

Fashioning a Pandemic Parliament: Getting On with Getting On

Following the initial flurry of activity and uncertainty, as institutions responded to the COVID-19 pandemic, much of the world has settled into a new normal in which the disease – and actions to prevent its spread such as travel restrictions and physical/social distancing – will remain part of life for the foreseeable future. Building on a previous article that examined the early actions of Canada’s federal parliament as the world confronted outbreaks of this novel coronavirus, the author now explores how to identify best practices that ensure the health and safety of parliamentarians and parliamentary staff while respecting parliamentary privilege and constitutional requirements. The author suggests that hybrid sittings (a mix of in-person and virtual participation) combined with a greater role for committee work could become a workable medium-term solution for parliaments during a pandemic. He cautions, however, that it must be parliament and not the government that decides how to fulfill the functions that underpin the Westminster system, maintain notions of parliamentary confidence in government and ensure adequate opportunity for opposition review to ensure accountability. Moreover, he notes that any additional authority granted by parliament to the government or self-restrictions imposed in light of pandemic conditions must be temporary and limited to the duration of the pandemic.

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At the time of writing, it has been six months since the first cases of COVID-19 were diagnosed in North America. Since then, COVID-19 has been declared a pandemic, the number of cases has waxed and waned, and there appears to be no natural end to it. Until a treatment and vaccine are developed and deployed, this disease will remain a part of life for the foreseeable and indeterminate future. As a result, institutions, including Parliament, must develop a modified *modus operandi* to carry out their constitutional functions based on a “new normal” over the medium to long term.

At the onset of the pandemic, the severity and transmission of the disease were unknown. Fearing the worst, it was prudent for governments to act swiftly and decisively. To do so, they needed to obtain funding, and exercise emergency powers and spending authority. Because the disease was communicable, restrictions were placed on travel, and “social distancing” was immediately put in place. Parliaments and legislatures were not able to meet in the usual

fashion. They were adjourned and temporarily recalled only to address the COVID-19 emergency. As a result, parliaments came to play a secondary role, with most of their functions limited to what was required to support the government’s initial and urgent responses. Given the exigencies of a Westminster system of government, Parliament was still required to pass the necessary legislation to grant the powers and spending authorities needed to address the emergency. The social distancing requirements and the restrictions on travel were met, in various Commonwealth countries, by differing emergency parliamentary processes that ranged from suspending parliamentary proceedings, hybrid parliamentary sittings, smaller representative sittings, specialized COVID-19 committees sitting as a smaller committee or as committee of the whole, and *ad hoc* plenary sittings¹. In addition, various voting systems were used, including in-person with social distancing, remote electronic voting, proxy voting, voting by party blocks, and hybrid combinations of these. Most significantly, parliamentary business was generally restricted. Parliamentary agendas and processes were stripped back to focus on the pandemic, leaving other government business and opposition initiatives sidelined or severely curtailed.

In the beginning, it was not known how to meet the needs imposed by social distancing. Was it even technologically possible to have an electronic

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meeting of upwards of 650 people? Could chambers be reconfigured to meet the needs? Could votes be held remotely and securely? Could any of these technologies and solutions be considered and still meet all constitutional requirements including quorum and ensuring that parliamentary privilege was protected?

Although the pandemic continues, the urgency that led to emergency legislation and stripped-down proceedings to address the immediate response has abated somewhat. It is now evident that the pandemic will last for some time and that more “permanent” solutions that meet the ongoing needs of both the government and Parliament must be found. In a briefing paper to the UK Procedure Committee (House of Commons), the Hansard Society noted that in the urgent stage of the pandemic and in the slow return to “normal” the focus has been on the business of government. The needs and the importance of the opposition were being ignored or curtailed. Any consideration of a return to a Parliament that is able to hold the government to account must ensure that not only government, but opposition business is promoted².

In Canada, at the federal level, full sittings were suspended and replaced by the COVID-19 Committee (essentially a committee of the whole) punctuated with single day sittings to pass urgent government legislation. There was no parliamentary time allocated to the opposition. Full parliamentary sitting days would normally include various opportunities for the opposition to put its concerns forward through designated days for debate on the Budget (which, to date, the federal government has yet to present), opposition days in which the opposition sets the agenda, private members business, and, adjournment and emergency debates often on topics pressed by the opposition. There were few available means for the opposition to test and vote on confidence in the government which is a hallmark of the Westminster system and required to give the government legitimacy. At a time when there is a minority parliament, when the opposition usually has a greater presence and “power”, a balance between the government and the opposition is even more evident and essential. While all mechanisms may not be feasible on the same timetable as pre-pandemic, each opposition tool serves a valuable function and ways to integrate the purposes for each into a revised parliamentary routine need to be found. The Westminster model is contingent on governing within a parliament infused with opposition. This is particularly true in a minority parliament.

