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Democratic Reform and Private Members' Business: Shifting Sands or Paradigms?

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Up until the mid-1980s, the law-making process in Parliament was dominated, if not monopolized, by the Cabinet. This is a general characteristic of parliamentary government based on the Westminster model. The Cabinet decides the position to be taken on all questions before the House, and party members are expected to vote accordingly or risk expulsion. The government's control of the lower house has also meant that its time is devoted to its own bills to the exclusion of all others.

This situation has produced a simmering discontent on the backbenches, expressed notably in the 1985 Report of the Special Committee on Reform of the House of Commons (the McGrath Report). However, one result of recent concern for democratic reform has been a new approach to the issue of private members' bills. This is an issue that should be of interest to all those – whether within or outside government – who are involved in the enactment of such bills.

The role of private members

The process for preparing government bills is complex and does not involve private members until the caucus briefings that take place just before introduction. Drafting must be approved by the Cabinet, and bills are drafted by the Legislation Section of the Department of Justice on instructions provided by departmental officials and counsel. The Privy Council Office manages the Cabinet approval process and supports the government House Leader in the parliamentary process.

Since the late 1980s, committees have been increasingly active in amending government bills, which are now rarely enacted without amendment, even substantial changes. A new procedure for referring a bill to committee before second reading was instituted in the 1990s, allowing greater scope for amendment, unconstrained by the approval of the principle of the bill. However, this procedure was rarely used.

Just as the preparation of government bills does not involve private members, the preparation of private members' bills takes place independently of the government. They originate in the offices of private members, are developed by their staff, often with the assistance of researchers from the Library of Parliament, and are drafted by legislative counsel in the Office of the House of Commons Law Clerk and parliamentary counsel.

Chapter IV of the *Standing Orders* of the House of Commons provides one hour of debate each day for private members' business. This is critical, since a particular item cannot proceed unless a certain amount of time is devoted to it. Given the number of private members and the limited

time allocated to their business, relatively few private members' bills can receive the attention of the House if any are to proceed through the parliamentary process.

At the beginning of the first session of each parliament, a random draw of the names of eligible members of the House is held to establish the List for the Consideration of Private Members Business. From that List, the names of the first 30 members who have either a motion or a bill on the Order Paper, is moved onto the Order of Precedence. The item at the top of the order is debated for one hour and then drops to the bottom to await another turn as the other items reach the top and are debated. A bill must be debated for two hours at second reading, at which time it is put to a vote on whether to refer it to committee. It typically takes six weeks of sitting days (two to six calendar months) for an item to work its way up the order to the top. However, members' items can be debated more quickly with a little help from their friends since members are allowed to change places on the order of precedence, as long as two weeks elapse between 1st and 2nd reading of a bill and there are at least 10 sitting days between the first and second hour of debate.

It is also worth noting that all private members' items are now votable, unless the Subcommittee on Private Members' Business decides otherwise. Bills and motions are deemed non-votable if they deal with matters outside federal jurisdiction, violate the Constitution, or concern questions that have already been voted on or are items of government business.

A new approach

Against this backdrop, the current government has laid out a new approach. The first element confirms a practice that was already in place, where the government determines its position on each private member's item. Ministers, working principally through their parliamentary secretaries, are responsible for ensuring that all members of Parliament are informed of this position for the purpose of seeking their support, either to oppose the item or to put forward amendments. Persuasion, not party discipline, should be used to advance the government's position.

The second element of the new approach establishes a system of votes:

- *one-line free votes*, on which all members are free to vote as they see fit;
- *two-line free votes*, on which the government takes a position that ministers and parliamentary secretaries are expected to support, but which other members are free to vote on as they wish; and
- *three-line votes*, on which all party members are expected to support the government as a matter of confidence.

Most votes will be one-line or two-line free votes. Three-line votes will be reserved for matters of fundamental importance.

