

CSPG seminar: The Legislative Role of Parliamentarians

In their legislative role, parliamentarians propose and amend laws, and review regulations. This seminar discussed the practical realities of law-making within the parliamentary context and provided an overview of shifts in Parliament's legislative practices as a result of developments that have seen, among other things, an increase in Senate-initiated legislation and amendments, and the increased consideration of messages in the House of Commons. Whether parliamentarians are experienced lawyers or persons with no legal background, they all participate in the legislative process; this seminar aimed to analyze how they go about that task and what it means for our democracy.

Will Stos

On November 15, the Canadian Study of Parliament Group gathered for the first of a series of three seminars that are part of the 2019-2020 programming year. The seminar, which focused on the legislative role of parliamentarians, began by honouring the late C.E.S. (Ned) Franks, the founding president of the CSPG. Mr. Franks's student and friend, Michael Kaczorowski was called to offer some personal memories of the man, while also putting the day's topic into the context of Mr. Franks's writings and research.

Institutional Perspectives

The first panel examined three groups within parliament that help parliamentarians research and draft bills and motions. Wendy Gordon, Deputy Law Clerk and Parliamentary Counsel, works within the Legislation Services branch of the House of Commons. Her team provides specialized legislative drafting services for all eligible Members – approximately 270 parliamentarians – who are not part of the government or Speakers or Deputy Speakers of the House of Commons. The service is confidential, non-partisan and offered in both official languages. A team of 17 people – 4 specialized drafters, 4 translators, 4 juriliguists, plus support and publications team – assist MPS as they draft Private Members bills (PMBs) or amendments to any bills (government bills or PMBs).

Gordon explained that the process is the same whether it's a bill or an amendment. A proposal comes from a member; sometimes it is detailed, sometimes it is quite raw. The people assigned to the proposal will look at its objective, prepare the text, find the right place for it (whether it should be standalone legislation or in existing legislation) and they always draft as though it will become part of Canadian law – a high standard.

Gordon noted that MPs often don't come with a legislative background and her team must work with them to help put their ideas and zeal into legislative proposals. They flag legal vulnerabilities (constitutional jurisdiction, Charter issues etc.) and use client management to work with them to shape their ideas into something likely consistent with the constitution. The team, which works under significant time constraints – especially for PMBs, but even more so for amendments – also partners with the Library of Parliament.

Gordon explained that not all Members are interested in proposing legislation, but those who are interested are very interested. "We call them 'frequent fliers,'" she laughed. Few PMBs and amendments are passed, however. Still, they provide for vigorous debate because they are provoking, challenging persisting ideas that are important for a participatory democracy. She categorized PMBs as provocative, innovative, platform pushing, or part of a shared jurisdiction. Although legislative context is complicated, Gordon concluded by stressing that knowledge and expertise is available to enterprising MPs and persistence sometimes pays off.

Will Stos is the editor of the Canadian Parliamentary Review.



Panel: Institutional Perspectives

Shaila Anwar, Deputy Principal Clerk in the Senate's Committees Directorate, began by stating the rule of laws is similar to the rule of sausages – you never want to see them being made. Nevertheless, she highlighted aspects of the process by explaining how procedure, practice, politics figure in legislation-making to show us what we can control and what we can't.

Anwar recounted the novel experience of the new government not having Senate representation in 2015. Procedure called for a clearly defined government and opposition, but suddenly this was no longer the case. The Senate used flexibility of practice to make it work. A basic and fundamental role of the Senate is to review legislation. Eventually a small government caucus was created. But the presence of a larger cohort of independents shifted how the traditional government/opposition format worked. And, government bills are now often sponsored by independents.

In terms of how politics plays a role in the legislative process, she rhetorically asked why are amendments moved and why do they pass or fail? First, if there is broad consensus of support, a bill or amendment is likely to pass. Second, if the government in the Commons differs in partisan colours compared to the majority in the Senate, amendments may be more likely. Finally, if a Senator has a particular interest, it may get added to bills.

Based on recent trends, Anwar expects broad consensus will still be very important (and amendments at all stages will be common). She also

noted that as Senators come from a wide variety of backgrounds and are less bound to party or group, their subject matter expertise will probably lead to more free agency. Without traditional party structure, Senators may need different supports than in the past.

