The Committee Process: Platform for Participation or Political Theatre?

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In Canada's parliamentary democracy, the government controls the legislative agenda. At least in the case of a majority government, government bills tabled in the House of Commons will ultimately become the law of the land. While the passage of legislation emanating from the government may appear inevitable, the system is structured to provide multiple opportunities to debate and discuss legislative proposals. The process of making law provides some avenues to test and question legislative initiatives, particularly those that may appear inconsistent with Canada's Constitution; lawmaking may also provide opportunities to ensure that the voices of Canadians — not all of whom feel represented by the government or their Members of Parliament (MPs) — are heard.

This article focuses on the role that committees of the House of Commons play in the legislative process. The Committee stage may provide individuals and organizations with a rare moment to engage with lawmakers, applaud or denounce their efforts, and raise concerns that may not be obvious to those who reside primarily in the halls of political power. Committee meetings may also be the only time for MPs to raise concerns of constitutional vulnerability or to put questions to legislative drafters about how a law will operate on the ground. This article examines how committees work in practice in order to assess whether the theory of citizen engagement reflects the practical reality of how committees perform their functions. I also consider how constitutional considerations are addressed before committees. By examining two significant and controversial laws passed in the second session of the 41st Parliament, I highlight concerns that the committee process is more political performance than a platform for meaningful participation and dialogue.

In Part 1, I briefly explain the traditional role of committees, how they are constituted, and their role in the legislative process.[1] In Parts 2 and 3, I closely examine the committee process in respect of two controversial bills passed in the last session of Parliament: Bill C-23, the *Fair Elections Act,*[2] and Bill C-51, the *Anti-terrorism Act, 2015*.[3] These case studies provide a helpful perspective from which to assess the committee process, as both Bills faced significant resistance from opposition members of Parliament and from the broader Canadian public. The Bills highlight, in particular, how the government can manipulate both substance and process in committees, resulting in hearings that take time, cost money, and often result in little or no substantive changes to the legislation under consideration.[4] In the final section, I will offer some preliminary thoughts on how constitutional considerations might be more meaningfully addressed in our legislative process and consider other possible access points for ordinary Canadians.

1. House Standing Committees

a. Basic committee structure and practice

Standing Committees of the House of Commons focus on particular government departments and activities and are responsible for examining proposed legislation that falls within their purview. Committees carry out significant work on the principle that a small and specialized group of MPs are able to tackle issues more efficiently and effectively than the House as a whole. *House of Commons Procedure and Practice* highlights a standing committee's main functions:

> …the responsibilities of parliamentary committees are to review in detail and improve bills and existing legislation, and to monitor the activities of the machinery of government and its executive branch: conducting reviews of and inquiries into government programs and policies, reviews of past and planned expenditures, and reviews of non-judicial appointments….
>
> *Through the public consultation they conduct, parliamentary committees represent the main avenue for elected Members of Parliament to enter a direct dialogue with those in civil society, such as: individual citizens, non-governmental experts, and representatives from the private sector*. Through their work, committees can draw attention and raise the awareness of the government and the general public to specific issues.[5]

The standing committees currently have ten members and their composition generally corresponds to political party standings in the House. As a result, a majority government will typically command a majority of all of the committees. Unless the government is willing to compromise, legislative amendments proposed by the opposition at the committee stage will not pass. Further, bills generally go to committee after second reading, when the principle of the bill has been approved. While uncommon, referral prior to second reading is a process that exists to allow the committee to examine the bill with a freer hand.[6]

As the main avenue for MPs to engage in a direct dialogue with citizens, experts, and organizations, the committee process should be examined from the perspective of those stakeholders. Engaging with a committee in a meaningful and substantive way can be challenging for witnesses for a number of reasons. First, a committee usually has limited time in which to consider legislation and, as a result, the opportunities for witnesses to appear are necessarily restricted. Witnesses may request the chance to appear before a committee, but it is ultimately the committee that decides who gets an invitation; since the governing party will have the largest membership on the committee, they will have more control over the witness list. For those individuals or groups who are chosen to appear, notice of the date of appearance is often short and the time allotted to speak to the committee is abbreviated. Where legislation is complex or multi-faceted, witnesses must carefully select the issues on which they will focus and typically submit a written brief so that they can elaborate on concerns or spell out any recommended amendments.[7]

When a witness appears before a committee, he or she will typically have a short period of time to make an opening statement (five to ten minutes) followed by several short rounds of questions from committee members. The question rounds are chances to engage experts, probe their opinions, and seek views on how a proposal might be improved. Unfortunately, question rounds are often used by committee members to score personal or partisan political points.[8]

b. Committee case studies: controversy in process and substance

I have selected two significant case studies from the last session of Parliament in order to provide some insight into the capacity of the committee process to engage directly with Canadians and address constitutional concerns. These cases look at how two controversial Bills fared in the House standing committees charged with examining them. The last Parliamentary session was marked by a strongly divided Parliament and some unusually partisan rhetoric and action. The Bills discussed below are far from the only controversial proposals that the government intro-

duced and Parliament ultimately passed. However, both were instances in which the public was particularly galvanized and strong opposition voices were raised in and out of Parliament.

