Recent Seminars on Parliamentary Practise and Procedure

Running out the Clock: The Strategic Use of Parliamentary Time

From the moment that a new parliament is elected and a new government is formed, the clock is ticking until the next election. While governments try to move their agenda forward and pass their legislation as quickly as possible, opposition parties often use parliamentary tools to delay the process to scrutinize, oppose, and/or secure changes to government initiatives. On January 20, 2017, the Canadian Study of Parliament Group (CSPG) held a seminar to explore the strategic use of parliamentary time by the government and the opposition and how it has evolved in recent decades, as well as proposals for reform.

Technical Briefing on Tools and Processes for Time Management in the House of Commons and the Senate

The first panel, moderated by **Michel Bédard**, president of the CSPG, featured veteran clerks from both houses of Parliament. **Jeffrey LeBlanc**, Principal Clerk at the House of Commons, provided an overview of the use of time in the Lower House. Section 28 of the Standing Orders set out the parameters of when the House shall sit, enabling a fixed calendar to help members manage their parliamentary and constituency responsibilities. The House sits for approximately 27 weeks per year, with extended breaks in the summer and at Christmas.

Time in the House of Commons is a precious commodity that can get quickly consumed. The 27 sitting weeks translate into approximately 130-135 sitting days per year. Of this total, 22 days are allotted as opposition days, four days are for the budget debate, six days are for the Throne Speech debate, and some days are for government motions. This leaves approximately 100 sitting days each year for the government to move its legislation through Parliament.

The daily order of business in the House of Commons is also rather structured (see Chapter IV of the Standing Orders). Of the 35.5 hours that the House sits per week, 23.5 hours are allotted to Government orders and routine proceedings, five hours for private members' business, five hours for members' statements and Question Period, and two hours for adjournment proceedings. Government orders are the meat of debate on government legislation. The government decides which item to call first each day and debate continues until it is concluded, interrupted, or adjourned. The government may switch items following an interruption (for example following Question Period).

As noted by Mr. LeBlanc, opposition parties can delay government business (to give time to amend or change opinion on proposed legislation) using various procedural tools. One such tool is the filibuster, which involves putting up a large number of speakers on an item and using the maximum time allotted for speeches, questions, and comment. Another tool is moving amendments, which allows members to speak more than once (on each amendment as well as to the main bill). Also, concurrence motions (for example in committee reports) can be used to delay the start of government orders, while dilatory motions, such as motions to adjourn, tend to force the taking of votes, which delays debate on other matters before the House.

Mr. LeBlanc added, however, that the government also has a number of procedural measures at its disposal to speed the passage of legislation. Time allocation allows for the setting of a specific number of days or hours to consider a stage of a bill (the minimum is one day per stage). Closure is a motion "that debate not be further adjourned," which forces a decision on any debatable matter by the end of the day. Another tool is the motion "that this question be now put," commonly known as the previous question. While this motion is debatable, it prevents any amendment to the main motion under consideration. Finally, Mr. LeBlanc noted that the government could counteract a filibuster by extending the sitting hours so that the opposition effectively talks itself out.

Once a bill is referred to a committee for study, different rules apply. There is no limit on the number or length of speeches. Meetings are called at the discretion of the Chair, and are adjourned by majority decision or consent. Committees may adopt motions to

govern their procedures and set deadlines to complete studies. There is, however, a 60-sitting-day limit for a committee to study a private members' bill, though it can request a one-time 30-day extension.

Finally, Mr. LeBlanc discussed the recent report by the Procedure and House Affairs Committee on a family-friendly Parliament. He noted the report's recommendation to have votes take place after Question Period, rather than later in the day, but observed there was no consensus on the elimination of Friday sittings, changing sitting schedule or the establishment of a second parallel Chamber to facilitate debate.

Till Heyde, Deputy Principal Clerk at the Senate of Canada, remarked that time has a different meaning in the Senate, given that Senators are appointed to serve until age 75 and that the Senate strives to work by consensus. Still, Mr. Heyde noted that time management in the Senate is in flux due to recent changes in the composition of the Senate. Historically, the two main parties in the Senate coordinated business, but now that more Senators have no caucus affiliation, there is less coordination.

