

“On Law, Policy and the Constitution”

Notes for an Address in Honour of Henry Molot

to the

2007 Constitutional and Administrative Law Seminar

by

James R. Mitchell

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Introduction

- I am deeply honoured – humbled is a better and more accurate word – to have been asked to speak today at this *festschrift* seminar in honour of our friend and colleague Henry Molot.
- It's an honour to be present in this distinguished company of scholars and practitioners of administrative law, and all the more in that I'm not a lawyer (though I have been accused on occasion of pretending to be one!)
- I guess I'm here today because I am one of the non-lawyers in government who had the privilege of working, over many years, with the person whose distinguished career and profound dedication to public service we are celebrating today.
- Now, there are many ways in which the people in this room will think of Henry Molot. For some of you, he has been a friend; for others a colleague of long standing; for others a mentor and role model. For many of us, he has been all three.
- If this were simply a personal occasion, we could celebrate Henry's immense generosity of spirit – the good humour with which he has always greeted us; his keen interest in history (as borne out by the various vivid anecdotes from the Greeks and Romans that he has shared from time to time, each conveying an insight – often a pointed one – into the often trying circumstances of government in Canada).
- We could talk about the joy he takes in his family and, of course, his work; his generosity to the community; his faith.. ..
- But this is a professional seminar, not a retirement party or a roast. We're here to talk about the things we care about as students and practitioners of administrative law, and about how Henry's work has shaped our understanding of the law and of law in government.
- My job is to talk about our friend as a lawyer and public servant, from the client's perspective.

Some History

- As some of you know, I spent the better part of my government career in the Privy Council Office and all of that time in the Machinery of Government Secretariat. There, we dealt with both the theoretical and the intensely practical dimensions of what people in this audience might regard as essentially administrative law.

- We had the two extreme ends of the spectrum, you might say, while you looked after the statutory middle.
- As Machinery officials – some of us were also lawyers, though not functioning as such – we applied the law, and from time to time we also had a hand in *making* the law.
- In serving the Prime Minister, we tried to do the right thing, sometimes in innovative ways, in areas that were largely defined by historical precedent and constitutional convention.
- In the course of our work, we often had a need for legal advice – usually on complex, even arcane, issues which few people are interested in and fewer understand.
- The person to whom we turned most often for that legal advice was Henry Molot.
- I remember distinctly the first time I heard his name. It was sometime around 1985 or '86 and we were wrestling with what is called a “machinery issue” (nowadays a much over-used term). My colleague Marc O’Sullivan, then a young lawyer in Machinery and now a senior person in PCO, said “we should ask Henry Molot”.
- “Who’s that?” I asked, in my glorious, non-lawyerly ignorance. “Why he’s the authority on administrative law”, said Marc. “I took a class from him in law school”.
- As was so often the case, Marc was right. Henry was, and is, the authority on administrative law in the government of Canada. We did ask him for his advice, and he was able to help us on that problem (as I believe he was on every single occasion that we turned to him for help).
- What were we looking for when we called Henry?
- We were looking first for a sympathetic ear, for a lawyer who understood the often obscure world of Machinery and who had patience with the sometimes difficult people in the Machinery of Government Secretariat.
- We wanted someone who could start with the problem as we saw it, and then try to give us advice, or a helping hand, or a definitive view, that we could actually use. Advice that helped us to solve our problem, and more important, helped the government to do what it was seeking to do, in a way that was respectful of the law and the Constitution.
- We wanted someone who understood that administrative law applies to the real world in which governments act.

- We wanted someone who understood that Prime Ministers don't have unlimited time in which to make a decision, and that they have ambitions and objectives that it is our business to serve.
- We found all those qualities in Henry Molot.
- That's what I want to talk about today:
 - I want to talk first about what I have learned from how Henry conducted his business as a lawyer and a public servant, and why we so badly need in government today the qualities that he exemplified throughout his career.
 - Using Henry's work and role as an example, I want to talk about what I think the centre of government needs from its legal advisors in the Department of Justice – at least with respect to the area I know best, namely advice on legal issues related to the theory and practice of Westminster government.
 - And finally, I would like to say a few things about the relationship between law, policy and politics that are illustrated in the dynamics on Parliament Hill today.
- In celebrating the work of Henry Molot, I should make clear that I am also celebrating the Admin Law Section of the Department of Justice, in which he has served both as head and as a distinguished senior counsel. I'm sure his immediate colleagues over the past 35 years – those who have known him best – would echo many of the sentiments I'm expressing today. His work informed theirs, and vice-versa.
- One thing I know for sure is that the standard he set in his work is the standard that every administrative lawyer in DOJ aspires to reach.

