

Interview with Gord Mackintosh ¹⁴¹

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I. INTRODUCTION

Gord Mackintosh was first elected to the Manitoba Legislative Assembly in 1993 but had years of first-hand experience with legislative procedure prior to becoming a member of the House. In 1979, Mackintosh was appointed Deputy Clerk of the Legislature and was responsible for providing procedural advice to members of the Assembly. As Deputy Clerk, Mackintosh gained valuable knowledge of how the House functions, and was a participant in memorable events like the bell-ringing crisis of 1984. Mackintosh left the House to pursue a law degree and subsequently practiced law and was an advocate for numerous community programs and initiatives. He also played a pivotal role in Elijah Harper's defeat of the Meech Lake Accord in 1990.

Upon entering the legislature, Mackintosh served as Justice Critic for the New Democratic Party. In 1999, the NDP formed government and since that time, Gord Mackintosh has served as Justice Minister and Attorney General, and also serves as the Government House leader.

With his perhaps unparalleled experience with legislative procedure in Manitoba, Gord Mackintosh provided us with a rare glimpse into the

¹⁴¹ Interviewed by B. Schwartz and E. Melrose (20 September 2002).

functioning of the legislature. He also shared with us his memories of the more notable legislative crises in Manitoba's last twenty years.

II. THE FRENCH-LANGUAGE DEBATE

What we'd like to do is go back and consider some of the legislative crises in Manitoba's history, and deal with the question, how did procedures affect the outcome? The first one would have been the French-language crisis. Were you involved with the legislature at that time as Deputy Clerk?

Mackintosh: Yes, very much so. I have had the rare opportunity to have been associated with the legislative process during a number of significant legislative events in Manitoba, and in different capacities, either as Deputy Clerk or as an outside advisor or as an MLA. I was the Deputy Clerk at the time of the French-language crisis and was very involved in the analysis of the applicable rules and past practices and providing advice to the Speaker. Following the event, I did some writings on it. In no small way the French-language crisis was about the tenor of the public and member contributions to the debate; it was a very difficult and divisive issue for Manitoba. It clearly sent a message that issues of language and constitutional change in Manitoba are hot button issues that have to be approached with extreme caution by legislators. That was one lesson that certainly was learned—and underestimated at the time.

We all remember the bell-ringing, but very few people would understand the whys and wherefores and technicalities around that. Can you take us through that, just how the bell-ringing started, the various procedural steps along the way?

Well of course it's open to the opposition to raise awareness on any issue by drawing attention to parliamentary tactics. But an opposition party then has to also consider the risks of public disdain when they use those kinds of tactics. A "filibuster" conjures up the old negative stereotype of some member reading *Gone with the Wind* into the record. Of course, over the years parliamentary rules, usually by consensus, have been refined to limit filibustering—to help ensure debate is relevant to the motion, and to limit speaking times. But as that tactic started to get covered off with stricter rules, other kinds of opposition tactics came to the fore, for example bell-ringing. The bells are rung to call members for a vote until the whips advise the Speaker that all members intending to vote are present. So, in the 1950's, 60's, 70's, we saw examples of extended bell-ringing in Canada and by the time the bell-ringing tactic was used during the French-language issue, it was well known as a tactic in parliamentary circles. It was recognized as an area that needed reform by some, and rejected for reform by others. In fact in Manitoba, rules restricting bell-ringing were

expressly rejected on two occasions, the last occasion being not long before the bell-ringing crisis here. That was certainly on the mind of the Speaker when he had been asked to turn off the bells. It was a serious question for him at the time, whether he should make up a rule and impose it when the members themselves had rejected a time limit on the bells.

Was the bell-ringing in response to a substantive part of the French-language bill or was it on other business of the House?

During the French-language crisis, the bell-ringing was used over many days, but usually the bells were turned off at the end of the day because the vote that was before the House was on a procedural matter and, under the Speaker's interpretation, that matter ended at the usual time of adjournment. What happened on the last bell-ringing was that the bells rang for 12 days on a substantive motion—it was on the “previous question” on a matter of privilege. We had to staff the Chamber around the clock on a skeletal basis. I have memories of the Sergeant-at-Arms sleeping on the couch, on the loge, and I had my head on the table in the middle of the Assembly. What I don't think is publicly remembered or known is that the government's decision to prorogue the House was not just because of the public debate, but because the government was running out of money, called supply, and was unable to get either the legislature's approval or the cabinet's approval to flow money—which is pre-empted if the House is in session. So it was a coincidence that had a remarkable outcome.

