CSPG conference – Parliament and the Courts

The Canadian Study of Parliament Group's annual conference explored the important, intricate and evolving relationship between Parliament and the Courts. Increasingly, Courts turn to the parliamentary record to inform their decisions, while parliamentarians cite judicial pronouncements as the reason for action or inaction. Four panels were organized to examine when and how Parliament seeks to inform the Courts, how the Courts understand Parliament, the role each institution plays within Canada's constitutional architecture, and the many facets of this relationship – from reference powers to the notwithstanding clause.

Will Stos

How the Courts Understand Parliament

Vanessa MacDonnell, an associate professor at the University of Ottawa, and Jula Hughes, a professor at the University of New Brunswick co-presented on how the courts have looked at parliament's "duty to consult" Indigenous Peoples prior to enacting legislation affecting them. MacDonnell noted the recent Supreme Court of Canada decision on Mikisew Cree First Nation v. Canada found there is no duty to consult at any stage of the legislative process.

She said that since 1982 there had been an idea that parliamentary sovereignty was now a bounded concept where there are competing interests. However, this case reasserted parliamentary sovereignty. The decision noted the duty to consult only applies to executive action. She views this ruling as a mistake and contends there is a way to separate constitutional principles and reconcile them so we can have a discussion of how the duty to consult is judiciable. However, the Court's mistake means parliamentary sovereignty takes prominence.

Hughes suggested that not all judges think about parliament in the exact same way, but they do agree that ultimately parliament should be treated as a black box (or at least a grey box in the view of some judges) that you can't really look into. She said it was surprising all justices made an attempt to settle the question in the Mikisew Cree case right away when this was a 'first look' case. These actions are not usually how common law works with respect to big questions. Hughes also suggested the judges didn't look at Treaty 8 fully because it imposes positive obligations on the federal government (not just not to interfere, but in the original treaty the government must 'provide munitions and twine'). Hughes concluded by noting some of the practical implications of a duty to consult (for example, limited parliamentary time to consider legislation).

Kareena Williams, a lawyer at Grant Huberman Barristers & Solicitors, represented a northern British Columbia First Nation in the SCC case. They asked to intervene to protect existing agreements and future agreements because there were questions about the value of agreements if one party can make changes without consulting/agreement of others. Williams compared the SCC decision to a line in the movie *Love Actually*. Billy Bob Thornton's character tells Hugh Grant: "I'll give you everything you want, as long as I want to give it."

Williams stated the court should not side with the Crown to assert paternalistic control of Indigenous people because that does not foster reconciliation. She wondered why First Nations are being told to make agreements rather than going to court if those agreements can be changed by the Crown. Although the government is already consulting on legislation, the approach the court has taken is 'wait to see whether your rights are infringed, then come back to court.' William said this decision promotes a 'trust us' philosophy that she finds troubling.

Will Stos is the editor of the Canadian Parliamentary Review.

Panel: How the Courts Understand Parliament

Saleha Hedaraly, a professor in the University of Montreal's Faculty of Law, explored how courts interpret a legislator's intentions. She said the law is a communication activity and the key word to retain is "text". The "text" is a form of communication that is interpreted. The courts must mediate the communication.

Why would courts look at the legislator's intent? Hedaraly explained that while we think the law's intent is clear, the interpretation may not be the same. In other words, the communication is not received the same way and there may be a grey zone. "Interpretation is a game of assumptions," she told the audience, and while some argue we must look at the words, others might suggest we should look at the goal.

Hedaraly concluded by noting that legislative intent must look at the text, the context, and the goal of a law by exploring complementary arguments: historical arguments, authority, jurisprudence, and common sense (for example, is the law absurd?) "What's abstract for you may not be abstract for me.," she said.

Philippe Dufresne, a law clerk and parliamentary counsel at the House of Commons, asked why courts are more or less comfortable with not addressing or settling a matter and why we reach different decisions on parliamentary privilege? He noted a trend of courts reviewing the executive branch. The more an executive decision affects 'strangers' or non-members, the more likely the court is to look at the case.

When a court feels that potential electoral remedies are realistic, they are more inclined to find for the sharing of power. Dufresne explains that privilege is "immunity from judicial review" rather than immunity from the law itself. He concluded by looking at the recent court decision on prorogration and compared the court's reasoning to Canada's Charter test. Does an action cause "irreparable harm" – can you undo it? If not, injunctions could be granted.

Sarah Burton, a doctoral candidate in the University of Ottawa's Faculty of Law, spoke about judicial review when a dispute about democracy arises by looking at the Supreme Court of Canada's recent voting rights decision *Frank v Canada (Attorney General)*. She said the law of democracy is a fascinating context in which to consider the role of deference by Courts because it forces lawyers, judges and other stakeholders to reconsider why we give, or do not give, deference to elected lawmakers.