While the Senate Rules allow for any day between Monday and Friday to be a sitting day, in practice the Senate tends to sit only on Tuesday, Wednesday and Thursday, for significantly fewer hours than in the House. Time in the Senate becomes more precious before the winter and summer breaks, when the government is most keen to pass legislation through both houses of Parliament.

Mr. Heyde identified three particularities with regard to the management of time in the Senate: First, unlike the House, the Senate has no fixed calendar. Sittings are set on a week-to-week basis. As well, Senate sittings can spill over into non-sitting periods (such as the summer recess). Second, Senate committees cannot sit at the same time as the Senate unless they are granted special permission. Finally, the Senate can sometimes wait for weeks or months to receive bills from the House. When the bills do come, there is pressure to pass them quickly. As a result, interventions by Senators are usually limited to those who have a particular interest in the issue. Unlike in the House, in the Senate there is no limit on time to debate a bill or motion. Because debate continues until it is done and Senators only sit for as long as they need to, dilatory tactics serve little purpose.

Changing approaches to the Use of Time by the Parliament and Opposition

In the second panel, moderated by **Kelly Blidook**, an associate professor of political science from Memorial University and CSPG board member, **Christopher Kam**, an associate professor of political science from the University of British Columbia, presented on the "Political Economy of Parliamentary Time." He posited that while there is a widely shared view that legislatures are passing less legislation due to a combination of archaic rules and opposition attempts to obstruct legislation, different factors might be at play. Indeed, he argued that governments are complicit in maintaining lower levels of legislative efficiency and productivity.

Mr. Kam demonstrated how over the past 30 years, legislative efficiency, as defined by the annual "pass rate" of government bills, has declined by about 30 per cent. He argued that this declining efficiency is not due to "vexatious and obstructive opposition." Rather, the fact that legislative sessions are shorter as well suggests that governments have not tried to offset any declining pass rate by adding sitting days. He added that while governments pass more bills in legislatures where one political party has won all or most of the seats, they do not do so to such an extent that significantly increases legislative efficiency.

Indeed, Mr. Kam argued, governments have failed to increase legislative efficiency via measures such as omnibus bills and time allocation (which increase efficiency by speeding up passage), and have been unwilling to effect "radical" measures such as letting bills survive a legislative session (as is done in some other jurisdictions), or enabling electronic voting in the legislature (as a means to increase productivity). This may be by preference; governments may not wish to boost the legislative pass rate, for a variety of reasons.

Next, **Paul Wilson**, an associate professor of political management of Carleton University presented on "Political Tactics, Time Allocation, and Omnibus Bills." He first observed that between 1994 and 2015, the average days of House of Commons debate per government bill has remained fairly constant – between three and four days (even though there are often arguments made suggesting that less time is being allotted to debate).

Mr. Wilson suggested that the term "parliamentary debate" is a misnomer as it implies the thoughtful exchange of ideas. Rather, he said, "in real life debate

in Parliament is about the clock." Since the 1950s, every government has charged the opposition with obstruction, while the opposition has charged the government with pushing legislation through without sufficient debate.

Indeed, from the government's perspective, the objective of debate is to move bills to the next stage of consideration as smoothly as possible, whereas for the opposition the time allocated for debate is one of their best tools for challenging the government's legislative initiatives. Debate, then, is often synonymous with delay, and from the opposition's perspective delay can serve the following objectives: raise media awareness of an issue; force the government to make strategic choices on how to manage its time; and possibly lead to compromise and amendment on a legislative initiative.

As discussed by Mr. LeBlanc, delay can also provoke the government to restrict debate by invoking time allocation and/or closure. According to Mr. Wilson this, in turn, can give the opposition a small victory as they can then paint the government as heavy handed and even undemocratic for stifling debate.