A third element proposes that parliamentary committees should play an active role in policy and legislative issues, and places a high priority on ministers developing good relationships with committee chairs and members and supporting their essential work. To this end, bills subject to one-line and two-line free votes will routinely be referred to committee before second reading, allowing committees greater scope to amend them since the principle of the bill has not yet been approved.

Finally, the government has promised additional resources to support committees and private members in their law-making activities, particularly for legislative counsel services provided by the Office of the House of Commons Law Clerk and parliamentary counsel. Although resources may seem to be simply a matter of internal house-keeping, they are critical to an enhanced role for private members. The preparation of laws is a complex affair, demanding considerable effort and expertise in determining legislative policy and how to implement it. These resources have until recently been concentrated within the government. If committees and private members are to assume a larger role, they must have access to the resources needed to fulfill it effectively.

In its last two sessions, Parliament has enacted eight private members' bills, four of which made significant changes to the law.

What does it all mean?

Despite the reforms instituted in the wake of the McGrath Report, relatively few private members' bills have been enacted. And of these, most have addressed matters of relatively little legislative significance, such as the designation of public days or changing the names of electoral ridings. However, in its last two sessions, Parliament has enacted eight private members' bills, four of which made significant changes to the law. There are several lessons to be learned from this as a harbinger of more to come.

First, private members' bills on the order of precedence have to be treated with the same seriousness as government bills. Those interested in their subject-matter, whether in government departments or in the private sector,

must follow them closely and be prepared to advance their positions effectively. Parliamentary secretaries now act as the link between the caucus and their minister on these matters. The task of lobbying members is for the political staff of the minister and parliamentary secretary. However, government policy officials are responsible for supporting their minister and parliamentary secretary in analyzing and formulating a position on private members' items.

The second lesson is that success in asserting a position on private members' business depends on being able to marshal arguments that have broad appeal. Technical correctness is of little use if it cannot be translated into a comprehensible argument that speaks to members.

The third lesson is that it is often easier and more effective to suggest amendments than to oppose altogether a private members' bill. The objective should be to find a middle ground that substantially avoids any problems in the original proposal, while at the same time advancing its main purposes.

The experience with Bill C-205 is instructive. This bill proposed to enact a procedure for the revocation of statutory instruments on the basis of a report of a parliamentary committee responsible for scrutinizing them. The bill was based on a procedure that was already in place under the *Standing Orders* but lacked legal effect and was limited in scope to statutory instruments made by ministers.

The government initially opposed Bill C-205 on the basis that it would have applied to many instruments of a non-regulatory nature and did not allow enough flexibility in preparing for revocation. A compromise reached at second reading saw the bill amended by unanimous consent to narrow its scope to regulations (as opposed to the broader category of statutory instruments) and provide a role for regulation-makers in revoking them. In addition, the government addressed some of the committee's underlying concerns about delays in government responses to its inquiries about regulations.

The experience on Bill C-205 suggests that the government and private members can work together effectively in the enactment of their bills, and it may help address concerns about resources for committees and private members. Beyond the resource considerations, it may also avoid the debilitating conflict that often characterizes the legislative process and leads to results that are less satisfying for all concerned, especially at a time when Canadians are expecting more from their government and representatives.

So what does it all mean? The role of elected members of Parliament – including those in opposition or on the backbenches – lies at the core of democracy. Much remains to be seen, but one thing seems certain: the sands, if not the paradigms, are likely to keep shifting.

International Human Rights Law and Domestic Law

By Johanne Levasseur, General Counsel, Human Rights Law Section

International human rights law is gaining steadily in importance, both domestically and internationally. Not only are Canadian courts referring more often to its norms, but Canada's actions are coming under close scrutiny by international bodies more frequently. Discrepancies between international and domestic law are brought to the fore by interested parties. The purpose of this article is to provide some basic information for a better understanding of international human rights law.