One approach (rights theory) suggests courts should stick to individual rights and balance them against government interests. A competing view is that politicians cannot be trusted with electoral law because of self-interest. This view calls for judges to step up to be referees, look back from the individual case and look to Canada's communal values (structural theory).

Burton pointed to enfranchisement cases as an interesting site for this debate because they are a location where you can see these competing theories

existing in tension with one another, and they are an area where you can see a clear shift in the direction of a structural approach. She explored the *Frank* case, which asked if the 5-year residency rule was constitutionally valid in a federal election. The majority found that it was not. They believed that derogations from core democratic rights demand strict scrutiny and they are only permissible with concrete evidence of harm. In dissent, two justices argued that lawmakers should be entitled to deference when legislating on matters of political community. In Burton's view the majority in Frank was influenced by structural theory, without acknowledging it as such.

She concluded by stating that the trend toward the structural approach brings a risk of a more American judicial system and major debates over the individual justices, but in the case of democracy rights, if politicians are using parliament for self-interest they don't have a moral leg to stand on.

Comparative Perspectives on the Complex Relationship Between Parliament and the Courts

Paul Daly, chair in Administrative Law and Governance at the University of Ottawa, presented a working paper on how courts protect constitutional principles by acting as guardians of these principles within legislation.

He outlined numerous constitutional principles that are considered carefully by courts, and particularly the Supreme Court of Canada, when evaluating cases. First, there is the principle of participation. In order to make legislation, it must go through the ordinary parliamentary process that opens up opportunities for debate in parliament (ie. parliamentary committees) and in the wider community (calls to MPs, water cooler talk, social media). He noted that MPs are conduits in this regard. Even private members bills, even if they rarely become law, can help set the agenda.

Another constitutional principle is individual or group self-realization. Courts are anxious to protect the rights of individuals (and in administrative law to protect them in managing their own affairs). In the UK there is a hybrid procedure – due process rights are protected when a law specifically applies to a group. There is the principle of electoral legitimacy or representativeness. For example, the elected lower house is seen as having more legitimacy for creating money bills. And finally, he observed there is a principle of federalism which balances regional difference and creates jurisdictional distinctions.

Daly concluded by noting that even if the courts see themselves as protectors of the constitution, there is a protective role within the legislative process. Law clerks and parliamentary clerks have a role in drafting bills and moving them through parliament.

Panel: Comparative Perspectives on the Complex Relationship Between Parliament and the Courts

Panel: A Discussion on the Reference Power

Alexander Horne, a legal advisor at the House of Lords, presented a case study on parliament, human rights and the courts by examining prisoner voting rights. In the UK prisoners are banned from voting in the *Representation of the People Act, 1983*, as amended. There was partial enfranchisement of prisoners convicted of misdemeanors between 1948-1969 and the ban on voting does not apply to prisoners on remand.

Three prisoners brought a legal challenge in 2001 but lost in the High Court. (It didn't reach the House of Lords or what is now the Supreme Court). One prisoner took his case to the Strasbourg Court. The Grand Chamber of the European Court of Human Rights ruled the ban on voting for all serving prisoners contravened Article 3 of Protocol 1. The UK tried to argue there is rational thought in its approach and that its law was not a blunt instrument. Not all people convicted go on to become prisoners; there is a high bar, and the UK government argued that should be enough. The court disagreed and said they saw it as a breach of human rights. European Court rarely brings monetary damages in these types of cases, but with many cases adding up there was a concern that they may start.

Horne outlined the UK government's response. First there was a debate about proposals to remedy the backlog of cases. One proposal was to re-legislate the law and challenge it in Strasbourg as an issue of parliamentary sovereignty. In 2013 Horne was part of a panel that proposed the government should just go back to the pre-1969 situation of limiting the term to under 12 months and possibly letting prisoners within the last six months of a long-term sentence be included too. The government did not respond substantively to this proposal.

Following the 2017 general election, the government proposed to clarify prison service guidance to allow those on temporary licence and home detention curfew to vote. This affects a small minority of prisoners, but the European Court accepted it as enough.

Horne concluded by outlining some consequences of this case. The UK's non-compliance with the judgment for 13 years was a clear violation of the rule of law. But it also sparked a discussion about judicial overreach in the UK which has never been resolved. The UK Government's threat to legislate in 2012 may have encouraged other states (for example, Russia) towards non-compliance with ECHR judgments. The compromise solution leaves open the risk of new cases and new judgments against the UK. And finally, the UK's domestic procedures (supervision by the Joint Committee on Human Rights; remedial orders, cases before the domestic courts, etc.) proved unable to remedy the breach. He noted there is also a potential for a differential approach to rights and the issue of prisoner voting across the UK (for example, Scotland).