How Henry Molot did his job, and why it is important

- The first quality that I associate with Henry is the obvious love he showed for his work in the Department of Justice. It's not that he was a workaholic (though goodness knows he certainly worked extraordinarily hard in the service of the Crown).
- It's rather that he cared deeply about his subject, and conveyed to all of us a contagious enthusiasm for the issues with which he was dealing.
- I confess that I used to call up Henry for lunch for the sheer pleasure of talking with him about issues at the intersection of Machinery and administrative law. I always came away with my own interest in my domain amplified, and my understanding deepened, by what I learned from him.

- The second quality we admire in Henry is expertise of the highest order.
- In an age when most public servants we know move from one job to another without ever really learning any, and when most DOJ lawyers are essentially generalists with generalist skills, it is useful to be reminded that there are some people at the very centre of government who really know a whole lot about a complex area that is of central importance to government.
- We need much, much more of that in the Public Service. We need to encourage expertise and mastery of difficult subjects; we need to valorize people – like Henry – who are prepared to step out of senior management jobs and devote themselves to high-level service as senior advisors and practitioners.
- A third quality, somehow typical of Henry but rare in senior people of his standing and accomplishment, is modesty. At a party you would never know at a glance that the gentle, gracious person standing over there in the corner with a glass of mineral water in his hand was one of Canada's leading experts on matters central to the interests not only of the Minister of Justice but, on many occasions, those of the Prime Minister.
- Modesty has gotten rather short shrift in recent years, in a Public Service where attention has been focused more on people and careers than on work and service.
- In the professional ethos of our colleague Henry Molot, we see an example of someone for whom the issue and the task and the ever-present obligation to get closer to the truth was the entire purpose of his work. This is an approach to public service that we would all do well to emulate.
- I have commented on Henry's professional qualities because I believe that when we look at a colleague's career what we admire is often less a matter of what they *accomplished* than of *how they did their work*. Virtue in government work, we might say, is more a matter of *being* than *doing*.
- Henry, of course, succeeded at both, and there are doubtless many of you here today who have read and re-read his opinions and who would argue that they represent an enduring legacy that will shape legal advice and government action, long after we are all gone.
- Doubtless true. I've read some of those opinions too.

What does the Centre of Government Need from DOJ?

- Indeed, I have often reflected on what it is about Henry, and the way he worked, that seems to represent the very best expression of the relationship that should exist between the Privy Council Office and the Department of Justice.
- It struck me that there are at least three sorts of occasions when you realize how much you really need your lawyer.
- The first is when you get into trouble.
 - Of course we never did! The risk for us in Machinery was more that we would make trouble for others, and that's where Henry was such a huge help. He helped us to avoid making mistakes in our advice to the Prime Minister, and in our plans and proposals, that would have created difficulty for Ministers and officials affected by machinery change. He helped us to think ahead.
- The second occasion is when you want to do something, and you don't quite know whether it's legal or, if it is, just how you could do it.
 - That's the creative side of admin law, and this is where Henry excelled. His knowledge of precedent, and his willingness to look in innovative ways at both statute and judicial rulings, enabled us to develop and refine tools for action by modern Prime Ministers that had not been used in these ways before.
 - (I am thinking in particular of that marvelous statute, the *Public Service Rearrangement and Transfer of Duties Act*, of which we made considerable use.)
- The third situation is more like a general requirement for people who work in high-pressure environments. You want as your lawyer someone who is there when you need them, and who takes your problems seriously.
- Henry was always there, and he always responded to our often unreasonable demands. This was truly the kind of legal counsel for which senior officials, especially those in PCO, are truly grateful.
- Henry exemplified what one might call a legal responsiveness to policy imperatives, while always maintaining his independence as a Justice counsel and his objectivity as an advisor.
- His contribution was made at the place where law and policy meet. This is where the centre of government needs DOJ to be working.