Do you think if the government had enough supply, it would have continued indefinitely? Do you think at some point, the opposition would have feared they would start to look like they were shutting down democracy?

We won't have the answer to that; we can only speculate. We do have evidence, of course, that the opposition had said they would ring the bells for a couple of weeks. Whether that would have happened, we don't know. There had been statements made by some members that the two weeks was no longer going to be followed. But the answer would more likely be found in how the public reacted to the continued bell-ringing. I suspect that if the public began to react negatively to the opposition tactics, the bells would have been turned off. But that's speculation and nothing more.

The Speaker seems to be a very lonely figure in a lot of these circumstances. If you're a Speaker, you seem to be an awfully lonely and isolated individual. You're in the middle of this crisis; you're supposed to be non-partisan. Where do you go to get advice?

Speakers used to be more lonely than they are now. Of course, during a crisis where all the eyes of the province are on the Speaker, it can become intensely difficult and I'm sure at those times isolation from the caucuses would be more pronounced. But the Speakership in Canada and in Manitoba now is enjoying much greater support, resources and research capabilities, and I think there has been recognition that it's important for Speakers across the country and the Commonwealth to share their ideas and experiences both formally and informally by working groups or conferences or calls. We also have in Manitoba a very strong Clerk's Office and they are in constant contact with Clerk's Offices in other jurisdictions in Canada. They are all very well connected. When I was hired as Deputy Clerk there were only the two clerks, and now there are many more and they have specialties as well in terms of journals work or committee work.

III. THE MEECH LAKE ACCORD

Weren't you one of the advisors to Elijah Harper during the Meech Lake crisis?

Yes, I was Elijah Harper's procedural and constitutional advisor.

Can you tell us a bit about that experience? How did Elijah end up connecting with you?

I knew Elijah when I was Deputy Clerk and helped him on some issues. We had a good relationship. Later, I was in private practice at Thompson Dorfman Sweatman. So, he retained me, after consultation with the Assembly of Manitoba Chiefs, as his advisor. At that time he had said 'no' to a request for unanimous consent to debate the Accord motions. So I came after the first day. The Chiefs asked what the chances were of being able to kill the Accord in the legislature, although there generally was an expectation on Elijah to merely stall the matter to draw attention to Aboriginal peoples being left out of both the consultation process and out of the document itself. So, being familiar with how the House works, and recognizing something called the "will of the House" and how the Speaker might interpret that, I thought there was nonetheless a chance, depending on further research, that the Accord could be killed in Manitoba. So, I went to work relying on information about how the related motions were provided to the House and began consulting the books on parliamentary law. I largely focused on the issue of whether proper notice to MLAs had been given of the constitutional amendments and, if not, what remedy could follow. Initially, I didn't think I had a strong case, but the more I researched and reflected on the importance of notice, the more I became convinced there was a very important point of order that could be raised by Elijah when the motions came before the House. As I recall, the rules required

about four days of notice. The government purported to give notice by handing out a document after the members had left on the first day and in the meantime had asked for unanimous consent of the House to deal with the matter without notice, and that's when Elijah said 'no'. But he only had about 4 days to say no before the matter in the government's view would come before the House for consideration and then go to committee hearings which were required. There were already a significant number of Manitobans who were signed up to speak on that. So, the initial challenge was—on the day the motions were going to be called for debate by the Speaker—whether they were rightly being called. We put together the point of order, and I advised Elijah and the Chiefs that there was maybe a 40 percent chance of success because I was concerned the Speaker might reject the point, considering who appointed him—and that's no reflection on the individual, but just a fact of parliamentary life—the importance of the issue, the fact the eyes of the nation were on Manitoba, that except for Elijah, there seemed to be a will of the House to have the matters dealt with. At issue was whether these considerations would govern the [Speaker's] decision. He might have simply decided that there was de facto notice. There was live media here; the hallways were full of Manitobans and in particular Aboriginal Manitobans. The Speaker found the point of order was valid and threw the motions out of the House. This meant the motions, done right, could not be brought back until the 20th of June, and the whole thing had to be passed by the 23rd. It was a great victory.