Gabrielle Appleby, a professor in the Law Faculty at the University of New South Wales, provided an overview and analysis of the 2018 Australian High Court's constitutional term by considering the 2018 developments with reference to their inter-institutional context; in other words, how the Court's jurisdiction and doctrinal development do and should impact the jurisdiction and behaviour of the other branches of government, including the Australian Parliament. She explored Chapter 3 provisions (separation of powers) and noted that constitutional issues are dominating to the detriment of legislative debate.

Appleby said Australia is "a rights poor jurisdiction" in many respects in terms of the constitution. However, in some areas the court has established a structured proportional test to examine how to balance rights to political communication. She explained that the idea of legislative intent and the context of parliamentary debates have been informing the doctrine of deference. Some observers have even advised the writers of legislation to include discussion on the structured proportionality test in second reading debate to clarify intent for future court cases.

Appleby looked at two cases where parliamentary debate and committee presentations were used heavily in a court ruling and explained she's trying to develop a spectrum of restraint/deference to determine how and when courts intervene and why.

A Discussion on the Reference Power

Kate Puddister, an associate professor at the University of Guelph, used a quirky chicken/egg industry dispute to explain reference powers. She reported that marketing board quotas in Ontario and Quebec had used legislation to prevent other provinces from being competitive in the marketplace. Manitoba passed similar legislation to that found in these provinces in order to bring a reference to the court. The court ruled the legislation *ultra vires*. Puddister observed this resulted in a remarkable situation where in order to win access for its chicken/egg producers, Manitoba had to lose in court.

Puddister noted reference cases involve the Governor in Council referring proposed legislation to the Court for a hearing and consideration of important questions of law or fact. She said there had been notable increases in reference questions during the Great Depression (especially by the federal government), but also in the 1980s (when the provinces used the tool substantially more often).

The vast majority of reference questions deal with division of powers (Section 91 or Section 92), the *Charter* (though not as often), and the *Constitution Act*. There are also many examples of cross government references (a province refers federal legislation for review or vice versa). Alberta and Quebec use this procedure most often.

Panel: The Notwithstanding Clause: When Legislatures Want the Last Word

In most legislation cases, the courts find the legislation is valid (46.4 per cent) but 20.6 per cent and 15.5 per cent are found to be invalid or potentially invalid in full or in part, respectively. About 65 per cent of references are abstract, however, and most references come from majority governments (coming from secure position).

Puddister stated that government would use references because: 1) they provide a solution to a problem, 2) it's a strategic advantage to challenge another government before an actual case in in court. 3) it avoids blame or credit claim, 4) it uses the authority of court to protect a law from further challenges, and 5) it signals displeasure toward another government.

She concluded that courts are powerful because they are seen as independent, but if they are used too often they come to be seen as more politicized.

Radha Persaud, a course director in Political Science at York University, explored the political and legal role and effects of references by focussing on Canada's federal character.

He asked if courts and legislatures respect the basis for the other and wondered if courts have become concerned by how they are being used and the longer-term effects on Canadian constitutional arrangements. He stated that reference cases have become more political in their reason as opposed to questions of law. If the court is being asked for 'opinions' as opposed to 'decisions' about constitutional reform, what will this mean for national stability? In the cases he mentioned in his presentation, the court had been prescriptive and was willing to be constitutionally generative. These included: a 1981 reference on the asymmetrical patriation of the constitution, a 1982 reference where the court ruled it does not have a veto as a matter of convention, a 1990 secession reference, the *Clarity Act* and the recent reference on Senate Reform where the court clarified constitutional terms and the scope of constitution on the Senate.

Persaud concluded by offering that the reference mechanism has freed the supreme court from dealing with the minutae of cases while being able to speak broadly on important matters. Whether this is a good or bad thing depends on your position.

Charlie Feldman, parliamentary counsel for the Senate of Canada, explored other types of references to the courts. There haven't been any private bill references to the Supreme Court of Canada since the 1880s, but of the three references he found, the court dealt with them in as little as two days and didn't offer much or any comment on them. They dealt with incorporations of organizations or businesses.

Feldman said Ontario's Legislative Assembly has a standing order to refer estate bills or part of a bill that contains an estate provision to the Commissioners of Estate Bills after first reading. These justices then provide a report to be considered by parliament. He noted there is a curious circular loop in that if there is disagreement the court refers offending passages for deletion in committee. Is the court dictating to committee? What if committee refused?

He also examined references to Tax Court, federal tribunals, and Attorney General of Canada references, and looked at interesting cases where parts of legislation were deemed not to come into effect until proclaimed by Governor in Council after sections had been referred to the Supreme Court. This latter concept was addressed by a House Speaker's Ruling on October 16, 1975, when he stated: "It seems to me to be repulsive to any act of Parliament that it should contain within it a condition that the Act must be referred in any part or in any particular to any other body for interpretation before it comes into force."