The case studies I have selected — electoral reform and anti-terror legislation — were chosen in part because they were the subject of significant public awareness and media coverage as they made their way through Parliament. Large segments of the Canadian population became engaged in the national discussion around these Bills, signing open letters, petitions, and taking to social media to voice their concerns. The cases are somewhat anomalous, since very few bills in a given parliamentary session will truly penetrate the public consciousness. At the same time, the cases serve to highlight that, even with an engaged populace, the ability of ordinary Canadians and civil society organizations to effect change during the committee process is quite limited. I acknowledge that these case studies are only representative of a particular moment in time and that the inner workings and peculiar dynamics of individual committees can vary significantly. Nevertheless, I believe these cases provide some helpful insights into how the significant work done by committees can be manipulated and undermined, having real impacts on Canadians and our laws. Moreover, the two case studies highlight different aspects of the challenges that arise when a committee seeks to grapple with legislation. The committee process that unfolded with respect to Bill C-23 (electoral reform) highlights how questions of democratic process are (or are not) effectively dealt with by committees, while the C-51 (anti-terrorism legislation) committee process is an example more focused on the substance of legislation.

2. Bill C-23: Fair Elections Act

The Conservative government introduced Bill C-23 in the House of Commons on February 4, 2014. At well over 200 pages in length, the Bill was a substantial overhaul of federal election law touching on topics as varied as voter identification, the role of the Chief Electoral Officer (CEO), election expenses, and new regulatory mechanisms in response to the robocall scandal. The Bill was immediately critiqued by the opposition and in mainstream media coverage, in part because it appeared to have materialized straight from the mind of the Minister for Democratic Reform, Pierre Poilievre, with little or no outside consultation. Since election laws set the rules for how MPs get their jobs in the first place, there has been a tradition of consultation before major changes are introduced. In addition, the government had a somewhat strained relationship with the CEO and, other than a brief introductory meeting with the Minister, he claimed he was not meaningfully consulted about the proposed changes before the Bill was tabled.[9] Debate in the House was limited and six days after its introduction, Bill C-23 was referred to the Standing Committee on Procedure and House Affairs (PROC).

Two of the most controversial aspects of the Bill were changes to the Chief Electoral Officer's role and voter identification requirements. As initially tabled, the Bill would have significantly restricted the CEO's activities by limiting the information that s/he could provide to the public to the bare essentials of our electoral system.[10] These restrictions put educational programs and studies undertaken by the CEO at risk and were the subject of criticism by many of the witnesses that appeared before the committee.

The Bill also eliminated vouching, one of the ways in which individuals may identify themselves when exercising their right to vote. An elector can vouch for another elector's identity and residence. There was evidence that in the last election over 120,000 Canadians established their identity through vouching. Its elimination was proposed on the basis that it was too vulnerable to fraud and undermined the integrity of our electoral system. Since the change had the potential to disenfranchise voters, it was one of the most contested proposals.[11]

a. Process problems: the filibuster

Almost immediately after Bill C-23 was tabled, opposition members within the PROC Committee began to raise concerns about the process that the committee would follow in its deliberations. First, the opposition sought to have the Bill sent to committee immediately after first reading, in

order to allow the committee to consider the Bill in principle.[12] This motion was quickly defeated in the House. In light of the nature and scope of the changes proposed under C-23, the opposition then sought to have the Committee travel outside of Ottawa in order to engage a broader spectrum of the Canadian public in discussion of the Bill. The decision to travel is not one that a committee can make unilaterally. Rather, the approval of the House of Commons is required.[13]

The motion to engage in cross-country meetings on C-23 could easily be viewed as a political tactic designed to kill time in the hopes of delaying (or ultimately avoiding) the Bill's passage. However, in this case the NDP motion included a date by which the Committee would begin clause-by-clause consideration of the Bill. The date was a reasonable one, allowing for committee hearings to take place in March and April with clause-by-clause consideration of the Bill commencing by May 1, 2014. When presenting the motion to the PROC Committee, ranking NDP MP David Christopherson focused on process and the importance of public involvement and participation:

> Once we start getting into clause-by-clause study, the ability of the opposition to do anything from a procedural point of view is very limited, notwithstanding extraordinary measures. By and large the government's majority at that stage in the process pretty much assures them that they can control all the way through to completion. We know, because we can do math, that in a majority government the government's going to win votes 10 times out of 10. We get that. We're not trying to take away the government's ability to govern. We are trying to minimize their ability to reign…[14]