Canada has agreed to be bound by the six primary international human rights treaties: the *International Covenant on Economic, Social and Cultural Rights;* the *International Covenant on Civil and Political Rights;* the *International Convention on the Elimination of All Forms of Racial Discrimination;* the *Convention on the Elimination of All Forms of Discrimination Against Women;* the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;* and the *Convention on the Rights of the Child.* The agreement to be bound by a treaty flows from a Cabinet decision authorizing the Minister of Foreign Affairs to sign and ratify an international instrument. The decision itself is based on the Royal Prerogative and does not require authorization from Parliament.

Parliament gets involved when legislation is required in order for Canada to fulfil new international obligations. For example, before becoming a party to the *Convention Against Torture,* Parliament amended the *Criminal*

Code to criminalize torture, as required by the Convention. With respect to the other obligations of the Convention, the government considered that they were complied with through existing legislation, programs or practice. In the human rights field, one rarely encounters legislation passed specifically to further an international convention. Rather, human rights treaties are typically adhered to on the basis that existing laws already conform to the treaty obligations and therefore no new implementing legislation is required. Before reaching this conclusion, the government conducts a thorough assessment of the scope and content of a treaty's provisions and identifies the domestic laws and practices that provide conformity. However, the government assessment is not made public, in whole or in part. Generally, treaties on human rights do not require states to have domestic legislation that reproduces the exact wording of the treaty in question. Such an approach is encouraged, however, because the legislation will then clearly provide for recourse in many instances where states are in breach of their obligations.

In many European countries, international obligations automatically become part of domestic law, and action may often be taken directly before domestic tribunals in the event of a breach. Canada's lack of legislation incorporating international treaties does not mean we are failing to comply with international obligations, though the situation has sparked a great deal of criticism from experts and NGOs. In Canada, as in a number of other countries with a common-law tradition, domestic courts cannot directly hear petitions to recognize rights guaranteed by non incorporated treaties. In most cases, however, domestic human rights instruments such as the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights* and anti-discrimination legislation guarantee similar rights as international instruments; but the symmetry is not always perfect. For instance, in *Suresh* v. *Canada (Minister of Citizenship and Immigration)* (2002), the Supreme Court recognized that international law prohibits in all cases deportation to a country where a person faces a substantial risk of being tortured – but the Court also found that the Canadian Charter could allow deportation to face torture in exceptional circumstances.

That being said, human rights treaties can certainly have an impact before the courts. The Supreme Court has stated that international law norms are a relevant, persuasive source of interpretation of the *Canadian Charter of Rights and Freedoms*, especially for those provisions that flow from international obligations entered into under human rights conventions. This is no surprise, considering that Canada's international obligations – particularly under the *International Covenant on Civil and Political Rights* – were a source of inspiration for the experts who drafted the Charter.

International norms also play a role in the interpretation of ordinary legislation and the exercise of administrative discretion. In *Baker* v. *Canada (Minister of Citizenship and Immigration)* (1999), the Supreme Court stated that "the values reflected in international human rights law may inform the contextual approach to statutory interpretation and judicial review." The Court went on to note that the legislature "is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred" (quoted from R. Sullivan's *Driedger on the Construction of Statutes*).

The *Baker* decision leaves some questions unanswered, however. For example, does the presumption of compliance with international law not imply more than just consideration of values and principles? What distinction should be drawn between the treaties to which Canada is a party and which bind it internationally and those to which it is not a party? What distinction should be drawn between norms that are enforceable, particularly in treaties that bind Canada, and those that are unenforceable, such as minimum principles and declarations? What is the impact of customary international law? (Custom refers to general practices that are accepted among states as law and are considered binding for all, such as the recognition that no state can ordinarily be prosecuted in the courts of another.)

Whatever role is ascribed to international law with respect to domestic law, Canada is still liable internationally for any breach of its obligations. Since human rights treaties tend to govern relations between a state and its own people, traditional vehicles that apply in other contexts, such as trade treaties, are difficult to apply here. For example, it would be hard to take reprisals in such a context. Human rights treaties nonetheless do provide for means of monitoring whether the states party to them have fulfilled their obligations.