Were the votes there to actually pass the Accord? Did people know whether there were enough votes to pass it?

It was generally thought that the majority would pass it, even though there was some lukewarm response, and I know of at least three other MLAs who would have voted against the Accord. There was a sense of fear of separation if the Accord didn't pass, more than that the Accord was indeed a positive step forward for Canada. I'll add that, unfortunately, the Prime Minister didn't acknowledge the role of Aboriginal peoples and Elijah and the Manitoba Chiefs and instead he pointed his finger at English Canada. That was very unfortunate.

There were other procedural blips in the way the Accord was handled in Manitoba that allowed you to raise various points of order, were there not?

There were a number of them in addition to the notice problem. If ever there was a time for due process and for very careful procedural planning and strategy, it was on the Meech Lake constitutional amendment. So, it wasn't just a matter of how notice of the motion was distributed; there were too many motions in Mr. McCrae's name, the motions were never formatted properly on the notice paper and I could go on.

Absent those procedural missteps and errors, was there time to actually process this through the Assembly, if it had been done perfectly?

An alternative plan was a focus on the public hearing process before committee. There certainly was a potential to ensure a huge number of presentations at committee. Of course committees can work around the clock, and they do. Now, there is a fairly standard practice of limiting time for public presentations to 10 minutes for presentation, 5 minutes for questions. So, whether that would have been imposed we can only speculate. Members might have put a 2 minute limit on presentations. The time was very tight but the legislature and members can take steps by motions, rules, to expedite matters. Bills pass in a day if there is the political will. But in this situation, with Elijah, nothing could be done by unanimous consent and this took away the ability of the legislature to take extraordinary steps.

IV. THE MTS DEBATE

One take on the MTS debate is this: The government says, we agreed to a new set of rules on an experimental basis, and the theory was we'll introduce bills in the spring so there is lots of time for debate, you can rally whatever public support you want, then normally they'd be voted on in the fall. So the privatization bill comes up in the spring, then comes the fall, and the NDP realize they've got a hot political issue, they try to obstruct things and slow things down. Some academics watching the debate say if the government wants to shut down debate they should take responsibility, invoke closure and not get the Speaker involved. And the government's response is, why should we take the political hit for shutting down debate when we are just invoking the rights we had under the rules that have been agreed to. How would you respond to that?

That take is not in accord with the rules which were adopted at that time. Earlier, there was a Memorandum of Understanding [MOU] reached between the parties about what ideas should be pursued for a new set of pilot rules. The MOU had set out that at the end of the fall session, all bills should be put to a vote. In the months that followed that MOU, it was instead decided as a result of negotiation that the rules should reject that. The government said they wanted the ability to extend sessions—so that alone indicated a rejection of the earlier notion. The opposition explicitly demanded no fixed end date to the fall session, and said so in writing. So, the eventual rule said that it would only be a guide for “normal” practice. That belies any notion there was some agreement or any rule that required a vote. Even if there had been an agreement that was then recognized in the rules, there were two days without democracy. Matters of privilege were raised in the House—I think it was Jeanne Sauvé who said “matters of privilege cut through debate like a hot knife through butter.” That is one of the basic foundations of parliamentary democracy. Matters of privilege

have to be heard. The leader of the Opposition was up on a matter of privilege, but the Speaker turned her back. I was also personally affected by this—I had 29 minutes left for debate on the bill. It was a debate that I had put a lot of research into. I was going to be arguing the privatization of MTS would have a very negative impact on research and development in the telecommunications area in Manitoba. But my microphone was turned off, democracy was turned off. There were other profoundly distasteful and undemocratic events in addition to the ridiculous interpretation of the rules.

So from your point of view, there was a clear understanding that this MOU did not change the rules, and the word “normally” was put in there to indicate this was a general guideline and not a change to the rules. How did Speaker Dacquay decide this was the day we were going to have the vote?

It was arbitrary; it was imposed. Speakers do not make rules. Speaker Walding recognized that, Speaker Rocan recognized that. We can speculate but I think there was collusion. That was just so unfortunate because it raises distrust. She got up and made up rules.