Commenting on the time constraints noted by Gordon, Anwar explained that these can be even more pressing in the Senate as notice periods are significantly different between the House of Commons and the Senate. With no notice in the Senate, her team has to be ready for a 'napkin amendment,' and she had had to gently remind people that "No, you can't use Google Translate to translate an amendment."

Kristen Douglas, the Acting Director General of the Parliamentary Information and Research Service at the Library of Parliament, explained that in comparison to the drafting teams at the House of Commons and the Senate, the library has a large staff of 150 researchers; however, they must cover every conceivable part of what might interest parliamentarians.

These researchers provide individualized reference and research services, research publications, put on seminars, support parliamentary committees, and synthesize news and current affairs. They do not draft bills or provide legal opinions on feasibility. She said they do get very close to the dividing line between legal advice and suggestions, but ultimately provide a menu of options a parliamentarian can choose from. The parliamentarian must always have a choice of how to proceed and the researchers don't recommend a particular option over another.



Panel: Academic Perspectives

Douglas said that analysts provide feedback on broad ideas for a bill by helping to narrow the scope of a plan, explaining what is possible to accomplish in a bill, and providing suggestions for how it might be accomplished (for example, would creating a motion be more appropriate?). Upon request, they may participate in a dialogue with legislative counsel and the parliamentarian to provide feedback on draft suggestions.

She concluded by listing other services offered by the Library of Parliament including providing legislative summaries of government bills and Private Members Bills written in very plain language, and supporting the House of Commons' subcommittee on Private Members' Business of the Standing Committee on Procedure and House Affairs.

Academic Perspectives

Brian Donald Williams, an Assistant Professor in the Department of Political Science at the State University of New York College at Cortland, outlined quantitative research into whether partisanship matters in passing Senate Public Bills. Using LEGISinfo (public bills) and sencanada.ca (senator info), he included control variables including province, gender and experience in the Commons. Other studies have shown electorally vulnerable MPs tend to be more active in their legislative agenda (New Zealand, and Wales) and government MPs tend to be rewarded for their private bill work.

He wondered if partisan division affects the fate of bills since senators don't campaign for office and have more independence from parties. There is nothing similar to the institutionalized crossbench in the UK, however.

Williams provided logistic regression models (Model 1, Senate Veto, Model 2, Commons Veto, Model 3, Bill Enacted). He found that an opposition majority in the Commons tends to make the terminal stage of bill there, while a senator's previous Commons experience also leads more bills to end there. A number of attempts over several sessions also helps chances of eventually prompting the government into action. Years of Senate service was also found to increase the likelihood in both total public bills attempts and also unique bill attempts.

One of his key findings was the importance of partisanship. Senate public bills were more likely to be vetoed in the chamber controlled by the opposition party. A second important finding was that experience matters: senators with more years of service tend to produce more legislation than newer senators.

Jean-Francois Godbout, a professor of political science at the University of Montreal, detailed his extensive research into partisanship and recorded divisions. He said backbenchers are sometimes described as "loose fishes," "shaky fellows" "trained seals" "voting machines," and "glorified rubber stamps." But he wondered how did we go from "loose fishes" during early Confederation years, to the modern idea of trained seals? Why has there been a shift away from independence?



Panel: Practice Perspectives

Godbout collected 14,725 votes in the House and 1,788 in the Senate. He asked why party discipline is so high today. The 42nd Parliament one of the most polarized since Confederation. What does this mean for political representation? He showed a graph depicting how often members of a caucus vote against a party. Calling the early years the “Golden Age of Parliament” when there were more maverick MPs, he found an exponential increase in party unity in the early 1900s.

But what about distinctions between different types of votes? He has studied this question and it cuts across multiple types of votes. In the 42nd parliament Conservatives voted with the party 0.995 of the time, Liberals voted with the party 0.996 percent of the time, and the NDP voted 0.998 per cent of the time. Of the Top 10 mavericks, all were Liberals or Tories.

Godbout said the most divisive votes in the 42nd parliament among the parties were: Liberal (C-240 Tax Credit First Aid and C-235 Fetal alcohol disorder), Conservative (C-16 Human Rights-Criminal Code and Motion to hear another Member), NDP (both procedural - Motion to hear another member).