Turning to the 41st Parliament, Mr. Wilson emphasized the importance of understanding what is happening behind the scenes in Parliament to make sense of how time is used by the government and oppositions parties. He noted that while time allocation was resorted to often in the last Parliament, the average length of debate on a bill stayed roughly the same. This suggests that time allocation was used as a time management tool in place of negotiation between House leaders rather than just a way to cut off debate. Finally, Professor Wilson touched on the use of omnibus bills over the past 20 years. He observed that, over the past few Parliaments, the length of budget implementation acts and the range of legislation amended by the acts increased. He observed that this tendency could perhaps be defensible in a minority parliament context (to force passage with the threat of a confidence vote), but appeared to become abusive in a majority context.

The final panelist, veteran Parliament Hill reporter **Kady O'Malley**, observed that while there is value in looking at the statistics related to the passage of legislation, it is important to look at Parliament as more than just a "bill producing machine." She noted that not all legislation is created equal. Sometimes more debate is required and productivity should not be measured based on how many bills are passed in a given session. She added that she is not convinced that efficiency is a parliamentary value. Indeed, sometimes it is more important to prevent a bill from passing "if it is a really bad idea."

With regard to the opposition's approach to time allocation, Ms. O'Malley noted that a lot can be worked out in advance by the House leaders to manage the parliamentary schedule and thus preclude any need to resort to delay tactics and time allocation.

Overall, Ms. O'Malley observed that Parliament tends to have a natural schedule and lifespan, which is perhaps why governments tend not to impose major changes to the calendar. As well, governments tend not to take away any significant amount of time from the opposition because they do not wish to be perceived as overly authoritarian.

In a lively question and answer period that followed, Ms. O'Malley said that while a number of good ideas had been raised in the Procedure and House Affairs Committee's study on a family-friendly Parliament – such as the creation of a parallel chamber to enable additional debate on legislation – much of the study's focus was on whether Friday sittings should be eliminated. Mr. Wilson added that, contrary to popular perception that MPs are only productive when they are in Parliament, MPs spend constituency weeks (when Parliament is not sitting) working and engaging with their constituents. With regard to measuring the productivity of Parliament, he said that it might be worthwhile examining when bills are introduced in a parliamentary session. Indeed, bills introduced by the government towards the end of a session may do not make it past First Reading. These bills may be intended to be a signal about why the governing party ought to be re-elected. Finally, Mr. Kam reiterated that there are a number of tools used in other jurisdictions that could be adopted to increase the efficiency of the legislative process, including introducing electronic voting, enabling whips to hold all proxy votes, and tasking committees to write legislation.

Practitioners Panel: Joe Comartin and Senator James Cowan

The third panel, moderated by **Paul Thomas**, postdoctoral fellow at Carleton University, featured two highly respected veteran politicians from the House of Commons and the Senate: **Joe Comartin**, former MP for Windsor-Tecumseh, and Senator **James Cowan**, whose presentation to the seminar was one of his final public appearances before his retirement from the Upper Chamber.

Mr. Comartin emphasized how MPs perceived their roles as speaking on behalf of their constituents in Parliament. As such, any attempts to limit the amount of time for MPs to express themselves in the House of Commons cuts to the essence of what it means to be an MP. He argued that managing time in the House has changed dramatically, with control over the parliamentary calendar being increasingly dictated from the Prime Minister's Office rather than through agreement between House leaders.

Mr. Comartin then addressed the use of closure and time allocation in the House. The increased use of both closure and time allocation, particularly in the last Parliament, he argued, is symptomatic of a clash between the right of the parliamentarian to give voice to their constituents with the government's desire for efficiency and productivity. While the federal New Democratic Party had taken the position that it will always vote against closure and time allocation motions, Mr. Comartin recognized that there are circumstances in which time allocation may be necessary, for example to meet a court-imposed deadline. Overall, he argued that time allocation and closure do not make Parliament more efficient, as parliamentary productivity is roughly equal in both majority and minority government situations (where closure and time allocations can be defeated in the House). This may be because minority parliaments force parties to achieve some level of consensus on how to move legislation through the House.