This motion and the request for broader hearings was the subject of discussion in the committee itself and also covered widely in the news media. Moreover, in response to the government's refusal to allow the committee to hold cross-country hearings on Bill C-23, the NDP party denied consent to approve the travel budget for House of Commons committees.[15] While the government was unwilling to allow for coast-to-coast meetings, there appeared to be agreement that a significant number of committee meetings should be held to hear from witnesses in Ottawa. The opposition continued to take the position that it was essential to get out of the Ottawa context and hear directly from the general population of Canadians. In Committee, MP Christopherson engaged in an impressive filibuster. Over the course of three meeting days, he spoke for approximately 10 hours until an agreement was ultimately reached on proceeding with hearings in Ottawa.[16]

b. Witnesses before the committee

While the opposition motion for cross-country hearings ultimately failed, it appears to have made some difference in ensuring a longer and more robust committee process than may otherwise have been the case. The PROC Committee's consideration of Bill C-23 included the evidence of over 70 witnesses over 16 meetings between February 13 and May 1, 2014. The organizations that appeared before the committee included the Council of Canadians, the Manning Centre for Building Democracy, the Canadian Federation of Students, the Assembly of First Nations, Canada Without Poverty, and the Canadian Centre for Policy Alternatives.[17] While some witnesses appeared as individuals, the majority of these were lawyers or academics with particular expertise. It appears that only one non-affiliated Canadian testified; he conveyed concerns about the process by which the Bill was being considered, stating: "All Canadians deserve to be part of this conversation, and not just those who've been able to make a written submission or appear before this committee."[18]

In light of the time spent in committee examining the Bill and the number of witnesses permitted to testify, it would be reasonable to assume that there was a great deal of substantive discussion on key aspects of the proposal. Unfortunately, the structure of the committee meetings can act as a barrier to meaningful discussion. In many instances, the committee heard from three or four witnesses in a one-hour period, giving each witness the chance to make an opening statement of no more than five minutes followed by several short rounds of questions. [19] It is difficult to summarize all of the evidence that the committee heard, and those interested in reviewing the

testimony would have many hours (or days) of reading, watching, or listening.[20] However, on any reading of the witness testimony it is clear that there were many more witnesses concerned about the Bill than staunch supporters. While a number of witnesses applauded aspects of the Bill, almost all voiced serious concerns, most frequently related to the elimination of vouching and the changes to the Chief Electoral Officer's role.

c. Amendments and reporting to the House

When the PROC committee went to clause-by-clause review, the government had conceded that amendments could and should be made to improve the Bill. Indeed, many of the concerns that were repeatedly raised by witnesses were the subject of amendments, although in some cases these did not effectively remedy the problems that had been identified.

For example, the elimination of vouching was initially proposed by the government on the basis that it undermined the integrity of the electoral system and was necessary to avoid electoral fraud. The testimony heard by the committee made it plain that while vouching did result in significant voting irregularities, evidence of fraud did not exist. Indeed, the primary report that was relied upon to support the elimination of vouching recommended better training for poll clerks or simplified procedures. There were many witnesses and high-profile civil society actors who were vocal in their concerns about eliminating vouching, and some made claims of voter suppression. As a result, the government proposed an amendment to require that individuals have identification showing their name when they vote but allowing another elector to attest (i.e. vouch) for a person's residency. While this amendment helped to address the concern that many people would have difficulty establishing their residency with a piece of identification, it arguably introduced a newer and even more complex voting procedure for poll clerks to administer. As a result, the high number of irregularities seen with vouching could well persist with the new procedure.

With respect to the Chief Electoral Officer's role, the changes that were made at committee responded to concerns that the initial proposals in Bill C-23 would undermine or prohibit the CEO's educational activities and, in particular, initiatives to engage young people in the civic process. The amendments expand what the CEO is permitted to do, but unfortunately leave some questions about the scope of the role. Moreover, despite all of the witnesses expressing concerns about the proposed change, it appears the government never truly justified the proposal to make any amendments to what the CEO could do in the first place.[21]

Significantly, while a number of witnesses raised concerns about the constitutionality of some of the changes that C-23 would make, this issue unfortunately did not get a great deal of time or attention, despite Parliamentarians' imperative to ensure that the laws they pass are compliant with our constitutional guarantees. Following its passage, the law was quickly challenged by the Council of Canadians and the Canadian Federation of Students. The applicants sought an injunction prior to the last federal election, arguing that the changes that had been made to the law should be suspended until their constitutionality could be fully reviewed by the court. The request for an injunction was denied;[22] a hearing on the merits of the application is pending, but may not move forward based on government promises to amend the legislation.

3. Bill C-51: Anti-terrorism Act, 2015

The high-profile and controversial *Anti-terrorism Act, 2015* was introduced by the Conservative government on January 30, 2015. The government had been planning for some time to make certain changes to the powers of Canada's national security agencies, and an earlier bill (C-44) had already introduced some of these changes. The impetus for C-51, however, appears to have been the ramming attack on a soldier in Saint-Jean-sur-Richelieu in Quebec and the shooting of a soldier by an armed man who proceeded to enter the halls of Parliament. Although it is possible that other legislative initiatives were in the works before these tragedies took place,

they appear to have been the animating force behind C-51 and the radical changes it proposed to our national security landscape.