In terms of collusion, do you mean the Speaker was partisan in terms of wanting to make sure the government agenda would be fulfilled, or do you think there was off the record collaboration between the Speaker’s office and the government?

It’s one or the other or both. I believe the latter.

Suppose there was indeed a change in the rules, taking the Tory point of view, that members of the House were obliged to honour in normal circumstances. What in your view was abnormal about the privatization bill that would justify going outside the rules?

There were a number of aspects that made that bill extraordinary. First, its effects were irreversible. Second, there was no record that the privatization of MTS was part of the government’s mandate. If anything, evidence was to the contrary. There were assurances given at the political level that it was not on the legislative agenda for the Filmon government. Third, public opinion was also highly opposed to this, according to all of the polling data and consultations. As well, there were significant changes to the bill that were taking place and serious shortcomings discovered in the very, very late stages of the bill. Finally, the sale of a crown corporation that had served Manitobans so well that was being contemplated for all the wrong reasons certainly made this not a normal piece of legislation. No one could ever classify the MTS sale bill as normal.

Was there anything abnormal about the way it was being processed?

That was part of the problem. There were so many policy issues that had not been considered. Amendments were being proposed in the House that were substantive. It was shoved through and there are still some very strong feelings about it, for people who were there at the time. To have the Speaker not even look at our side of the House for a matter of privilege let alone the points of order being raised, was unconscionable. She just looked at one side of the House. As part of our reaction, I went down on the floor of the Chamber and stood on the government side to make the point that it was only there where you could get noticed. I have spoken to observers in the media at the time, some of whom have no particular like for the NDP, then or now, but they found it just so profoundly distasteful and so wrong. As history has unfolded, that event formed part of the persona of the Filmon government as it headed into the 1999 campaign. So, there was some democratic justice if you will as a result of all that, but that still doesn't make me feel any better about what happened because I believe it was a terrible thing. The government had the ability to extend the session, it had the ability to move closure, previous question, it had parliamentary rules on its side, and instead chose to denigrate the office of Speaker and undermine trust in the institution.

My sense was always that the government had some sort of legal, business imperative, that they had to get this thing through in a specific timeline. Would that have been a good enough excuse by the government—that there could have been serious financial consequences to getting off the timetable?

There can be no timetable excuse for what took place. They took away a crown corporation from the people of Manitoba. The value of the shares speaks more loudly than I can on what was taken from Manitobans.

Why were the Tories willing to take the public relations consequences of proceeding this way, and why did they use the Speaker rather than just do the upfront technique?

They thought they could get away with it without moving closure. By having the finger pointed at the Speaker, the Filmon government thought it could avoid some negative backlash. That is my speculation.

It has been suggested by some the points of privilege you were raising weren't bona fide points...

A matter of privilege can only be judged once it's heard. The microphones were off. My view is these events went to the heart of privilege. The Speaker

arbitrarily imposing rules is a very serious matter that is all about the ability of members to perform as representatives of Manitoba.

VI. TOOLS OF OPPOSITION

After the bell-ringing episode during the French-language debate, the rules on bell-ringing were changed. One concern is that the rules seem to be progressively tightening so that there are limits on bell-ringing, there are time limits on speaking. Does an opposition party still have the ability, if it's really determined, to stall and delay a government measure any more? Or are the rules now sufficiently tightened to the point that a government can basically push things through on a fairly tight timeframe?

First, I should note that most recently, we saw bell-ringing being used to stall and try to attract attention to *The Public Schools Modernization Act*.¹⁴² We estimated about 24 hours of bell-ringing cumulatively arose from that debate, not necessarily related to motions on the bill, but other events in the House, sometimes appeals of Speaker's rulings, that are fairly attributed to opposition tactics on that bill. But now there is a one hour cut-off. So bell-ringing is still being used even though it has been limited.