Feldman concluded by providing options for parliamentarians interested in reference power, including raising the matter in debate, introducing the idea in an Opposition Day motion or committee report, or using a hoist to delay the bill and asking that the subject-matter be referred by the Governor in Council to the Supreme Court.

The Notwithstanding Clause: When Legislatures Want the Last Word

Yuvraj Joshi, a doctoral candidate at Yale University, explored the implications of the notwithstanding clause's recent revival for democratic dialogue. The success of constitutional arrangements, he argued, depends not merely on who has the last word, but how that last word is exercised, and whether these arrangements facilitate meaningful dialogue between courts, legislatures, and (crucially) members of a polity. He suggested that by focusing on inter-institutional dialogue between the legislature and the courts, we risk missing the most important piece of the democratic dialogue puzzle: the people, and especially those vulnerable and marginalized people who need both the legislature and the courts to have their rights vindicated and their voices heard.

Joshi explored these concerns about democratic dialogue by discussing instances when the notwithstanding clause was considered in Ontario and Quebec. He stated that the premier's response to a ruling that Ontario's "Better Local Government Act," unjustifiably violated the Charter's guarantees of freedom of expression proposed to discredit the court by making an argument about the democratic illegitimacy of courts to question legislative actions. He noted a change in tone when the higher court ruled in the government's favour.

In Joshi's view, the premier's words suggest the only dialogue of significance is the one between an electoral majority and their elected representatives, and any respect the courts deserve is contingent on their reaching the legislature's preferred outcome.

Turning to Quebec, Joshi explained that Premier François Legault's Bill 21, named *An Act respecting the laicity of the State*, sought to prohibit judges, police officers, teachers, and other public servants from wearing religious symbols at work. Quebec pre-emptively used the notwithstanding clause as a way to "avoid lengthy judicial battles."

Citing the response of some visible religious minorities opposed to the legislation, he observed it evoked a phenomenon that Monica Bell describes as "legal estrangement" — "a marginal and ambivalent relationship with society, the law, and predominant social norms that emanates from institutional and legal failure." He noted that the example of Quebec's Bill 21 shows that neither the ruling nor the opposition parties may give adequate voice to minorities. He contended that where political incentives militate against minorities making their voices heard by the democratic branches of government, courts become indispensable to a democratic dialogue that includes all members of a polity.

He concluded by stating the entire polity loses something of value when an exercise of the last word impedes the ability of minorities to speak up. Through certain exercises of the last word, dialogue reverts to monologue and becomes less democratic.

Benoit Pelletier, a professor in the University of Ottawa's Faculty of Law (Civil law), outlined the roles of parliament and the courts in the Canadian political system. He said there are times when legislatures want the last word, and there are times when legislatures must have the last word. "We all know section 33 was the result of political compromise. The question is, can it be justifiable on grounded principle? And my answer is yes."

Pelletier said the framers of the constitution are clear: parliament and the provincial legislatures are the main architects of our democracy. Three branches of government are distinct and complimentary and the result of this separation of powers and responsibilities has been a strong democracy. Legislatures make laws, the executive applies laws, and the courts interpret laws with respect to the constitution. Pelletier stated each branch must be able to fulfill its role with respect and integrity. He noted that there appear to be differing ideas about when, why, and how often to use the notwithstanding clause in Canada. In essence, he concluded the idea of the two solitudes is still alive and well.

Maxime St-Hilaire, an associate professor at the University of Sherbrooke, spoke about the conditions for Canadian legislators to legitimately derogate from constitutional rights and freedoms. He said when the Lieutenant-Governor of Quebec gave Royal Assent to the *Act respecting the laicity of the State* on June 16, 2019, only five Quebec laws contained provisions derogating from rights in the Canadian Charter of Rights and Freedoms, specifically section 15 rights.

However, he said a meta-myth quickly took root in Quebec claiming that a study had debunked the myth of section 33 of the federal Charter (which allows for derogation from certain of its guaranteed rights and freedoms) being used only in exceptional cases in Canada. In other words, Quebec's legislative practice of derogating from constitutional rights makes standard derogation legitimate. St-Hillaire noted that this is not the case and that it offers an opportunity to reframe this debate, which is also emerging in "the rest of Canada" following the issue of public funding for Catholic schools in Saskatchewan, for example.

He observed that a thorough understanding of the terms of the issue renders implausible the argument that the "standard" or "dialogic" use of section 33 of the federal Charter — in other words, outside exceptional circumstances — is legitimate. He concluded by stating the widespread idea that overriding constitutional rights should only be "curative" rather than "preventive" must also be refuted.