Bill C-51 is complex omnibus legislation that created two new statutes and amended many others. It allowed for broad information sharing among many government agencies, codified and amplified Canada's no-fly list, amended the *Canadian Security Intelligence Service Act,* created new *Criminal Code* provisions, and amended the *Immigration and Refugee Protection Act.* Critics had concerns about almost every aspect of the changes.[23]

The Bill was referred to the Standing Committee on Public Safety and National Security (SECU) on February 23, 2015 after heated debate in the House of Commons. As was the case with the electoral reform legislation, committee members raised concerns that the government was trying to rush complex legislation through Parliament without sufficient time for study. After some procedural wrangling at the Committee it was ultimately determined that eight meetings would be dedicated to studying the Bill.[24]

a. Direct engagement with constitutional considerations

In contrast to the experience with Bill C-23, the committee examining C-51 engaged in a great deal of discussion and questioning of witnesses around matters of constitutional compliance. The question of constitutionality was raised as soon as the relevant Ministers addressed the committee. MP Randall Garrison (NDP) asked the Minister of Justice if he would table the advice he had received from the Department of Justice on the Bill's constitutional compliance. The Minister of Justice assured the committee that

> …we would not have introduced a bill, and certainly from a justice perspective no bill is introduced in Parliament unless it has been drafted and presented to Parliament in a way that is consistent with the charter and the Constitution. Every bill receives that vetting, that lens, from the Department of Justice prior to its introduction….The Supreme Court of Canada, of course, has recognized that the prevention of terrorist acts is a valid state objective given the grave damage that can result…This is not to say that legislation — all legislation — presented to this committee or any committee is not subject to charter challenge. We anticipate and look at various aspects, including privacy, to come back to the member's question, and we do so to ensure that ultimately the courts will pronounce favourably on the charter compliance. With regard to presenting that advice to this committee or any committee, I'm not able to do so as the Minister of Justice and Attorney General as solicitor-client privilege exists between the Department of Justice and the Department of Public Safety in this case.[25]

Minister MacKay declined to waive the privilege.

Constitutional concerns were front and centre in the debate on C-51 due in large part to two well-respected legal academics who dedicated significant time, attention, and ink to examining Bill C-51. Kent Roach of the University of Toronto and Craig Forcese of the University of Ottawa created a series of backgrounders, housed on an online blog, that carefully scrutinized various parts of the legislation. The backgrounders addressed constitutional concerns, considered the legislation in light of recommendations made by various public inquiries, and engaged in comparative analysis by looking at legal frameworks in other countries. The thorough and thoughtful backgrounders were quickly published while the Bill was being considered by Parliament and in Committee. Members of the committee and the witnesses who appeared before them were no doubt assisted tremendously by this work, and the quality of debate and discussion on the Bill would have been seriously diminished without it.

In addition to providing significant analyses, Professors Roach and Forcese also appeared before the Committee. Kent Roach was asked about the new warrants CSIS could obtain and whether these would violate the *Charter* or were "outright unconstitutional." He responded:

> I think that there is certainly a high risk of a charter challenge. As we said, this is not a typical warrant. A warrant is granted by a judge to avoid a charter violation, whereas the CSIS warrant could authorize a charter violation, so we have an open-ended authorization for the

> violation of any charter right. To me, that may be very difficult to justify under the charter. We really are not being honest with the public in prescribing by law what charter rights we're talking about.
>
> My own view is that the first charter right that will be violated by one of these warrants is the section 6 right of citizens of Canada to leave or to come back to Canada. We could be having a debate, as they have had in the U.K., about whether reasonable and proportional limits should be placed on that right, but that's a very different and more specific debate than saying to Federal Court judges that they can authorize any violation of the charter.
>
> Obviously, the Federal Court will take a hard look at this, but we also have to remember that there is no appeal from their decision. This idea that judges would pre-authorize violations of the charter is totally novel. I'm not aware of any other provision that allows for that, and I do think it could be challenged under the charter.[26]

Witnesses repeatedly raised constitutional concerns about particular aspects of the Bill. On behalf of the Canadian Bar Association, lawyer Peter Edelmann was asked about compliance with the *Charter* and responded forcefully:

> I'd like to start by pointing out that certain parts of Bill C-51 are clearly unconstitutional. According to the bill, a judge can authorize violations of the charter. No such precedent exists in the law. I think it's important to stress the fact that none of the legal experts who appeared before the committee stated clearly and in no uncertain terms that the provision was constitutional. Even the Minister of Justice was ambiguous about that. He said that the legislation had been studied and adopted but that no opinion had been formed, pursuant to the Department of Justice Act. If you really consider what he said, you will see that his position wasn't clear.
>
> In short, I would say that certain provisions are clearly unconstitutional. And as for judges being empowered to authorize charter violations, I don't think judges will get on board….[27]

Ron Atkey, a former MP, Minister, and Chair of the Security Intelligence Review Committee, included his concerns about constitutional compliance in his opening remarks to the committee:

> Constitutionality and the independence of the judiciary go right to the major flaw in the bill. Part 4 authorizes the Federal Court to issue a warrant to CSIS to take measures that may contravene a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms*. This provision, in my view, is clearly unconstitutional and will be struck down by the courts….
>
> I ask you, why provoke an avoidable constitutional challenge? Canadian judges are fiercely independent and are not agents of the government who can be mandated to authorize measures at all costs to protect against terrorist threats. Federal court judges have carefully authorized or rejected wiretap applications since 1984, under existing section 21 of the CSIS Act. I have seen or reviewed some of those applications and judicial decisions. The process of judicial control of wiretap warrants applications works today….
>
> …This notion of Parliament authorizing a charter breach, short of using the notwithstanding clause, is clearly unconstitutional and is not consistent with our constitutional tradition and the way in which section 1 of the charter operates….[28]