The opposition still has lots of tactics available. Yes, a lot more success relies on the ability of parties to attract the attention of the media and be effective in their communication strategies. There has been a professionalization of political communications over the last couple of decades. There are unique skills that have to be rallied in order to effectively communicate with the public. But in terms of the legislature itself, we did see the opposition in this last session significantly slow down the session over *The Public Schools Modernization Act*, but they were never really successful in rallying public support for their cause. In fact, there seemed to be a disconnect with what the opposition was doing and its priorities, and what Manitobans were telling us and what the media was reporting. What we saw in that session was a failure of the opposition to get attention through parliamentary tactics. That wasn't because of the rules and the tactics available to them. That was because the government's proposal itself was not one that the public felt strongly opposed to. But there still remains one very important tactic an opposition can use and that is debate—substantive, extensive debate. We are seeing less and less of that. In this past session, for example, we witnessed points of order, bell-ringing, those types of tactics which are easier than getting up and talking on an issue to raise awareness.

¹⁴² Bill 14, *The Public Schools Modernization Act (Public Schools Act Amended)*, 3d Sess., 37th Leg., Manitoba, 2002 (assented to 17 July 2002).

What are the rules now for debate – the leader can speak for an unlimited time?

Yes, or the leader can designate someone to take that time. All other members can speak for 40 minutes. Really, debate could be endless, because you can move motion after motion, and you can move amendments to the motions. And then, under the rules, the government has to consider its political ability to limit debate at some point. Within the rules, there is what is called the previous question and there's closure. Over the last twenty years, I have noticed less media attention to the legislative process as a whole and a greater concentration instead on question period for the source of stories that emanate from the legislative building. I think, in recognition of that, the opposition has the attention of Manitobans in question period for 40 minutes each and every day that we are sitting. That is a very powerful tool and that tool has grown in strength. So, yes, there may be some limits on the other tactics in terms of speaking time or bell-ringing, but the significance of question period has grown and that is the opposition's key opportunity to put its best foot forward and to influence public opinion.

If you're in government and you've got a majority, you can close down debate. So, if you had a government absolutely determined to go ahead, there's really nothing you can do to stop them.

If the government really wants to go ahead, it has the parliamentary means to move debate along. The check on that is public reaction.

VII. PROPOSALS FOR REFORM

Right now there is a concern brewing in Canada over what we term the "friendly dictatorship"—40 percent of the people elect a majority government, the majority government can do whatever it likes for 5 years, cabinet controls caucus, the First Minister controls the cabinet, so basically we have one person rule. What are some of your suggestions for perhaps dispersing the power and creating a larger role for backbencher members?

The legislative review committee is a very important body because it oversees what bills go into the house and what the bills look like. Except for me, all the members of the committee are backbencher members and it is chaired by a backbencher. Their views are very important and they are listened to—they are critical. So, that is one example of an important role of backbenchers. Another example is the strategy committee which is comprised of backbenchers. Some backbenchers are appointed as legislative assistants to Ministers and, depending on their particular relationship with the Minister, can play influential roles. Of course caucus is where the support has to be obtained for any government

initiatives and there is no one in a cabinet that can ever afford to disregard the views and the need to try to develop a consensus in caucus around legislative issues. In terms of the rules in the House, backbenchers have a more limited role in question period, but regarding bills, members' statements, private members' legislation and the committees, they have a key role. We have been introducing changes to the rules to strengthen the public accounts committee, for example, to give MLAs more power to scrutinize the spending of the government and limit the role of Ministers. But it is always important to continually look to see how backbenchers can play a greater role because they all have something to offer.

Proponents of the current first-past-the-post electoral system say it gives a very strong link between MPs and local constituents, it tends to produce majority governments and that gives you the stable government who can be decisive, who can have a game plan at the beginning of a mandate, without being concerned about being obstructed all the way through by opposition parties. The critics say this is undemocratic in the sense that governments with 40 percent of the popular vote wield 100 percent of the power, and that it is creating problems with regionalization in Canada. Do you have any views on whether there's a future for proportional representation, or should we stick with what we've got?

I look forward to hearing the different views on this alternative and I'm generally aware of the arguments on both sides. I would be watching for what would have to be a very compelling argument to move away from the current system which is understood by those who practice democracy. I believe that is a very critical aspect for a successful democracy. Until now, I haven't been rallied by the cause of proportional representation, and that's not only because Manitobans currently have an understanding of how our system works, but because I have seen dubious results in western Europe with proportional representation, a significant instability which I don't think has served democracies well.