In order to re-establish the balance between government and opposition, parliamentary committees³, academics, study groups⁴, and commentators have examined the various approaches used initially throughout the Commonwealth and considered what has or has not worked, what was sidelined, and possible ways forward for the remainder of the pandemic.

What is evident from these reviews, and from observed experience, is that it is not possible to return to “normal”, full attendance proceedings. Where legislatures have tried to fully return, the result has been numerous infected members and the need to shut the legislature down⁵. The related extreme of adjourning Parliament indefinitely, on the excuse that health officials have indicated that meeting would exceed permissible numbers of people in a group⁶ is just a pre-emptive way to the same result. In either case, the legislature does not sit, with the resulting lack of opposition and therefore accountability, legitimacy and legislative underpinning for government action.

At the other end of the spectrum, full parliamentary proceedings that only take place by virtual means or by reconfiguring the legislature seem to only have worked in settings that are small enough to manage through technology⁷ or by virtue of small numbers in a large enough space⁸. When full in-person plenary sittings are tried for a larger Parliament the result less than successful. In Ireland, the legal advice received by the Oireachtas was that the constitutional meaning of “sit” meant physically sitting in one place at the same time (a view not shared in most other countries). As a result, the assembly meets, for constitutionally necessary business, such as votes, in a convention centre that allows social distancing. The centre is located away from where the legislative building and its offices are located, committees meet (virtually or in a hybrid fashion) and some plenary meetings are conducted with limited numbers present. The result is a logistical and procedural nightmare.⁹ It is evident that neither extreme, fully in-person or fully virtual proceedings has been attractive for moderate-sized Parliaments, most of which adopted some form of a “hybrid” system of in-person and virtual attendance that allows all members to participate.

Except for the smallest legislatures, various studies and experiences point to some form of hybrid system as the only way forward. The question to now address is what processes should be adopted or adapted and how they should be expanded to include more House business.

At the beginning of the pandemic, there were both technological and security concerns that presented challenges to virtual proceedings and electronic votes. Over the last six months, these issues have been addressed and there now appears to be no technological impediments¹⁰ or electronic security concerns to holding virtual meetings of Parliament or electronic, remote voting.¹¹ More robust digital systems for multiple attendees and multiple meetings (e.g., chamber plus committees) have been developed and fine-tuned. As a result, technological reasons for not moving to include full or partial virtual attendance do not exist. There may, however, be minor impacts on some proceedings and practices. For example, there may be a need for more translators¹², it may take a bit longer to verify votes, speaking will likely be from pre-determined lists, and ways to electronically signal the chair may need to be developed.

How any particular proceeding will be conducted may be dependent on various factors and may vary between types of proceedings. Chamber business and committee business may need to be conducted differently; and, studies of legislation as opposed to inquiries by committees might also require different tools and practices. In addition, where physical presence is required, the size and configuration of the meeting space can also have an impact on the size of the meeting or the maximum number of people physically allowed for a hybrid proceeding.¹³ In some cases, it may be that meetings can, and therefore should, be conducted entirely virtually in order to eliminate risk.

At the federal level in Canada, Chamber (plenary) proceedings should be conducted in a hybrid fashion. The chamber is too confined to allow all members to attend and meet social distancing requirements. And, given the numbers (338 in the House of Commons), a full virtual attendance might cause technological challenges including the inability to view all members attending at the same time making it difficult for the chair to keep track of proceedings. Such a hybrid model has been successfully piloted through the COVID-19 Committee (a committee of the whole) for the last number of months. Although at times challenging, it should be remembered that except for significant speeches, (for example leaders' remarks and budget presentation), question period, and votes, the overall attendance is short of a full House and more routine proceedings should not pose many issues.

There will, however, need to be various rules or practice changes to ensure that no more Members are physically present than the space will permit. Seating

will have to be assigned and the rotation of Members on a single day should be kept to a minimum¹⁴. This is not to suggest that there can be any restriction on a Member attending the proceeding. The practice will only affect how Members will attend. Although likely left up to the various party Whips to determine, one hopes that principles of equity will guide a rotation of Members who wish to attend in person. Knowing who is in the Chamber will also assist when votes are taken, particularly if the voting process will involve some combination of in-person as well as electronic distance voting. Instead of having spontaneous speaking by "catching the Speaker's eye," speaking order will have to be organized by list. Lists of those who will be speaking, or posing questions, would include those present in person and those attending virtually. A means to allow certain interjections (such as points of order, indicating non-consent when unanimous consent is sought, and posing questions in debate) by way of electronic signalling will also need to be developed.