Many other witnesses argued forcefully that certain aspects of the Bill could not be justified under the *Charter*.[29]

b. Committee's treatment of witnesses

The excerpts above provide a sampling of some of the constitutional concerns raised by witnesses who appeared before the committee. Although it cannot be easily encapsulated here, a review of the witness testimony and questioning shows some troubling patterns in how committee members responded to those concerns. For example, a number of the panels contained a mix of witnesses who supported the Bill overall and witnesses who had serious concerns or clearly opposed the Bill. In principle, this is perfectly appropriate (and probably desirable), but it frequently provided Conservative committee

members with the opportunity to ignore critical witnesses.[30]

Further, in some cases Conservative committee members used their question rounds to tell critical witnesses that their interpretations or analyses of the Bill were wrong, provided no opportunity to respond, and then posed a question to a supportive witness. For example, Conservative MP and Parliamentary Secretary Roxanne James asked the following question when Dr. Pamela Palmater and Inspector Steve Irwin of the Toronto Police Service appeared before the Committee:

> **MP Roxanne James:** I was just very concerned to hear from you, Ms. Palmater, that you think this bill literally covers everything. I'm not sure you quite understand that this bill is actually five separate and distinct parts. What you are referring to is actually under the proposed information sharing act. The purpose of that act is simply be allow one branch of government to push information out to a national security agency when that information is pertinent to the national security and safety of Canadians...
>
> There are safeguards in this. I'd like to thank the inspector for bringing that up. You clearly said it. There are adequate safeguards in this legislation and you are in support of the information sharing aspects, but I'd like to ask the inspector a question with regard to warrants…[31]

Dr. Palmater was given no opportunity to respond to her alleged misunderstanding of the Bill. In another exchange, Conservative MP LaVar Payne commented on a news release in which Alex Neve, the Secretary General of Amnesty International Canada, took issue with the expedited process for considering the Bill, but then posed a question to Prof. Elliot Tepper, a witness whose testimony was more supportive of the Bill.[32]

As a result of this approach by some committee members, an opportunity for meaningful and comprehensive discussions addressing constitutional issues was lost. As discussed further below, this imbalanced approach was compounded by the generally nasty tone of many of the committee meetings and by comments that impugned the integrity of some of the witnesses that were critical of the Bill.

While these examples highlight the ability to ignore critical witnesses, in some cases such witnesses were given a great deal of attention and were addressed rudely, combatively, and in a manner unbecoming of a parliamentary body.

One of the earliest witnesses to appear before the SECU committee was a representative of the British Columbia Civil Liberties Association (BCCLA). Her opening statement expressed the organization's significant concerns about the Bill, including constitutional vulnerabilities. Conservative MP Rick Norlock engaged in a lengthy speech, using up more than half of his allotted seven minutes to pose his question to the witness, and eventually concluded by asking, "Is there any degree of checks and balances that would satisfy you? Are you simply fundamentally opposed to taking terrorists off the street?"[33]

In what was the most offensive exchange, Conservative MP Diane Ablonczy posed a question to the Executive Director of the National Council of Canadian Muslims (NCCM), repeating allegations about the organization and ties to terrorist groups. The exchange is lengthy, and is excerpted below:[34]

> **MP Diane Ablonczy:** Mr. Gardee, I'd like to start with you, because I think Canadians are hoping that moderate Muslims — and the majority of Muslims in Canada are moderate Muslims — will join and raise their voices against jihadism, jihadi terrorism, because, as you rightly say, that is a real threat here in Canada. I think your perspective on partnering with others in society in addressing the issue of the radicalization of our young people would be very welcome.
>
> The question I have for you, though, will not surprise you, because as you know, there's a continuing series of allegations about your organization and its ties to your American counterpart. Why does this matter? It matters, as you know again, because your American counterpart has often supported radical views and publicly endorsed Islamist terrorist groups, including Hamas.

> I'm sure you're familiar with some of these allegations, and I'm sure you're familiar with many more, but I'll put a couple on the record….
>
> I think it's fair to give you an opportunity to address these troubling allegations, because in order to work together, there needs to be satisfaction that this can't be a half-hearted battle against terrorism.
>
> Where do you stand in light of these allegations?
>
> **Ihsaan Gardee:** Thank you very much for your question, Ms. Ablonczy.
>
> First and foremost, I'll say on the record that NCCM has condemned violent terrorism and extremism in all of its forms regardless of who perpetrates it for whatever reason.
>
> However, the premise of your question is false and is entirely based on innuendo and misinformation. The NCCM is an independent and non-profit grassroots Canadian Muslim civil liberties and advocacy organization that has a robust and public track record spanning 14 years, 15 shortly, of anti-extremism work, promoting civic engagement, and defending fundamental rights.
>
> These are precisely the types of slanderous statements that have resulted in litigation that is currently ongoing….
>
> Furthermore, the NCCM is not going to submit to a litmus test of loyalty used against Canadian Muslims and their institutions which underlies such offensive questions. We are here today to answer questions about Bill C-51 and the real concerns of Canadians, including Canadian Muslims, about the impact of this far-reaching legislation.
>
> McCarthyesque-type questions protected by parliamentary privilege are unbecoming of this committee.