Godbout wondered if the growth in partisanship was related to partisan sorting and ideology; career or replacement effects; promotion incentives and rewards; or legislative agenda and parliamentary rules. His argument is that “most of the historical increase in party unity is explained by parliamentary rule changes and the decline of private member influence in the legislative process.” With the modernizing state, there is much less need for private legislation but

also a decline in non-government private bills. There is also less opportunity to introduce amendments by backbenchers. Rules were tightened up between 1906-1913 and there was a shift in power to the front bench. He notes that changing the number of times amendments can be proposed results in an increase in partisanship discipline. In terms of debates and the amount of speaking time in parliament, government backbenchers speak far less than other MPs. Only the independents are worse off in terms of total words spoken.

Godbout concluded that there has been a general decline in influence by backbenchers, especially government backbenchers.

Practice Perspectives

Paul Thomas, a senior research associate with the Samara Centre for Democracy, began by telling the audience that one MP had described PMBs as “two hours of glory” or what it must feel like to be king or queen for a day. Thomas explained that private member business is a tool of the backbench and research indicates it does have an impact. Even failed bills can influence the agenda and increase likelihood of an MP’s re-election.

There is time reserved each sitting day for private member business with order determined by lottery. The lottery creates a list known as the “Order of Precedence.” The Senate can also introduce bills or motions, but there are no limits and this business can be debated at any point.

In the last parliament, about half of MPs had the chance to have a piece of business considered and Thomas said with a PMB it is now not a question of when, but if it will be debated. In the House of Commons, it's a highly regimented system, but progress is not affected by prorogation. While drafting support is available from Law Clerk's office, a royal recommendation is required for expenditures.

Thomas said his research has found partisanship plays a role. More bills sponsored by government members are being passed; but there is also another trend where more PMBs are going down to defeat rather than just being left to die. There is also an increase in PMBs being defeated in the Senate. Senate bills don't die, but a motion is required to move them, so some are stopped. However, these are affected by prorogation.

A lot of Commons bills passed tend to be 'symbolic' or ones "asking the government to create a strategy to do something." A few are related to substantive issues. Senators also pass symbolic acts, but generally more substantive ones.

Thomas concluded by outlining some solutions to allow more private member business to be debated over the life of a parliament and ways to ensure PMBs are being created for their intended use as opposed to another way for the government or parties to control the agenda. First, expanding time for PM business in the Commons could be achieved by creating a parallel chamber to expedite consideration in the Commons. He suggests that perhaps MPs may consider adopting a threshold of cross-party support to help substantive bills jump the queue. Finally, he contends that these bills should not be whipped or controlled by parties; rather, MPs should consider creating a system for distinct opposition bills (which would leave space for actual private member business).

Former Senator Wilfred Moore discussed his well-publicized Bill S-203 (To End the Captivity of Whales and Dolphins). It was the longest legislative battle in the history of Canada, with 17 hearings and more than 40 witnesses. Moore said it is important to have a sponsor in the house for Senate PMBs and choosing the wrong person can mean the MP toys around with the bill. He said Senators need a like-minded person who

is committed. For example, he sought out Elizabeth May for this bill and immediately her assistant called the clerk to make her sponsorship known.

Another of the bills he worked on, which would have created a visual artist laureate, had a change of sponsor in the Commons due to an MP's promotion to parliamentary secretary. Unanimous consent was required to change the sponsor, but two people voted against this consent without realizing the bill was a non-partisan matter. Although they tried to reverse the error, it went back to the Senate and died.

Moore concluded by calling the Senate a place where Canadians can really be influential if they get Senators to take up their ideas.

Conservative Wellington – Halton Hills MP Michael Chong, whose PMB created the widely known *Reform Act*, discussed how his bill was designed to try to return more power to MPs that had been assumed by party leadership. He noted that political parties have not always been central to our parliamentary democracy and initially they were not formal creatures, but informal associations. Members could be part of multiple parties. For much of our history, Chong said parties were secondary to the individual member.

Today there are two kinds of parties in Canada, he explained. First, there is the registered political party; but that party does not exist in parliament. Second, there is the recognized party (informally called party caucuses). This latter party operates under unwritten rules. The *Reform Act* was designed to say this recognized party is too important not to have written rules, and there was a need to devolve power back to members from registered party leadership.

Ultimately, after some amendments were made to ensure it's passage, Chong's bill created an act which established four rules covering MPs ability to decide on: 1) the expulsion and readmission of an MP from/to caucus, 2) the election and removal of a caucus chair, 3) the review and removal of the party leader, 4) the election of an interim leader.

The event concluded with a keynote address by former prime minister Joe Clark.