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Two main mechanisms are used. The first requires all states parties to submit periodic reports on action taken to fulfil treaty obligations. These reports are then presented to a committee of experts elected by the states parties, which issues a set of observations along with recommendations for future action. These observations can provide invaluable guidelines for policymakers. (The Canadian Heritage Web site www.pch.gc.ca provides periodic reports of the Government of Canada and committees' concluding observations.

The second monitoring vehicle is optional. It involves providing individuals under the jurisdiction of the state party with an opportunity to file individual complaints with the committees of experts. Canada has accepted the individual complaints mechanism with respect to the *Protocol to the International Covenant on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.* Canada may also be the subject of complaints to the Inter-American Commission on Human Rights for alleged violations of the American Declaration of the Rights and Duties of Man. In all cases, complainants must first exhaust all domestic forms of recourse available to them. Decisions rendered by these bodies are not binding on states, but domestic courts may lend them considerable weight – and they may attract media interest.

Crown Confidentiality Agreements with Third Parties – Useful or Useless?

By Kris Klein, Counsel, Civil Litigation Section

As information itself becomes the most valued commodity in our society, it is not surprising that the Crown is being placed under greater and greater pressures to keep third-party information secret. At the same time, though, the government is increasingly expected to demonstrate accountability and transparency by making all its information holdings publicly accessible. What's the public servant stuck in between these two tensions supposed to do?

What's more, the government has to work within a framework of rules and regulations that private-sector parties may not be subject to or even aware of. As a result, approaching the issue of the inherent weakness of confidentiality agreements with government is sometimes difficult. Here are a few tips for dealing with an organization that wants the government to promise confidentiality.

While the *Access to Information Act* gives a right of access to government-held information, it still recognizes that some things need to be kept confidential. You can always look to the Act, and to decisions that have interpreted it, to find out if the information you're dealing with falls under the legal definition of confidential. There are four situations where the law recognizes that third-party information must be kept from disclosure:

- where the information is a trade secret;

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- where a third party has supplied a government institution with financial, commercial, scientific or technical information which the third party consistently treats as confidential;
- where the information, if disclosed, could reasonably be expected to result in material financial loss or gain to a third party, or to prejudice its competitive position; and
- where the information, if disclosed, could reasonably be expected to interfere with a third party's contractual or other negotiations.

How do you determine whether the information is really confidential, as in the second situation above? Keep in mind that the standard to be applied is an objective one, while subjectively all the parties must have consistently treated the information as confidential. Further, the parties must be in a situation or relationship where the circumstances give rise to a reasonable expectation of confidence and the information is not easily available to the public. Just as important, the information must be supplied to a government institution directly by a third party. A government official's observations of a third party would not qualify; likewise, negotiated terms of a contract are not normally seen as information supplied to the government. Lastly, you must ask whether the public interest in the relationship between the government and the private entity will benefit from the secrecy, or whether the public interest in transparency is the greater interest.

Because of the law, the government cannot give blanket promises of confidentiality. To do so is actually dangerous, and it opens the door to liability if the government gives a promise to keep something confidential and is later forced to disclose it. Even in those situations where such a promise is probably safe, it should always be accompanied with a caveat that leaves the door open for the possible disclosure – for example, a phrase such as "the government undertakes to keep the information confidential and will not disclose it unless otherwise required by law." This can protect the government if it ever turns out that the law does require the disclosure; moreover, it alerts the third party that the government is prepared to treat the information as confidential but that it can give no guarantee.

Finally, a promise of confidentiality does not automatically negate disclosure obligations. In fact, the Federal Court has remarked in a number of instances that the government cannot "contract out" of its obligations to disclose information simply by entering into confidentiality agreements with third parties. It is true that the agreement will be one piece of evidence tending to prove that information should not be disclosed; but there may also be a whole host of other evidence in favour of disclosure. The ultimate decision to disclose information requested under the *Access to Information Act* will depend on more than whether or not a confidentiality agreement was signed.

In short, while government promises to keep things secret and other forms of confidentiality agreements clearly have their benefits, keep in mind that they can ultimately go only so far.

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