National security legislation is complex and controversial. Claims that witnesses critical of proposals are supportive of terrorism does not contribute to a serious debate about the legislation. The tenor of some of the C-51 committee meetings was quite troubling and supports the thesis that the committee process is more political theatre than meaningful dialogue. Ultimately, very minor amendments to C-51 came out of the SECU Committee and, by and large, the serious constitutional concerns raised by numerous witnesses were ignored.[35]

4. Concluding Thoughts

The case studies described above highlight concerns that the House committees examining legislation are not effectively fulfilling some of their core functions. As a forum for dialogue with Canadians, committees fall short for a number of reasons including constraints on time and on the scope of their examination of legislation. In reality, what constitutes the public with whom committee members engage are usually experts or those affiliated with stakeholder organizations. Since the governing party has a majority of seats on a committee, that party can control the witness list to a significant degree, and critical or dissenting voices may be somewhat muted as a result. Moreover, since there is no transparency in the witness-selection process, it can be hard to discern why some witnesses are selected to appear and others are not.

As a chance to address constitutional concerns or vulnerabilities of proposed legislation, committee structure and procedural rules also hinder meaningful discussion, debate, and positive outcomes. As the committee exchanges with respect to C-51 highlight, while the government benefits from legal advice and the significant expertise concentrated in the Department of Justice, this advice is considered privileged, and the privilege will not be waived. By contrast, committees and MPs have very limited access to legal expertise or resources and will not have a sense of the evidence upon which the government relied to support their approach to an important issue of public policy. Furthermore, the personal attacks and nasty rhetoric used against critical witnesses serve to undermine a committee's primary work and do nothing to inspire public confidence.

At the structural level, the fact that most bills go to committee after second reading means that the work that a committee can do is lim-

ited. As noted above, adoption of a motion for second reading means that the House is approving the bill in principle. Amendments made during committee study and at the reporting stage are therefore limited and cannot challenge the principle of the bill. Thus, even when very serious constitutional or other concerns are raised before a Committee, it may not be possible for the members to address those issues effectively.

While the case studies noted above come from a particular point in time and a particular government, there is no reason to think they are unique. In October of 2015 the Liberal party was elected to government on the promise of "real change," but there are already signs that the dysfunctional committee process will not be ameliorated by that change.[36]

Diagnosing the problems with the committee process is not difficult; finding a cure is much more challenging. Many of the system's failings are structural in nature and would require reconsideration of the partisan nature of our committees and the timing of consideration of bills. In addition, requiring fulsome disclosure of the Department of Justice's legal opinion on the bill to the Committee would provide the committee with more information and a solid basis for debate, although the concern that this is a matter subject to solicitor-client privilege would need to be carefully addressed. In addition, committees could do more meaningful work if they had more resources; they could retain independent legal and policy experts to assist them in interpreting and understanding witness testimony.

Unfortunately, while some of these changes and many others are worthy of study and consideration, there is little evidence of any political will to reform the way our committees function. As a result, we are likely to continue to see political and partisan dramas play out before our committees and will have to look to different venues for meaningful participation and debate.

Endnotes

* LL.B. (Osgoode Hall), LL.M. (New York University), Director, Fundamental Freedoms Program, Canadian Civil Liberties Association (CCLA). Although I was involved in CCLA's work on the two bills considered in this article, the views expressed herein are my own and do not necessarily reflect the views of the CCLA.

1 This article focuses on standing committees of the House of Commons and does not address the role or function of Senate committees.

2 Bill C-23, *An Act to amend the Canada Elections Act and other Acts and to make consequential amendments to certain Acts,* 2nd Sess., 41st Parl, 2014.

3 Bill C-51, *An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts,* 2nd Sess., 41st Parl, 2014.

4 I was involved in the development of CCLA's written submissions to committee on both of these bills. With respect to C-23, I also appeared before the Committee on behalf of the CCLA.

5 Audrey O'Brien & Marc Bosc, eds, *House of Commons Procedure and Practice,* 2nd ed (Montreal: Thomson Reuters, 2009) at ch. 20, online: <http://www.parl.gc.ca/procedure-book-livre/Document.aspx?sbdid=DC42FA65-ADAA-426C-8763-C9B4F52A1277&sbpidx=1&Language=E&Mode=1> (emphasis added).

6 *Ibid* at ch. 16, "Traditionally, adoption of the motion for second reading amounts to approval by the House of the principle of the bill. This effectively limits the scope of any amendments that may be made during committee study and at report stage. In order to provide more flexibility in the legislative process, the House amended its Standing Orders in 1994, instituting a new procedure that allows Ministers to move that a government bill be referred to committee before second reading. This empowers Members to examine the principle of a bill before second reading, and enables them to propose amendments to alter its scope."