Ultimately it is the formation and recording of decisions of the entire House that have normative effect. The passing of legislation, amendments, and resolutions are what have a real legal impact on the country and processes for these functions must therefore be most rigorously designed and implemented. The usual form of determinations (consent or vote) must be retained but, given the circumstances, modified. A voting system that allows for all Members to participate, whether in person or remotely, needs to be designed, tested, and implemented. Any system must be transparent, accurate, secure, and verifiable, and will likely need to include certain redundancies. While it is probably best that only one system be used, either in-person voting (including block voting, pairing or proxy) or electronic voting, including for those in physical attendance, it is most likely that Members will prefer that those in physical attendance vote in a traditional manner with those virtually attending being seen as being accommodated. As such, a mixture of various methods will be required for each vote. Given the number of time zones in Canada, and the varying degree of robustness of internet connectivity across the country, fairness for those voting electronically and remotely must be hallmarks of the system. Except for extraordinary votes that must be immediately taken, all votes should be on notice that includes precise language of the question; votes should be held at a set time that is convenient to all time zones; a longer period for casting votes may be required; a means for those voting remotely to be able to see and verify how their vote has been recorded

will need to be established; and, redundancies (such as phone voting) for failures or lack of connectivity built into the system. One concern that has been raised is verification of the user of any remote voting apparatus. Various security and application development experts have indicated that systems including PINs, security questions, and biometrics could be integrated into the system. And for those Members still tempted to allow another person vote on their device, the Speaker and others have indicated that such a misuse would be a serious contempt subject to severe discipline.

These measures would allow a substantially complete agenda to be developed for the House that allows for both government and opposition business to be conducted. However, given that any contact in a group setting poses a risk for Members and staff, however much it is mitigated, consideration might be given to having certain aspects of proceedings take place only electronically, such as filing of petitions, reports, motions, government responses and documents, which could be deemed to be received and presented.

Notwithstanding the need to expand the work of the Chamber to allow for opposition business, more work could take place in committees that can more easily conduct their business virtually, thus mitigating personal contact. Committees are of a size that is more conducive to virtual meetings,¹⁵ and their votes do not have the same normative or legal effect. Their work is geared toward reporting to the whole House that has the final say. By meeting virtually, Committees are not susceptible to the physical distancing requirements of the pandemic. It is also easier to secure the attendance of witnesses and to avoid any travel or other virus-related restrictions.

The more “complete” the work of a committee when presented to the House, the less time that the House needs to spend perfecting it and bringing the matter to a vote. Depending on the completeness, an agreement or revised procedures may allow for consent adoption (or consent on division) on tabling (electronically) which limits or eliminates the time required in the whole House.

By using procedures modelled on “green”¹⁶ and “white”¹⁷ papers and Standing Orders that allow Ministers to ask a Committee to assist in the preparation of a Bill before introduction on a first reading¹⁸, more effective advanced study can be carried out in Committee and any resulting Bill can pass through the House more quickly, having already received

appropriate scrutiny. Finally, each Committee, being masters of their own proceedings, also have the necessary flexibility and agility to quickly, and more easily than the House, adapt to any circumstances or needs.

These suggestions and considerations are based on both the present state of the pandemic and various proposals being considered around the world for allowing for both government action and parliamentary scrutiny as required in the Westminster system of Parliament. Whether they are the only ones to be considered, will work, or will require to be modified, is as unknown as the course that the virus may take.

In an earlier paper¹⁹, written as some of these questions were initially being considered, I contended that parliamentary privileges over internal processes and proceedings, combined with Article 9 of the *Bill of Rights, 1689*, precludes judicial interference in proceedings, and would allow for almost any form of physical, virtual or hybrid proceeding so long as the following factors were taken into account and respected:

- A recognition of the constitutional centrality of Parliament even, or particularly, in times of crisis, and that the Government’s authority to act is still subject to parliament’s approbation.
- The parliamentary functions of approving taxes and spending, legislating, and the holding of government to account must be recognized and processes for their continued exercise be developed and implemented.
- Oversight and accountability of the Government’s management of the crisis is central to the legitimacy of the Government’s actions.
- Each member of parliament has the same rights and privileges as all other members to participate and vote in any proceedings established, and that only the House of which the individual is a member can regulate such involvement. Care must be taken not to disenfranchise any member or their constituents unnecessarily.
- Any changes to parliamentary proceedings, practices or rules are for Parliament, not the Government, to make.
- Technology should be leveraged to allow for virtual participation and voting, recognizing the limits of technology but working for solutions.
- Recognizing and insisting that whatever form the work of parliament takes, the result is a proceeding and parliamentary privilege attached

to it. As necessary, the Houses of Parliament and their Speakers must be prepared to assert and defend the principle that parliamentary privilege attaches to the functions being carried out, not the form that that work might take.

