House of Commons
CANADA

Legislative Committee on Bill C-2

CC2 • NUMBER 016 • 1st SESSION • 39th PARLIAMENT

EVIDENCE

Wednesday, May 31, 2006

Chair

Mr. David Tilson

Legislative Committee on Bill C-2

Wednesday, May 31, 2006

● (1535)

[*English*]

The Chair (Mr. David Tilson (Dufferin—Caledon, CPC)): The chair sees a quorum and calls the meeting to order.

Good afternoon, ladies and gentlemen. This is meeting 16 of the legislative committee on Bill C-2. The orders of the day are pursuant to the order of reference of Thursday, April 27, 2006, Bill C-2, an act providing for conflict of interest rules, restrictions on election financing, and measures respecting administrative transparency, oversight, and accountability.

We have two witnesses before us this afternoon. Representing the United Steelworkers is Kristen Agrell, counsel in the legal department of the national office of the United Steelworkers union; and representing the Ontario Nurses' Association, we have Shalom Schachter, the interest arbitration and long-term care regulation lead on the provincial services team.

Good afternoon. The two of you can make introductory comments, which will then be followed by the questions of the committee. Thank you for coming. Please proceed.

Mr. Shalom Schachter (Interest Arbitration and Long Term Care Regulation Lead, Provincial Services Team, Ontario Nurses' Association): Thank you for the invitation to appear before your committee.

I'm going to restrict my remarks to three areas: the first area is the need to improve protection for whistle-blowers against retaliation; the second is the need to expand the whistle-blower protection beyond federal public employees; and the third is to expand the definition of wrongdoing and to narrow the scope for the refusal to investigate disclosures.

On the first point, in terms of whistle-blower protection, I think there is a recognition, given past events, that it is important for people to come forward with evidence of wrongdoing so that the public can hold their elected representatives to account. It needs to be recognized that there is a great fear in doing so, and that's why we need to have effective provisions against retaliation in order to encourage people to overcome their fears.

One of the things that's missing from the bill is a reverse onus clause. When an employer takes action against an employee, the employer knows the reasons for taking the action. The employee is not in a position to bring forward evidence that the reason the employer took the action is retaliation against whistle-blowing.

In most major labour legislation, there is a reverse onus provision with respect to unfair labour practices. The employer has to prove that the action taken against the worker was not motivated by a desire to punish a person for exercising labour rights. In normal arbitration, in terms of discipline, the employer has the duty to lead evidence of just cause and the worker does not have to prove there was no just cause.

We urge the committee to include a mandatory reverse onus clause in the legislation when employers want to take disciplinary action against people who have engaged in disclosure of information.

The other element is that there needs to be a broader justice with dignity clause. One of the major improvements of this bill over the previous legislation is the provision in proposed section 19.5, when the act is amended, that indicates when the commissioner decides to investigate a complaint, the employer has to reverse the action. For example, a worker who was fired would have to be reinstated, pending the investigation and the outcome of those proceedings.

It is a major improvement in the legislation, but it doesn't go far enough because it's contingent on the commissioner deciding to engage in an investigation of the complaint. The justice with dignity provision should be made applicable to everyone who has engaged in whistle-blower activity. Before employers are allowed to take disciplinary action on other grounds, they should have to prove it. Until that proof has taken place, they should not be allowed to impose the discipline on the worker.

Those are our comments with respect to the first issue.

With respect to the second issue, in terms of the scope of the protection, it needs to go beyond those who are in the federal public sector. In the “sponsorgate” situation, if the only people who had access to information about wrongdoing were employees of third parties who were dealing with the government, we needed them to come forward. I don't believe they would be covered under the existing provisions of the bill.

As well, there would be people under provincial jurisdiction. We have a situation in the city of Toronto, where I'm from. A police officer has come forward with allegations that the city police brass have swept concerns of police brutality under the carpet, and he is being disciplined for engaging in that public disclosure.

The federal Parliament has already engaged in legislation that affects the entire country. When it comes to making fraud a criminal activity, for example, the disclosure of fraud should be protected by federal legislation, even if it's done by people who are under provincial jurisdiction.

Finally, in terms of the third element, section 8 of chapter 46 of the previous legislation has very narrowly defined wrongdoing so that it only covers gross mismanagement, substantial danger, and serious breaches. Those criteria are far too narrow and are going to deprive the public of other disclosures that they need to know about.

● (1540)

Similarly, the criteria in proposed sections 24 and 19.3 of the bill, which give the commissioner the right to decline to engage in investigations or pursue complaints, are too broad and should be narrowed as much as possible so that as many disclosures as possible are investigated.

Those are my remarks.