7 In some cases, the scope and length of written briefs that can be submitted to the Committee is also limited.

8 In cases I observed, scoring personal or political points was done most frequently by posing a very leading or suggestive question to the witness, designed either to elicit strong support for the

legislation or to undermine those who oppose it. At times, however, members will use the time designated for questions to deliver a speech on why the witness' opinions or analyses are wrong or to impugn the integrity or credentials of those testifying. Although the latter tends to occur rarely, these incidents make the committee process appear nasty, partisan, ineffective, and a waste of time. It is worth noting that while witnesses may also be called to testify before Senate Committees in respect of legislative proposals, these committees can engage in a pre-study of a bill while the Commons committee is still undertaking its review. Since witnesses generally expect a Senate committee to consider a bill after it has passed the House of Commons, it is easy for a witness to miss out on Senate committee proceedings. When a Senate committee engages in pre-study of a bill, it will still consider it after second reading in the Senate, but this review is abridged in light of the pre-study. An examination of the Senate committee process is beyond the scope of this article.

9 Standing Committee on Procedure and House Affairs, *Evidence,* 41st Parl, 2nd Sess, No 20 (6 March 2014) at 1209.

10 This would be limited to: how to become a candidate, how to register to vote, how, where and when to vote, how to establish identity when voting, and how electors with disabilities could be assisted.

11 There were many other significant concerns raised, including an election expense loophole that would have excluded certain fundraising activities from being considered an election expense and thus benefited those parties with more money and a more established donor base. The bill also included a change in organizational structure whereby the Commissioner of Elections — an official charged with investigating violations of the *Canada Elections Act*, SC 2000, c 9 — would have been moved from its location within Elections Canada to reside within the department of the Director of Public Prosecutions. The move was defended as a step toward improving the independence of the Commissioner, but some worried that the shift would make communication between the Chief Electoral Officer and the Commissioner difficult and ultimately undermine effective enforcement of the law. The bill also failed to include one significant change that had been the subject of recommendations by both the Chief Electoral Officer and Commissioner for some time: the power to apply to a judge to compel witnesses to provide certain information during the course of an investigation. Many of these issues and others were addressed repeatedly by witnesses and opposition members during the course of the committee's proceedings.

12 *House of Commons Debates*, 41st Parl, 2nd Sess, No 42 (5 Feb 2014) at 1517 (Craig Scott).

13 O'Brien and Bosc*, supra* note 5.

14 Standing Committee on Procedure and House Affairs, *Evidence,* 41st Parl, 2nd Sess, No 16 (13 Feb 2014) at 1200 [*PROC-16*].

15 See: Alex Boutilier, "NDP Grounds Commons Committees over Lack of Hearings on Fair Elections Act," *Toronto Star,* online: <http://www.thestar.com/news/canada/2014/02/12/ndp_grounds_commons_committees_over_lack_of_hearings_on_fair_elections_act.html>; See also *PROC-16*, *supra* note 14 at 1240.

16 The government's refusal to undertake national consultations outside of Ottawa was premised on the argument that national hearings were unnecessary because the committee could hear all the witnesses it wanted to in Ottawa. Nevertheless, the NDP opted to conduct town-hall meetings, at their own expense, to hear from Canadians. These meetings were organized in eight cities: Victoria, Ottawa, Toronto, Vancouver, Regina, Winnipeg, Dartmouth, and Gatineau.

17 The full list of witnesses is available at: <www.parl.gc.ca/Committees/en/PROC/StudyActivity?studyActivityId=8224003>.

18 Standing Committee on Procedure and House Affairs, *Evidence,* 41st Parl, 2nd Sess, No 30 (8 April 2014) at 1905.

19 Typically each party would get an opportunity to ask questions as part of a seven-minute round and then again as part of a four-minute round. The time allotted for questions includes the time to both ask and answer the question. As a result, in the four-minute round, an MP may want to ask three or four witnesses a substantive question about the bill. The question must be posed and all answers given within the four-minute period. This time restriction does not lend itself to meaningful discussion.

20 The opposition made a motion in committee to have the Library of Parliament create a summary of the evidence heard by the Committee (without recommendations), but this motion was defeated.

21 The truly partisan nature of the committee process came through in consideration of some of the amendments put forward by opposition members. One proposal would have required that the voter information card (VIC) be clearly and prominently

marked, indicating that it cannot be used as identification. The opposition suggested this would help to ensure voters were not misinformed or relying on previous pilot projects in which the VIC could be used in some cases. The amendment, which could not have done any harm and may well have helped to avoid confusion, was rejected by the Conservative members of the committee.

22 *Council of Canadians v Canada (Attorney General),* 2015 ONSC 4601.

