Fairness in Committees

by Rob Walsh

On April 10, 2008 the House of Commons found Barbara George, Deputy Commissioner of Human Resources for the Royal Canadian Mounted Police, to have made misleading or false statements in testimony to the Standing Committee on Public Accounts during its hearings on the administration of the RCMP pension and insurance plan. The Committee recommended unanimously in its Report tabled on February 12, 2008 that she be found in contempt but that no further action be taken. The decision raised questions about whether the Deputy Commissioner had been treated fairly, about the relationship between the Canadian Charter of Rights and parliamentary privilege and about the role of parliamentary committees in carrying out investigations. This article points out some important differences between parliamentary proceedings and court proceedings.

There has been much public comment recently about how the House of Commons Standing Committee on Public Accounts ("PAC") did not treat its witness, former RCMP Deputy Commissioner, Barbara George, fairly or in accordance with the principles of natural justice. Although natural justice is a legal term that is usually applied to courts or tribunals, arguably it might also apply to parliamentary committees, *mutatis mutandis*. Fairness is a lesser standard.

We should all act fairly in our dealings with others, especially when discharging a public duty or exercising a public authority. House committees recognize the importance of acting fairly and are generally quite concerned that their witnesses be treated fairly. Fairness and due process may not seem evident from the often unruly and nasty partisan exchanges between committee members or between committee members and the committee chairperson but this is a different issue; we are concerned here only with the treatment given to a person who appeared before a House committee as a witness.

Some take the view that parliamentary committees should conduct their proceedings much as courts or public inquiries do, that is, requiring a prior exchange of documents between opposing witnesses or allowing the cross-examination of opposing witnesses. However, there are differences between parliamentary committees and courts or public inquiries and one has to keep these differences in mind. Secondly, one has to look at what "natural justice" or "fairness" mean in the context of a parliamentary committee proceeding.

Some would argue that we look at the *Canadian Charter of Rights and Freedoms* for indication of the rights enjoyed by every Canadian vis-à-vis government or governmental bodies or authorities. These rights are meant to ensure fair treatment.

Section 7 of the *Charter* requires that the "principles of fundamental justice" be applied in any legal process that might deprive a person of "life, liberty and security of the person." This would not apply to a witness. However, when a committee indicates to a witness that her testimony seems untruthful and calls upon her to explain her testimony or face citation by the House for contempt, one might argue that the witness is no longer merely a witness but a person faced with a possible charge (contempt) for which a penalty could be imposed (incarceration). If we applied section 7 to the PAC proceedings, how would we apply the principles of fundamental justice? What is meant by "principles of fundamental justice" in section 7?

The term "fundamental justice" under section 7 has been held[1] by the Supreme Court of Canada to be more than the traditional common law principle of natural justice. The Court said that the principles of fundamental justice are to be found "in the basic tenets and principles, not only of our judicial process, but also of the other com-

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ponents of our legal system" and that this term "cannot be given any exhaustive content or simple enumerative definition." Not very helpful for our purposes, except to note that the Court refers to "our judicial process" and "our legal system." Proceedings of the House of Commons and its committees are not part of either judicial process or the legal system of this country.

Fundamental justice includes natural justice, a well established principle underlying all legal proceedings where the decision-maker is acting in a judicial or quasi-judicial manner. We can look to this legal rule for some specific content on fair process. Parliamentary committees, of course, do not act in such manner. Nonetheless, we might apply natural justice to committee proceedings as a test of fairness.

There are two principles underlying natural justice: the right to be heard and the right to an impartial decision-maker. The witness George was given a hearing. Impartiality is an important component of natural justice. The law does not require an actual demonstrated lack of impartiality or, conversely, the actual, demonstrated presence of bias. One need only show that one might have a "reasonable apprehension of bias," an objective test.

The standards for reasonable apprehension of bias may vary depending on the context and the type of function performed by the decision-maker, in this case a parliamentary committee. A decision-maker must consider the matter at issue with an open mind and weigh the particular circumstances of the case free of stereotypes or other prejudicial assumptions. The apprehension of bias must be a reasonable one. The test is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would this informed person more likely than not, think the decision-maker (PAC) did not consider the matter fairly.

Public officials have a duty to act fairly, that is, a person who will be directly affected by a decision ought to have an opportunity to make a submission to the decision-maker and to know the case that must be met for a favourable decision. Fairness is a general procedural requirement without imposing any particular procedural requirements. The particular procedural requirements in each case will depend on several factors, such as the nature of the decision to be made, the status of the decision (whether determinative of the issue, whether appealable), the importance of the decision to the individual affected and the legitimate procedural expectations of the individual affected.