Mr. Comartin offered a number of suggestions on how to improve time management the House of Commons. First, additional authority could be given to the Speaker to determine whether time allocation is appropriate and how much time should be allocated to consideration of a bill. Second, he observed that while rules exist in the Standing Order enabling the Speaker to cut off repetitive or frivolous debate, such rules are rarely enforced. Given that debate is often used as a delay tactic, it would be worthwhile to give the Speaker more authority to intervene. Third, he said bills could be referred to committee right after First Reading, and the committee could decide how much debate time to allocate to the bill. Finally, in minority parliaments, government bills could be carried over from one session to the next, rather than dying on the Order Paper.

Senator Cowan observed how politics turns time into a "strategic tool and sometimes into a weapon" and how there is always some tension between a government and parliamentarians who scrutinize government legislation. Scrutiny of proposed legislation, if done right, takes time. While parliamentarians' use of parliamentary rules to control time can really look like "inside baseball" gamesmanship, the public does not want important matters to be pushed through Parliament without proper study. The real issue is how and when to use parliamentary rules to control debate.

During his 12 years in the Senate Senator Cowan saw "repeated abuses of traditions and rules of parliament" that inhibited the ability of parliamentarians to scrutinize legislation. He cited the Senate's review of Bill C-2, the *Accountability Act*, in 2006 as an example where the Senate review improved the bill by correcting drafting mistakes and identifying other gaps, despite pressure to pass it quickly. However, in other cases the ability to review was been impeded by the increased use of multifaceted omnibus legislation, the resort to time allocation once the governing party had a majority of seats in the Senate, and, in one case, procedural manoeuvrings around a private member's bill that involved the Senate overturning a Speaker's decision regarding the rule that time allocation and closure apply only to government, and not private member, bills.

Senator Cowan emphasized the importance of taking time to carefully review legislation. He added that time is not an enemy but a friend and ensures that Parliament is able to do its job. He concluded by noting that while time allocation can be important in select circumstances, it should be the exception rather than the rule.

The question and answer period that followed focused on the role of the Speakers to help with time management issues. One individual suggested that the primary sponsor and opposition critics for government bills could propose lengths of time to debate a bill, which could be arbitrated by the Speaker. Mr. Comartin supported the idea, adding that the house leaders of other parties could weigh in. A related suggestion was for the Speaker to be able to rule on the length of sitting days, for example by adding evening sittings where necessary to move legislation forward.

In terms of the ability of the Senate to overrule the Speaker (there is no equivalent power in the House), Senator Cowan explained that unlike in the House (which elects the Speaker), the Speaker of the Senate is appointed by the Government. Thus, he suggested that giving more power to the Speaker should be matched with enabling senators to elect the Speaker.

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CSPG Seminar: Bill C-14 – A Case Study of the Relationship Between the two Houses of Parliament and the Supreme Court

On November 18, 2016, members of the Canadian Study of Parliament Group met to discuss the unique circumstances surrounding the passage of Bill C-14 (*An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*) and what it can tell us about the relationship between the two Houses of Parliament and the Supreme Court.

Case Study of Bill C-14: Technical Briefing

The first session offered a technical briefing of the circumstances that led to the creation of the legislation. **Maxime Charron-Tousignant,** an analyst for the legal affairs and national security section of the Parliamentary Information and Research Service, began by noting the pre-existence of Quebec's *An Act respecting end-of-life care*. Following years of study, it was tabled as Bill No. 52 on June 12, 2013, given Royal Assent on June 5, 2014, and came into force on December 10, 2015. As of September 1, 2016, 262 people received medical aid in dying.

One year before Quebec's legislation was tabled, Gloria Taylor and the British Columbia Civil Liberties Association (Carter v. Canada) challenged the laws prohibiting assisted dying in the courts. On June 15, 2012, a trial judge ruled that restrictions on medically assisted dying violated sections 7 and 15 of the *Charter of Rights and Freedoms*. When the Court of Appeal overturned the trial decision on October 10, 2013, the case made its way to the Supreme Court of Canada.

On February 6, 2015, the Supreme Court concluded that sections 14 and 241(b) of the Criminal Code violated section 7 of the Charter, and declared that those sections were void. It also suspended this declaration of invalidity for a period while federal parliament and provincial legislatures could decide guidelines for medically assisting dying subject to court guidelines.