- Recognize that any self-imposed restrictions that compromise the full range of the functions of Parliament, particularly the protection of the rights of all members, are temporary and last only for the duration of the pandemic, or as Parliament itself decides. Once the reasons for the changes subside, any such modifications must end. It is important that any increased authority granted to the Government that might otherwise have required greater scrutiny of Parliament must also be limited by the duration of the pandemic.

These factors must remain the foundation for any evolution of a fully functioning Parliament. It is time to accept that COVID-19 will be with us for the foreseeable future. We must, and can, move towards a Parliament that is able to address government initiatives and responsibilities beyond the pandemic and that allows for fuller involvement of opposition members in their traditional roles and responsibilities. We may not be able to “return to normal” – that is, back to exactly where we were – but we can move forward to meet the challenges we face with a revised, robust, and fully functioning Parliament.

Notes

- 1 For the initial Commonwealth experience see “Protecting parliamentary democracy in “plague” times: Accountability and democratic institutions during the pandemic,” Steven Chaplin, *Commonwealth Law Bulletin*, (2020) 46:1, 110-123. For an examination of other countries experiences see “Covid-19 meets politics: the novel coronavirus as a novel challenge for legislatures”, Ittai Bar-Siman-Tov, (2020) *Theory and Practice of Legislation* <https://www.tandfonline.com/doi/full/10.1080/20508840.2020.1800250>
- 2 Hansard Society submission to House of Commons Procedure Committee, June 5, 2020. https://committees.parliament.uk/writtenevidence/6374/html?utm_source=hansardsociety.org.uk . The submission addresses many concerns related to Covid-19 and the way the government has attempted to curtail the opposition, including prematurely abandoning the hybrid model for a full parliament and failing to address how committees should function during the pandemic.
- 3 Primarily the Standing Committee on Procedure and House Affairs (Canada) and Procedure Committee (UK House of Commons).
- 4 For example, the Constitution Unit and the Hansard Society.
- 5 For example, in Mississippi both presiding officers in their bicameral State Legislature and 12 other members were infected leading to an indefinite shutdown (*Mississippi Today*, July 7, 2020). Similarly, in California when a legislator became so ill that he required hospitalization, the decision was made to suspend the re-opening of the legislature (*Los Angeles Times*, July 9, 2020). In the US Senate a sufficient number of Senators have contracted COVID-19 to possibly affect the nomination of a US Supreme Justice.
- 6 This is the situation in Australia (“Australian Prime Minister delays Parliament as COVID spreads” *Reuters* July 7, 2020).
- 7 States Assembly Jersey, <https://www.hansardsociety.org.uk/blog/how-jerseys-legislature-has-risen-to-the-covid-19-challenge> .
- 8 In Prince Edward Island arrangements have been made for social distancing by having some members sit in public galleries. In Israel, the Knesset now sits spread out over three levels (Bar-Simon-Tov Note 1.)
- 9 Ireland’s New Parliament: Political and physical Change. Mary Murphy, Hansard Society Blog July 9, 2020 <https://www.hansardsociety.org.uk/blog/irelands-new-parliament-political-and-physical-change-coincide-amid-covid-19> .
- 10 While there may be some lingering connectivity issues for the most remote Members, these may be addressed with one off accommodation alternatives, for example by deploying more sophisticated technologies.
- 11 “Carrying Out Members’ Parliamentary Duties: The Challenges of Voting During the COVID-19 Pandemic”, Report of the Standing Committee on Procedure and House Affairs, Canada, House of Commons, July 2020, 43rd Parliament, First Session.
- 12 *Ibid.* pp 33-35, 53.
- 13 This issue is a more serious one in the United Kingdom where hybrid proceedings in the chamber were discontinued in June in favour of in-person presence, and the fact that meeting rooms for committees are of varying sizes. This poses particular problems to meet social distancing requirements- See evidence of Procedure Committee (UK HoC) July 1, 2020 <https://committees.parliament.uk/oralevidence/634/html/>. The limit on room size would also be a factor in determining configuration for hybrid proceedings.
- 14 This will eliminate the need for cleaning between Member attendance. Cleaners would be strangers to the House and would not normally be allowed into the chamber during proceedings, and a full cleaning could take considerable time.
- 15 The Jersey Parliament has 24 members and it only meets virtually.
- 16 Draft legislative proposals.
- 17 Written policy papers for public and parliamentary comment.
- 18 House of Commons (Canada) *Standing Orders* S.O. 68(4),(5),(6).
- 19 Chaplin, Note 1.