With respect to the George matter, the decision to be taken was whether the PAC had received false testimony from the witness. The decision to be taken by the PAC would not be final, but rather would depend on concurrence by the House.

No doubt, the issue of truthfulness was important to the witness George, but not any more important than it would be for any other witness giving testimony to a court, tribunal or parliamentary committee. Of course, it's damaging for a witness to be charged by a parliamentary committee with untruthfulness, particularly someone holding a senior position with a public institution such as the RCMP. But untruthfulness by a witness before a parliamentary committee is also damaging to the greater public interest, particularly from someone holding a senior position in a public institution such as the RCMP. The importance to the witness of being taken as truthful must be weighed against the importance of truthfulness to the public interest.

Finally, the witness had no basis to expect that the PAC proceedings would be any different than the usual and time-honoured parliamentary practice in respect of committees. The cross-examination of a witness by a lawyer acting for another witness has never been allowed, either in a court or a committee proceeding. Nor is it reasonable to expect that no member of the committee would ever comment unfavourably on a witness' testimony.

Section 11 of the *Charter* sets out nine process requirements in respect of cases where a person is charged with an offence under the *Criminal Code* or other penal statute[2]. Clearly, committee proceedings are not proceedings of this kind, at all. Nonetheless, section 11 provides an authoritative source of what, at law, constitutes due process.

The first requirement is that the person be informed of the offence without unreasonable delay. The record shows that Ms George was so informed and in writing.

Second, the person is to be tried in a reasonable time. This requirement was met as the witness was heard only a few weeks after being informed of the committee's concerns. There was no complaint from the witness that she did not have enough time to prepare her "defence."

Third, the person is not to be compelled to testify against himself or herself. This requirement was also met as the witness was not compelled to appear again before the committee but only invited to do so. A person charged with an offence has the right to testify, but cannot be compelled to do so.

Fourth, the person is to be presumed innocent until proven guilty and to be tried by an impartial and independent tribunal in a public hearing. The PAC did not make its determination until after witness George had had an opportunity to explain her earlier testimony.

While some members of the committee may have appeared to have developed settled views on the truthfulness of the witness before she appeared before the committee, others may not have settled on the outcome. Given that it was a unanimous decision of the committee to recommend contempt to the House, it seems to me unreasonable to say that because some of the committee members might have pre-determined the issue of truthfulness, that the committee as a whole was not open-minded in approaching a decision of the matter of truthfulness. Presenting to the witness allegations of untruthfulness, as the committee Chair did, is not evidence of closed-mindedness but rather a necessary step in fairness to the witness, that is, informing the witness of the case against her, the case she has to meet. The committee gave the witness a hearing where she was at liberty to fully explain her earlier testimony.

On the matter of independence, the peculiarity of the matter at issue is relevant here. We are talking about untruthful testimony given under oath by a witness. A judge in a court may decide that a witness has been untruthful, even where the judge is the one before whom the witness was untruthful. It is not uncommon for a judge to publicly characterize a witness' testimony as untruthful. Usually, the judge would simply say "I don't believe witness X" rather than use more damning language (although the judge could do so). This determination is integral to the judge's task of weighing the evidence before the court. If a judge in a court of law is entitled to say a witness has been untruthful, why can't a parliamentary committee do so? Also, a witness in court does not have the right to appeal the judge's finding about the truthfulness of the witness' testimony. Why can't this also apply to parliamentary committees and the House?

The remaining 5 requirements of section 11 clearly would not apply to parliamentary committees.

It's of interest to note here that the Standing Committee on Access to Information, Privacy and Ethics was presented with lawyerly due process arguments from counsel for one of its witnesses in the so-called Airbus matter. The legal counsel demanded an exchange of documents between his client and another witness who was making allegations against his witness. An exchange of documents between the parties is required in a court action. This happens before the trial. The lawyer was treating the committee proceedings as if they were a court proceeding and his client was a party to the legal action. His client was a witness only.

Parliamentary committees do not adjudicate on legal matters as this is the exclusive business of the courts. Committees do not act as public inquiries on behalf of the Executive Branch in furtherance of its responsibility for administering and enforcing the law. The constitutional function of the House and its committees is to hold the Government (the Executive Branch) to account, not to act on its behalf in the discharge of its duties.

Parliamentary committees are also charged with studying such matters (within their mandates) as warrant a public review, with a view to possibly recommending changes in the law or in the practices of the Government or to simply bringing a matter to the attention of Canadians generally.