The federal government established an External Panel on Options for a Legislative Response to Carter v. Canada on July 17, 2015 with a mandate to hold discussions with the interveners in Carter and with "relevant medical authorities," and to conduct an online consultation "open to all Canadians and other stakeholders." The provinces and territories established an Advisory Group on Physician-Assisted Dying in August 2015 with a mandate to "provide non-binding advice to participating Provincial-Territorial Ministers of Health and Justice on issues related to physician-assisted dying." The advisory group and external panel issued their final reports on November 30 and December 15, 2015, respectively.

On December 11, 2015 the House of Commons and the Senate passed motions to establish a Special Joint Committee on Physician-Assisted Dying consisting of 10 MPs and five senators. The committee had a mandate "to review the report of the External Panel on Options for a Legislative Response to Carter v. Canada and other recent relevant consultation activities and studies, to consult with Canadians, experts and stakeholders, and make recommendations on the framework of a federal response on physician-assisted dying that respects the *Constitution*, the *Charter of Rights and Freedoms*, and the priorities of Canadians." It marked the first time in 20 years that a special joint committee of parliament had been created. The previous special joint committee explored the religious and charter schools question in Quebec and Newfoundland at the end of the 1990s. It issued its final report on February 25, 2016. On April 14, 2016, Bill C-14 received first reading.

Jeremy LeBlanc, Principal Clerk (Acting) of Chamber Business and Parliamentary Publications at the House of Commons, noted some unique and interesting aspects of the resulting debate, including the very divergent points of view of the matter and the very tight deadlines (narrow in parliamentary terms) for drafting, debating and enacting legislation.

Opinions varied widely among MPs, even within party caucuses; as the legislation was deemed to be a matter of conscience, they were permitted a free vote.

Within the committee, there were numerous questions about dementia, palliative care, indigenous patients and discussion about whether to add language in the bill that mirrored the Supreme Court's own wording. Mr. LeBlanc also noted there were some substantial amendments at committee which was unusual. Moreover, the Speaker brought back some amendments defeated in the committee at the Report stage (eligibility criteria, reasonably foreseeable death, idea that a person should physically administer the substance if they were so able, etc.).

The government attempted to prolong sitting hours, but failed to receive unanimous consent, and instead used time allocation for the legislation a second time (the first time was to move the legislation to the committee stage). The bill passed in the House on May 31. With a deadline of June 6 set by the court for a new

law, there was not much time for the Senate to debate the legislation, but Mr. Leblanc said senators "did so with alacrity."

Till Heyde, Deputy Principal Clerk of the Senate's Chamber Operations and Procedure Office, remarked that at the start of this parliament there was no government present in the Senate, and therefore no established lines of communications with the House.

On April 20, the Senate allowed its legal committee to examine the content of the bill while it was still before the House, a process set up 40 years earlier to allows for early study or input into legislation expected from the House of Commons. The committee held six meetings over 20 hours, and Mr. Heyde said there was very intense participation by senators. The day after first reading of the bill, the Senate received the Justice Minister and then the Health Minister for two hours each.

In the Senate, amendments are often moved even during third reading as there are less restrictive procedures than in the House. This results in an open process that allows senators to be active right up to final passage. Mr. Heyde suggested the third reading process was quite extraordinary for this legislation. First, debate was organized by theme; and second, senators were not limited in the number of times they could speak on third reading. As a consequence, the number of amendments were not limited and therefore the amendments could be more cohesive and coherent. Normally amendments proposed must take into account the entire legislation. For this bill, the process was very innovative. It allowed wide-ranging debate and ways to proceed even though there was very wide ranging views.

Mr. LeBlanc explained that while it's not unusual for the Senate to amend bills, it had become less common recently. Once the bill came back to the house, there was an exceptionally rare use of procedural practise to wave usual orders. The government argued the Court deadline had passed and it needed to move quickly to get a framework in place, though the provinces were looking into creating guidelines based on the legislation as it stood.

In a question period following the technical briefing and background, the clerks were asked if the special processes used in the Senate might be used for other bills in the future. Mr. LeBlanc speculated that as a matter of conscience that was not along party lines in the House of Commons, it was a rather special, once-in-a-generation bill. While he doesn't see these processes becoming more common, he said when these rare issues do arise there is an openness to them.

