature that Norman Sterling had been hoping for.

However, the political landscape of committee-drafted legislation began to change in 2004 with the introduction of Bill 138, *Emergency Management Statute Law*

⁵² Sterling, Norman. "Recent Committee Reforms in Ontario." *Canadian Parliamentary Review* 23, no. 2 (2000): pp. 7.

⁵³ Ibid. pp. 8

⁵⁴ Visit www.ontla.on.ca for details.

Amendment Act, 2004 by the Standing Committee on Justice Policy. The matter of Ontario's emergency management statutes was never intended by the government to be examined by a Standing Committee. On June 24th 2004 the government House Leader sought the consent of the House to have the matter referred to a Select Committee, which would prepare a draft bill to be reported to the House, but did not receive the required unanimous consent.⁵⁵ Reportedly Peter Kormos, now the NDP House Leader, brought public attention to the matter of remuneration for Select Committee members and insisted that the matter be referred to a Standing Committee if at all.⁵⁶ The government responded by referring the issue to the Standing Committee on Justice Policy, but not before completely rewriting the committee's membership, effectively making the distinction moot.⁵⁷

As it turned out the committee's official membership became irrelevant as committee proceedings were dominated by a consistent batch of substitutions for government members. Of the committee's original membership, only two regularly attended committee meetings: Peter Kormos and Liberal member Jim Brownell.⁵⁸ Eventually, the opposition members ceased attending entirely. Kormos later commented that he stopped attending because the committee's majority ruled that considerations would be held in camera, which he held as being an affront to transparency.⁵⁹ When the report and bill were finally adopted by the committee and referred to the House on October 27th 2004, no opposition members were present. When the resulting Bill 138 was brought forward for First Reading, the committee-sponsored bill was co-sponsored only by government members.

Bill 138 was never called for Second Reading. Instead, the government presented a nearly identical bill to the House on December 15th 2005 entitled Bill 56 *Emergency Management Statute Amendment Act, 2006*. During First Reading the Minister of Community Safety and Correctional Services Mr. Monte Kwinter noted that the government had intended to call Bill 138 for Second Reading but that they "did not receive the required all-party support to do this".⁶⁰ Procedurally speaking, Mr. Kwinter was not correct. There is no requirement under the Standing Orders that mandates all-

⁵⁵ Ontario Legislative Assembly, *Hansard: Official Report of Debates*, 38th Parliament, 1st Session (June 24th 2004).

⁵⁶ Katch Koch, Committee Clerk, Legislative Assembly of Ontario. Interview by author. Toronto ON, April 14th 2011

⁵⁷ Ontario Legislative Assembly, "Minutes of Proceedings, Standing and Select Committees Vol. 3" 38th Parliament, 1st Session.

⁵⁸ Ibid.

⁵⁹ Ontario Legislative Assembly, *Hansard: Official Report of Debates*, 38th Parliament, 2nd Session (April 6 2006).

⁶⁰ Ontario Legislative Assembly, *Hansard: Official Report of Debates*, 38th Parliament, 2nd Session (November 15th 2005).

party support for committee-generated legislation. He may have meant that doing so would have been objectionable in principle, given that one of the goals of committee-sponsored legislation is to incentivize multi-party support. This was not Mr. Kormos' interpretation of the statement, to which he responded:

“To suggest that somehow opposition parties haven't been eager to collaborate in developing emergency management at an effective level in this community, I tell you, sir, is beneath you...Shame on you for attempting to imply that you were going to give effect to the role of backbenchers, when you have denied the effectiveness of your own backbenchers, never mind backbenchers in opposition parties.”⁶¹

Kormos' retort probably overstated his case. In committee Kormos had used every tactic at his disposal to delay or belabour proceedings, including voting 'nay' on every committee motion.⁶² Kormos himself simply did not like or believe in the bill. He felt that it overrode the freedoms Ontarians in the name of emergency measures, and would probably never have voted for the kinds of amendments the government members would be willing to accept. At the same time, the issue could have been avoided entirely if the sitting government had referred a matter on which it was honestly willing to compromise. Because that was not the case, the experience does smack somewhat of the government's intervening in committee business to achieve its own objectives. During Second Reading debate, Kormos even implied that the Standing Committee was supplied with a pre-drafted bill by the Ministry of the Attorney General in the course of its deliberations, and that it had played heavily into the development of Bill 138.⁶³ If this is true then the government did indeed tread quite deliberately into an area where it had no business and Kormos may have been correct in chastising it.