In addition, and not to be underestimated for its importance, parliamentary committees provide an opportunity, in a public proceeding, for the governed to face their governors and to tell them what they think on the matter under consideration. When reports emerge in the media that put an individual, whether a public official or former public official or a private citizen, in a bad light on a matter of public interest the individual should have an opportunity to defend himself or herself, in his or her own words, without the technical limitations and adversarial challenges of a legal proceeding of a court or a public inquiry. It's called free speech, protected by the law of parliamentary privilege.

One might also see the differences between parliamentary committees, courts and public inquiries in terms of their objectives. Parliamentary committees do not seek to establish the truth on a matter in some final or authoritative manner nor to effect justice on the matter at issue but rather to cause the relevant issues to be aired and concerns to be identified for which recommendations might be made by the committee for further study by the Government with a view, perhaps, to introducing remedial legislation or regulations and/or modifications to Government practices and policies.

Court proceedings, seek justice, whether criminal or civil. Legal rules on the admissibility of evidence may cause relevant facts to be excluded from consideration because it would be unjust were the facts to be admitted in evidence: justice is more important than truth.

For public inquiries, however, factual truth is the primary objective. The proceedings are much more disciplined than those of a parliamentary committee and include cross-examination of witnesses by commission counsel or lawyers having standing on behalf of parties who have a recognized interest in the matter under inquiry. In the end, the Commissioner conducting the public inquiry settles the relevant facts and may or may not make public policy recommendations depending on the terms of the mandate from the Government. The relevant facts are determined based on sworn evidence that is given close scrutiny. Justice *per se* does not have priority

in public inquiries because no person is on trial. Facts have priority.

The George matter arose in the course of the PAC hearings on the administration of the RCMP insurance and pension plans. The PAC was discharging its duty in respect of matters raised by the Auditor-General, an Officer of Parliament, in a report to the House. There can be no question about the propriety of this undertaking by the PAC.

I have not reviewed the evidence before the PAC with reference to the truthfulness of witness George. This is not relevant to the issue of fairness as a process issue, which is my focus here. The substantive issue of whether or not the witness George misled the PAC is a matter for the PAC and the House to determine and not one on which parliamentary counsel can comment. In human terms, as we all know, the test of one's truthfulness lies in the eyes of the person to whom one is speaking; likewise with a parliamentary committee. In legal terms, this determination requires fairness in the process. In this case, in my view, the process was fair, even when measured by legal standards that don't apply, and as fair as it ought to have been in view of the nature of the proceedings.

The power of Houses of Parliament to punish for contempt parallels the same power enjoyed by the courts. In a 1992 case, the Chief Justice of the Supreme Court explained the court's powers as follows:

> Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.[3]

For a parliamentary committee, one might substitute "the public interest" for "the rule of law."

Finally the George contempt action is not , as many have said, the first contempt since 1913. In November 2003 a witness before a committee of the House was found unanimously to have provided misleading information. The committee was of the view that the witness was in contempt. The committee's action was described in the House as "an exercise in fulfillment and in support of the institutions of this House." The Government House Leader offered this suggestion to the Speaker:

> I suggest it is essential that in your ruling, Mr. Speaker, you should make it very clear to every citizen who may come before a committee of the House the responsibilities that he or she has for providing that committee, and therefore by extension this House, with full and truthful information and the consequences that may follow from a failure by anyone to uphold those responsibilities.[4]

In his ruling finding a *prima facie* breach of privilege, Speaker Milliken made this comment:

> Committees of the House and, by extension, the House of Commons itself, must be able to depend on the testimony they receive, whether from public officials or private citizens. This testimony must be truthful and complete. When this proves not to be the case, a grave situation results, a situation that cannot be treated lightly.[5]

The breach of privilege was then made the subject of a motion to the House, as follows:

> That this House find [the witness] to have been in contempt of this House, and acknowledge receipt of his letter of apology, tabled and read to the House earlier today.[6]

This motion was adopted unanimously by the House.

Notes

1. Re: *B.C. Motor Vehicle Act*, 1985 CanLII 81 (S.C.C.).
2. 11. Any person charged with an offence has the right:
   (a) to be informed without unreasonable delay of the specific offence;
   (b) to be tried within a reasonable time;
   (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
   (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
   (e) not to be denied reasonable bail without just cause;
   (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
   (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
   (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
   (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.
3. *United Nurses of Alberta v. Alberta (Attorney General)*, 1992 CanLII 99 (S.C.C.).
4. House of Commons Debates, *Hansard*, November 5, 2003 (Volume 138, no. 151, 2nd session, 37th Parliament).
5. *Ibid.*, No. 152, November 6, 2003.
6. *Ibid.*