Mr. Heyde suggested there was a lot of support for the process after the fact, and the Senate's modernization committee has looked at some of the ideas of speaking time and how amendments are considered, so this case may inform some of the processes in the future.

Case Study of Bill C-14: Parliamentary Panel

A second panel, which included a senator, an MP, and the parliamentary assistant to an MP, offered another vantage point of the legislation's debate. Senator Serge Joyal began by characterizing this issue as quite exceptional as there are major components of the legislation that touch upon still-pending societal values, the institution of parliament and the law.

In terms of societal impact, with the Carter decision and in reviewing legislation concerning sex workers, the Court has outlined what it sees as a competent individual's autonomy over bodily integrity and the fundamental principle that legislation cannot compel a person to suffer or put at risk his/her bodily integrity, according to section 7 of the Charter. Senator Joyal said these decisions have an impact on Section 2b of the Charter dealing with religious freedom, as some religions believe that prostitution is a sin, that suffering is part of redemption and salvation, and that life and death is a matter for "God" to decide. He noted that there is currently a challenge by some physicians against The Ontario College of Physicians directives compelling a physician to refer to another doctor patients seeking end of life care. A Bill that would permit religious hospitals to refuse to assist in medically assisted death is also being debated in Ontario.

In terms of institutional impact, Mr. Joyal suggested that Bill C-14 brought up a number of questions about the relationship between the Senate and the House of Commons. The Senate doesn't often propose amendments, and it insists on those amendments even less often. During the debate on Bill C-14, Mr. Joyal proposed an amendment that was adopted by the Senate but refused by the House.

There was debate about whether the Senate should insist on the amendment – something he strongly supports. John A. Macdonald said the Senate should not stand in the way of legislation that has a mandate through the election platform of members of the

Commons. But when it doesn't, the Senate should insist on protecting minority interests, in the present instance those having a right not to suffer indefinitely, as recognized by the Supreme Court in the Carter decision.

When the bill came back from the Commons, some senators said the Court should ultimately decide the issue, while others argued the Senate should defer to the elected House of Commons. Mr. Joyal noted the Senate is still in the process of debating its constitutional power and duty about insisting on amendments that challenge the position of the House of Commons in reference to discrimination against minority rights.

The debate is still pending since the constitutionality of Bill C-14 is currently being challenged in BC by Julia Lamb, a person suffering from a debilitating disease, precisely on that argument of the protection of a right recognized to suffering patients by the Supreme Court in the Carter decision.

Conservative MP **Michael Cooper** was one of two Members of Parliament who were involved in the Bill's process all the way from the striking of the Special Joint Committee to the legislation's passage. He said responding to the Carter decision has been the most complex issue this parliament has had to consider, but all members of the committee worked in a collegial and generally non-partisan matter.

Mr. Cooper noted that time was a significant factor for this parliament as it had a very narrow window to act. Prior to being appointed to the Special Joint Committee, members were aware of the Carter decision, but he, and he suspects probably others on the committee, had not likely studied the issue and considered it substantively. With a short timeline, the discussions were intense; some critics contended there wasn't adequate time to properly consider the issue. But after three weeks of a very intense schedule, Mr. Cooper said he doesn't believe the final report would have changed much with more time.

The questions arising out of the court's ruling were extremely complex: What is a competent adult? What is a "grievous and irremediable"condition? Who should decide? What kind of effective referral means should we have? What conscience protections should we have and who should have them? The committee's work was distilled in a main report and dissenting report which helped clarify the issues and framed some aspects of public debate.

Cooper concluded by noting his agreement with Senator Joyal, C-14 is just a starting point in a debate that is uncharted territory for Canada.

Andrew Johnson, parliamentary assistant to NDP MP Murray Rankin, began his talk on an optimistic note. "Let me say, as a young cynic, that the conduct of our parliament gave me a great deal of optimism about our institution," he stated. Mr. Johnson said the discussion and debate surrounding the Bill showed there was genuine respect for different views.