23 In particular, the new information-sharing law, the *Security of Canada Information Sharing Act,* SC 2015, c 20*,* authorized the sharing of personal information not only among many government agencies but also with foreign entities. It did not incorporate the safeguards associated with information sharing that had been recommended by previous public inquiries. The new *Secure Air Travel Act,* SC 2015, c 20*,* codifying Canada's no-fly regime, lacked procedural safeguards and meaningful due process protections for those who might be identified as the appropriate subject of a travel ban. Amendments to the *Canadian Security Intelligence Service Act,* RSC 1985, c C-23 provide the agency with increased powers, including the power to disrupt activities and a new warrant-seeking power. The most controversial provision in this part of the bill allows CSIS to seek a warrant to engage in activities that may violate the *Canadian Charter of Rights and Freedoms,* Part I of *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11. Amendments to the *Criminal Code,* RSC 1985, c C-46 created a new offence of "promoting terrorism offences in general" and provisions for the deletion or destruction of terrorist propaganda. The breadth of these provisions gave rise to concerns about their impact on freedom of expression and questions of their necessity in light of existing offences. Finally, amendments to the *Immigration and Refugee Protection Act,* SC 2001, c 27 made changes to the security certificate scheme that appeared to backpedal on some of the constitutional safeguards that had been mandated by the Supreme Court of Canada following previous legal challenges.

24 Initially, a government motion put forward at committee would have limited witnesses to the relevant Ministers, plus three additional meetings with up to two panels and three witnesses per panel. Clause-by-clause consideration was proposed to begin by no later than March 31, 2015. An amendment to this motion was put forward by NDP committee member Randall Garrison, seeking to have the number of meetings increased to twenty-five and two witnesses per panel (rather than three). The government then proposed a sub-amendment to take the number of meetings up to eight and the keep the number of witnesses per panel at three. This ultimately passed after lengthy debate in a committee meeting that lasted the better part of a day. See: Standing Committee on Public Safety and National Security, *Evidence,* 41st Parl, 2nd Sess, No 51 (26 Feb 2015) at 1300.

25 Standing Committee on Public Safety and National Security, *Evidence,* 41st Parl, 2nd Sess, No 53 (10 March 2015) at 0933.

26 Standing Committee on Public Safety and National Security, *Evidence,* 41st Parl, 2nd Sess, No 54 (12 March 2015) at 1925 [*SECU-54*].

27 Standing Committee on Public Safety and National Security, *Evidence,* 41st Parl, 2nd Sess, No 59 (25 March 2015) at 2035.

28 *SECU-54, supra* note 26 at 0913.

29 For example, Aboriginal legal scholar and activist Dr. Pamela Palmater detailed a number of serious concerns about the bill and concluded by stating: "Bill C-51 must be withdrawn. There is no way to fix it. There must be proper public information consultation, specific consultation for indigenous peoples, and a proper parliamentary study. Directing Justice Canada to rubber-stamp the bill as compliant even if it has a 95% chance of being overturned in court is not democratic." (Standing Committee on Public Safety and National Security, *Evidence,* 41st Parl, 2nd Sess, No 57 (24 March 2015) at 845 [*SECU-57*]). The latter remark appears to refer to information, which came out largely in the course of a Federal Court action brought by former Department of Justice lawyer Edgar Schmidt. He argued that the Department's approach to advising the Minister on when to report *Charter* inconsistencies to Parliament was being interpreted in an overly narrow manner. The evidence was that the Department of Justice did not consider a report necessary if there was *any credible argument* that could sustain a law's constitutionality.

30 See e.g. *SECU-57, supra* note 29.

31 *Ibid* at 0940.

32 LaVar Payne commented on a news release in which Mr. Neve was quoted as saying, "To cut short the opportunity for these enormously consequential changes to be thoroughly examined in itself is a grave human rights concern." Mr. Payne commented, "I'm not sure how having a certain number of meetings on legislation is a human right, but that might be stretching your comment a little bit far. We know that this legislation in a number of

places deals with peaceful protests, lawful or not, and is not attacking free speech, so it's not really attacking human rights. Anyway, I have questions for Professor Tepper…" Although a point of order was raised by an NDP committee member asking that Mr. Neve have the opportunity to "reply to the drive-by insinuations from the member," this was not accepted by the Chair. [Standing Committee on Public Safety and National Security, *Evidence,* 41st Parl, 2nd Sess, No 55 (12 March 2015) at 2020.]

33 SECU-54, supra note 26 at 0929.

34 *Ibid* at 2020.

35 Many aspects of Bill C-51 are the subject of an ongoing constitutional challenge initiated by the CCLA and Canadian Journalists for Free Expression (CJFE); however, the Liberal government elected in October 2015 has promised to make changes to address some of the provisions in C-51 that raised concerns. At the time of writing, no amendments to the existing law have been tabled.

36 One of the early challenges for the new Liberal Government has been addressing the issue of medically assisted dying in response to the Supreme Court of Canada's decision in *Carter v Canada (Attorney General),* 2015 SCC 5, [2015] 1 SCR 331. While the Government appointed a Special Joint Committee to advise on the issue, the Standing Committee on Justice and Human Rights that dealt with the tabled legislation worked on an abbreviated schedule. Those submitting written briefs to the Committee were given less than two weeks' notice of the due date of their briefs and were instructed to keep submissions to no more than three pages. While the Committee heard from many witnesses, only four meeting days were spent hearing from witnesses not associated with a government department. It is concerning that the Committee was asked to do its work on such an expedited schedule.