The Chair: Thank you.

Ms. Agrell.

Ms. Kristen Agrell (Counsel, Legal Department, National Office of the United Steelworkers Union, United Steelworkers): Thank you very much.

I'm here from the United Steelworkers. We appreciate the opportunity to speak to you.

As you know, the Steelworkers represent 280,000 members in Canada in all sectors of the working world. We encourage all our members to participate in and take control over their conditions of working and conditions of life. To that end, the Steelworkers are looking to the bill to provide what we have found workers need to have faith in their ability to contribute to a democratic system, which is information about the system and the ability to have input into the system.

The Steelworkers have taken a more general approach than my colleague in our response to this bill. We have identified three areas. There are areas where we strongly support the bill and think it should not be changed, areas where the bill is silent and where the Steelworkers think there's a strong need for action, and areas that have the potential to be great, but where we would suggest changes.

The Steelworkers strongly support the creation of the parliamentary budget officer. We feel that to give accurate information that's not swayed by political concerns is a move that's beyond due.

The reporting requirement for lobbyists we think is also important information for the public to have. Also, we are strongly in favour of ending the lobbyists' success fees, and also of ending corporate and union donations in elections. The Steelworkers have been active in assisting political parties, but there are other ways than financial to do so. Those are the areas the Steelworkers support.

There are also areas the Steelworkers would like to see added to this act, such as Access to Information Act reform, which had been discussed prior to the bill. Some federal bodies have been added and are now covered by access to information, but the system really needs a greater overhaul, in our opinion.

We're also disappointed that there's nothing in the bill that would affect leadership races, as opposed to elections, and nothing that speaks to members who are elected and then change their party affiliations. Those are areas where the Steelworkers feel the bill could be improved.

Finally, there are cases that the Steelworkers think have good potential. The creation of the Public Appointments Commission we think is a great thing, but in order for it to be effective, we would suggest that the committee introduce language that would require it to be independent of the Prime Minister's Office and to report on its functioning. And come to that, if possible, there should be language to require that it come into existence at all and that it can't be delayed by the refusal of the governing party to nominate someone to chair it.

Finally, with regard to whistle-blower protection, the Steelworkers echo and adopt the submission of my colleague from ONA. Unions have experience in how to protect workers from retaliation, and we agree that the public is best served if people can speak out before a situation reaches a point of major illegality or immediate threat to life.

Those are our submissions.

● (1545)

The Chair: Thank you to both of you.

We now have a process by which four different caucuses have an opportunity to ask questions of you. There are about seven minutes for questions and answers.

We will start off with Mr. Tonks.

Mr. Alan Tonks (York South—Weston, Lib.): Thank you very much, Mr. Chairman.

Welcome, Mr. Schachter and Ms. Agrell.

I note there's a congruity in two areas on page 7 of your overview, Ms. Agrell, on whistle-blowing protection and the concepts of reverse onus that have been mentioned by Mr. Schachter, so I'd like to question on that particular part.

We've had conflicting viewpoints with respect to the entrenching of the regime that would protect whistle-blowers around the use of a special tribunal that would be adjudicated through judges, as opposed to the labour arbitrations act and mechanism. It would appear from what you're saying that your comfort level—and I don't mean to put words in your mouth—would be to deal with an entity and regime that has an experience and an understanding of labour issues, labour law. And when it comes to whistle-blowers, you talk about the employer's duties, you talk about mandatory just cause, which obviously are mixed terms. They could be put into a judicial context as they could into a labour context.

My question is, which is more suitable? Is it to create a tribunal that would protect the rights of whistle-blowers through the regime that has been suggested? Or do you think it would be better to use the labour arbitrations act and panel and the experience that is gained in terms of protection of those rights?

Mr. Shalom Schachter: Obviously, there's a certain expertise that labour tribunals develop that the courts have recognized and give deference to, and we would be obviously more familiar and therefore more comfortable with having these proceedings before an appropriate labour tribunal.

For example, I think the act already indicates that if you're a federal public servant you could go to the Public Service Staff Relations Board, except if you're an employee of the Public Service Staff Relations Board, and then you go to the Canada board, and if our proposal is adopted, to extend this to people within provincial labour jurisdiction. They could go to their own labour boards or even have the option of going to the arbitration board process that's under the collective agreement.

If you're going to a labour board, as opposed to a new tribunal, the important thing is that this board should also have the power that's set out in proposed subsection 21.8 of the bill, to respond appropriately to the wrongdoer who retaliated. Labour boards generally only give redress to employees and don't engage, if you like, in punishment of the wrongdoer.