Bill 56 passed through the House with the help of the government's majority and received Royal Assent on June 20th 2006. No bills have been drafted in committee since 2004 either under S.O. 126 or by an order of reference from the House. Interestingly, both the Standing Committee on Justice Policy's acting Chair and one of its permanent substitutions who was active on the committee were subsequently offered positions in Cabinet.

⁶¹ Ibid.

⁶² Ontario Legislative Assembly, “Minutes of Proceedings, Standing and Select Committees Vol. 3” 38th Parliament, 1st Session.

⁶³ Ontario Legislative Assembly, *Hansard: Official Report of Debates*, 38th Parliament, 2nd Session (April 6th 2006).

Discussion

What lessons can we learn from the Ontario legislature's experience of S.O. 126 and its forbears? What factors continue to frustrate the balance of member empowerment and profuse partisanship in the committee system? What did S.O. 126 do wrong?

One answer to that last question is: nothing, and also arguably everything. The two committee-drafted bills of 2000 demonstrate that committees have the capacity to produce non-partisan legislation for the House's consumption. But the question deserves to be asked – why would we want them to? Those two bills were thoroughly uncomplicated and uncontentious; so much so that the House did not even see fit to debate them in third reading as is the standard practice in the Ontario legislature. They were, in effect, legislative no-brainers. One of the major goals of committee reform as everyone from the McGrath Commission to Norman Sterling understood it, is to give significance to the role of private members, and by extension to the legislature itself. It is difficult to see how committee members were ever truly empowered by having been given leave to participate in the process of drafting bills of this kind.

There is one aspect of committee-generated legislation that does legitimately empower members and that is their likelihood of passage through the House. Private members in the Ontario legislature are entitled to present bills of their own design to the House on Thursdays for the legislature's consideration. A stark few of these are passed by the legislature and go on to receive Royal Assent. Between 1997 and 2002, fewer than six percent of private member's bills introduced in the House became law.⁶⁴ The reasons behind this are expansive, but one of the major factors is that the government House Leader controls the legislative agenda. The government House Leader has a disincentive to move reading of legislation brought before the House by a member of an opposing party.⁶⁵ As a result it is especially rare that a private member's bill originating from an opposition member becomes law. A bill originating in committee is more likely to reach Royal Assent; a possibility which, when realized, secondary sponsors are able to communicate to their constituents. Therefore committee sponsored bills do, in a limited way, empower their sponsors. Nonetheless, committee sponsored bills are treated by the House in a way almost identical to private member's bills which, as David Docherty notes, are "more chimera than meaningful vehicle for participation."⁶⁶

Incidentally recent reforms to the Standing Orders in Ontario have made it such that we need not mourn even this marginal casualty of S.O. 126's recent disuse. In 2008, the Standing Orders were amended to permit the co-sponsorship of private member's

⁶⁴ Docherty. *Legislatures*. pp. 113.

⁶⁵ Frank Klees, MPP Newmarket-Aurora, Legislative Assembly of Ontario. Interview by author. Toronto ON, April 14th 2011.

⁶⁶ Docherty. *Legislatures*. pp. 113.

legislation by members of different parties.⁶⁷ Though the matter has not been systematically investigated, there is good reason to believe that these reforms will improve the rate of passage of private member's bills without producing the wastage of resources entailed by committee generated legislation.