On Law, Policy and the Constitution

- Policy shapes the law; law informs and constrains policy choices. Law defines to a considerable degree the playing field on which officials advise and governments decide. The relationship between the two domains – law and policy – is, or ought to be, symbiotic.
- Nowhere is this proposition more true, or more relevant, than in the area of administrative law, the place where policy objectives intersect with statute and constitutional convention.
- But as we see all too often today, government is not simply a matter of well-intended policy being advanced on a sound constitutional basis within a clear framework of law.
- What is happening on Parliament Hill these days, in committees of the House and less frequently those of the Senate, shows what happens when neither the law nor constitutional convention is understood or respected.
- What is happening is that officials, and occasionally private citizens, are being called before committee for what are essentially political reasons, masked as the right and duty of Parliamentary committees to inquire into the operations of government and to hold someone accountable for what has been done.
- Those same officials – often mid-ranking officers or lower level executives – are being questioned about matters for which they are not responsible and for which they are most certainly not accountable to Parliament. They are being subjected to reputation-destroying comments and innuendo that would never be permitted in a court of law, or even a newspaper.
- Why? Because the political dynamics of a minority Parliament, coupled with a recent history of apparent failures in accountability, have encouraged MPs to take unfair advantage of their powers and to cloud and politicize the relationship between officials and Parliament.
- This is not what is spelled out in the 2006 *Federal Accountability Act*. It is not what the Prime Minister intended, as he made abundantly clear in his public letter last December to concerned former deputies after the passage of that *Act*.

- In bringing forward that piece of legislation, the Government had certain policy objectives, which were stated quite explicitly. Those objectives were to increase transparency and strengthen accountability to Parliament in a whole variety of ways that were wrapped together in a new statute – the *FedAA*.
- In advancing its policy agenda and this major piece of legislation, the Government was fully mindful of the conventions of ministerial responsibility and the roles of Ministers and officials on which this particular policy and legislation rest.
- This can be seen clearly in the Prime Minister's seven page letter and the subsequent detailed guidance from the Privy Council Office on the responsibilities of officials before committees.
- As a machinery person, I do not know what more could have been done to frame the relationship between officials and committees in a way that was both respectful of Parliament and consistent with convention.
- I have never seen a more detailed or substantive public statement by a Prime Minister on a Machinery issue than the December letter. It is a masterpiece.
- Here is just one sentence as an example:
 - “ ... as the legislation also makes clear, the responsibilities of accounting officers are exercised within the framework of ministerial responsibility and accountability to Parliament, which will remain unchanged.”
- The point couldn't be clearer. But the words of the statute and all this constitutional theory, so well explained to the public, do not seem to be working in Parliament today.
- I suppose the best explanation is that there is a fourth vector at work in addition to policy, law and convention. That fourth vector is the public environment and political culture of 21st century Canada. But I'll leave that topic to another occasion.
- These are the complex, often heavily political, circumstances in which Martin Freeman and Ann Chaplin and the other heirs and successors of Henry Molot are working today.
- They will have to advise on what's constitutionally appropriate and what is not; on what the *FedAA* means or permits and what it doesn't; on the significance of the explanatory comments in the sidebars to the sections that define the role of officials before committee.

- As Henry did, they will have to work closely with officials in PCO – able people doing the same things I did fifteen years ago – who are charged with advising the Clerk and the Prime Minister on these matters.
- They will be required to show the same sensitivity to political and policy realities that Henry Molot has done in his long career. Like him, they will be challenged to come up with innovative legal solutions to policy and Machinery problems that few people really understand.
- In some ways, their work will be more difficult because the public environment is more demanding and less forgiving than the world in which Henry and I have spent our careers.
- But as they try to address the challenges of the future, they can have no better role model than their colleague, and our friend, Henry Molot. If they can live up to the standard he has set, our government and our constitution will be well served.

Thank you.