Remarking that most committee sittings were after regular sitting hours, Mr. Johnson said clerks had to do in less than 24 hours what they would usually do in a week. Johnson said that in addition to what the court ruling specifically required, many topics, such as advanced directives and psychiatric conditions, were also considered as the committee knew these issues are on the horizon. In his view, the government receded from the highwater mark of restrictions, but also below the floor set by Carter, pointing out that the same legal team behind the Carter case raised a challenge 11 days after the Bill was passed (the Lamb case).

In the question period following the panel, one audience member asked if it was possible for parliament to continue the co-operation it showed during this process in the future. Mr. Cooper suggested the issue and time constraints were so unique in this situation that it may never be replicated again, but added that he found the interaction between the chambers through the special joint committee to be quite useful and said relationships between parliamentarians had been built over the course of the process. Mr. Johnson said that since the Special Joint Committee, he has felt more at ease about calling counterparts in other parties without fear of spilling of partisan secrets. He cited Bill C-22, dealing with security oversight, as another issue which should be non-partisan and predicted the muscles developed under C-14 would be working again.

Carter v. Canada and Bill C-14: A Case Study of the Relationship Between the Supreme Court and Parliament

A final panel session explored the role of the courts with respect to creating Bill C-14.

Dennis Baker, an associate professor of political history at the University of Guelph, explained that among scholars there are a variety of opinions on how parliament and the courts should ideally interact (dialogue theory). He falls on the side of co-ordinated dialogue (parliament can debate boundaries and not cede solely to the court) as opposed to court-centric

dialogue (court sets the parameters, parliament can pick options, but not boundaries). Mr. Joyal's speech was cited as an example of the court-centric view. Although Mr. Baker argued this may be viewed as a surrender of content, defenders of the court-centric approach note that it avoids further legislative challenges and preserves judicial resources.

Mr. Baker concluded by noting that what parliament says does have a great degree sway over judicial considerations. As the Justice Minister has stated, legislation is never a matter of simply cutting and pasting decisions from the court; legislators must listen to diverse opinions.

Charles Feldman, a legislative counsel in the Office of the Law Clerk and Parliamentary Counsel at the House of Commons, examined the various options available in terms of referring legislation to the courts (see a forthcoming issue of the *Canadian Parliamentary Review* for a revised version of this presentation). Mr. Feldman stressed that limited options are available to Parliamentarians and raised the question of the *sub judice* convention (limitations on Parliament discussing matters before the courts).

Finally, **James Kelly**, a professor of political science at Concordia University, examines the time constraints surrounding this legislation. Kelly focussed on the extension requested by Parliament and suggested it created the idea of severe judicial deference. Rather than asking parliament how much time it needed to provide an appropriate debate on legislation, Kelly says the government asked the court to provide decide on the length without knowing much about the parliamentary calendar. "A year is not a year in the life of parliament," he said, explaining that parliament didn't have many sitting days.

Mr. Kelly suggested there is a dominant narrative of the notwithstanding clause as a denial of minority rights; he cited the Quebec's decision to use it and the debate about using it with respect to same-sex unions as examples of how this narrative developed. But Mr. Kelly said that using Section 33 to provide room for more debate over this issue would challenge the narrative of the notwithstanding clause being used to trample minority rights. If an issue such as this one cuts across party lines, it would likely have the support to satisfy the Manfretti two-thirds majority rule proposed to help ensure the clause is not being misused.

During a question and discussion period, Mr. Baker told Mr. Kelly that if ever there were an instance where the notwithstanding clause could have been justifiably used without further the denial of minority rights narrative, this would have been the time. He asked if the battle to ever use it outside of that narrative has now been lost? Mr. Kelly responded that the clause was essential to generating consensus during constitutional talks in 1981, and this should be the narrative put forward when it is being discussed.

Another question posed to panellists concerned whether the dialogue between the courts and parliament is working. Mr. Baker suggested 'dialogue' is not the best term to use and called it more of an inter-institutional interaction. He noted these are sometimes messy interactions, but they are necessary. Mr. Feldman explained the structure for references hasn't been debated in some time and that it would be worthwhile to investigate them and discuss them.

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