Even if it were possible to create a body of rules that permitted committees to independently develop complex legislation, we very likely would not want to do so. This is because the idea of such an empowered committee runs somewhat contrary to the principle of responsible government that characterizes the Westminster system. The conflict is most eloquently summarized by Susan L Sutherland, who writes:

“In the context of British-style Cabinet government, the government has no duty – and in fact it has no business – to *share* power with politicians who are not members of the government. Responsible government can only make sense when the government is an identifiable entity within another entity that keeps it responsible”.⁶⁸

For the sake of completeness it should be noted that this is probably not an all-encompassing maxim of the committee system. There may well be select occasions where committees will thrive from taking on some executive functions. One that suggests itself is the case of a minority government. Executive powers are sacrosanct and inviolable by the legislature in a majority government scenario because the electors – the people – have made a clear decision about who should take on those powers. In a hung parliament that decision is less explicit and the legislature may conceivably take on a greater policy role as a result. This may be a particularly appropriate outcome since successful minority governments revolve around compromise; in fact, S.O. 126 may be ideally suited to a minority government scenario. At the same time there is reason to dismiss such an eventuality. In a minority government the stakes on any given vote, motion, or measure are higher than in a majority government because the governing party cannot necessarily count on a majority of the votes, thereby increasing the incentive for strict party discipline.⁶⁹ In any case, until the time comes where S.O. 126 can be used in a hung parliament, it is difficult to say for certain what the outcome will be.

In the meantime however, we are left with the question: what does it mean to ‘empower’ members in a majority government? The argument that this paper has sought to construct is that S.O. 126 provided an answer to the wrong question. The best way of empowering members is not to give them greater legislative clout, but to give them the freedom to use the powers they already have. This means giving committees and their

⁶⁷ Clerk of the Legislative Assembly. “Standing Orders of the Legislative Assembly of Ontario”. January 2009. S.O. 69.

⁶⁸ Sutherland, SL. “The Report of the Liaison Committee on the Effectiveness of House of Commons Committees”. (1993) 44 Parliamentary Government, August. pp. 8.

⁶⁹ Barnhart, Gordon. *Parliamentary Committees: Enhancing Democratic Governance*. London, England: Cavendish Publishing Ltd., 1999. pp. 9.

members the freedom to express their opinions and it also means compelling the government to listen to them. Thankfully, this is something the legislature already does quite well. The pathology lies not in the legislature itself, but in the behaviours and attitudes of the parties that dominate the experiences of backbench members in the legislature.

S.O. 126 and its forbears sought to circumvent those attitudes by incentivizing members to behave in a productive and non-partisan manner where possible. But no weapon in the legislature's arsenal, including the Standing Orders, can overcome the tools at parties' disposal to produce the desired votes and actions among their members. It is easy to speculate, and hard to prove, that the investigations under S.O. 123/125 were subject to government influence. Norman Sterling thought so. In any case they certainly produced some rather glaring instances of partisanship in committee and government whipping would help to explain Michael Gravelle's dogged insistence on embarrassing the Conservative Government in the Standing Committee on Social Development. The government had, at the very least, a questionably appropriate interest in the proceedings of the Standing Committee on Justice Policy in its development of Bill 138, as evidenced by its gerrymandering of the committee's membership and its reportedly submitting a pre-drafted bill to the committee. There is, in the absence of evidence, good cause to believe that S.O. 126 and its predecessors did not have the intended effect of empowering members and committees in the way that their authors might have hoped.

Conclusion

If committees are to become more effective tools of the legislature they will need to escape the partisanship and party dominance that often characterize them today. But – and this is the point – they cannot escape, and as we have seen reforms to the Standing Orders have been of limited use in liberating them. If committee reform is to have a meaningful, positive impact on the way committees go about their business, it seems that they will have to be released by their parties. This, of course, seems somewhat unrealistic given the pressures and incentives for party leaders to keep a firm hold on their subordinates' activities. While we are waiting for parties to do their part, there may yet be room for experimentation with the Standing Orders that may modestly empower committees and their members. Nevertheless, if the case of S.O. 126 can teach us anything it is that the legislature is limited in its capacity to cure committee pathologies without a moral commitment by parties to supply the vaccine. If we want to truly whip the committee system into shape and energize our legislatures as a result, we need to recognize that it is the parties, and not the legislatures, that are holding the leash.

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