It's very important that proposed subsection 21.8 be enacted in some form, otherwise the retaliator will have no incentive not to engage in retaliation. The worst that can happen is that the person who discloses will be returned to work, but the wrongdoer, obviously, hopes there will be pressure on that person to give up before the case is addressed. There need to be penalties beyond redress to the whistle-blower to give an incentive to the potential retaliator not to engage in that conduct.

● (1550)

The Chair: Mr. Owen.

Hon. Stephen Owen (Vancouver Quadra, Lib.): Thank you.

Perhaps I could continue with the topic by looking at the public appointments commission that is vaguely suggested and may be withdrawn at this stage.

It seems to me that the Public Service Commission, under the Public Service Employment Act, with proper amendment to that act, and creating a role of the president of the Public Service Commission as an officer of Parliament, might play a part and apply a useful set of skills and knowledge and mandate to fulfill that need. I wonder if you could react to that.

Mr. Shalom Schachter: My submissions didn't address the Public Appointments Commission, but perhaps I do have some experience that would be relevant.

Prior to getting my law degree, I did work as a staff representative with the Public Service Alliance of Canada. The Public Service Commission, at least as it then was, was viewed as an arm of the employer in making appointments. Given my experience years ago, I would say that the public would not see this entity—unless it has changed—as being at arm's length from government and as being able to safeguard the public appointments neutrality.

The Chair: Ms. Agrell, we don't mean to leave you out. If you have any comments, feel free.

You have about 30 seconds, Mr. Owen.

Hon. Stephen Owen: My only response to that, Mr. Schachter, would be that the composition and the legislation underlying the Public Service Commission have changed, but if it were to take on this additional role, it would be necessary for statutory change to create an independent president and commission with the necessary powers, one who would be an officer of Parliament.

[*Translation*]

Le président: Ms. Guay.

Ms. Monique Guay (Rivière-du-Nord, BQ): Thank you, Mr. Chairman.

Welcome to the committee. My questions will be quite simple.

I know that, in each of your unions, you already have processes enabling people to make disclosures when something occurs. Am I wrong?

[*English*]

Mr. Shalom Schachter: In fact that's not the case. Employers generally take the view that workers have a duty of fidelity to their employer, and they do not appreciate workers going public with evidence of wrongdoing. Keep the dirty linen in-house, is the view, and in fact even in-house, there may be antipathy to going above the appropriate line of supervision. Even in unionized workplaces, there are not, at this point, proper procedures and protections for whistle-blowing.

[*Translation*]

Ms. Monique Guay: Is the same true in the case of the Steelworkers Union?

[*English*]

Ms. Kristen Agrell: Some collective agreements can try to deal with the issue internally, but success with that sort of approach varies widely.

[*Translation*]

Ms. Monique Guay: So Bill C-2 is very desirable for you and would correct all the deficiencies there currently are in each of your unions.

[*English*]

Ms. Kristen Agrell: That is what we are hoping.

[*Translation*]

Ms. Monique Guay: There is a provision in the bill that states that, when a person makes a disclosure, he or she will be paid an amount of approximately $1,000. We're opposed to that. I'd like to have your opinion on the subject.

[*English*]

Mr. Shalom Schachter: I think the more important elements of the protection would be that no retaliation could take place, that before discipline could be imposed the employer would have to prove just cause, and that if retaliation was found to exist, not only should the worker get a remedy in terms of reinstatement and lost wages, but the retaliator should be punished.

There is no need for an economic incentive. In fact, part of the legislation stipulates that the disclosures have to be made in good faith. Offering some kind of monetary reward opens up the Pandora's box of having to question whether any disclosure is being made in good faith or strictly for the payment.

● (1555)

[*Translation*]

Ms. Monique Guay: It's called a witch hunt.

[*English*]

Ms. Kristen Agrell: The Steelworkers are also not in favour of the monetary reward, for the same reasons stated by my colleague.

[*Translation*]

Ms. Monique Guay: Earlier you referred to confidentiality. When someone makes a disclosure, it's extremely important that that person be able to be protected in a confidential manner. Do you believe that Bill C-2 really contains everything necessary to protect the employee? Do you want to make amendments to improve the bill?

[*English*]

Mr. Shalom Schachter: Getting back to the justice with dignity proposal, if an employer who is governed by the bill felt that he or she had just cause to discipline an employee for something else, before the employee could be disciplined the employer would have to send an inquiry to the official within the department who was appointed under section 10 of the bill to deal with disclosures, to find out if the employee had in fact engaged in making a disclosure. If that was the case, then the official would advise that the employer could not engage in discipline until after just cause has been proven.

If that provision were put into the bill, it would give very good protection.

[*Translation*]

Ms. Monique Guay: You should put that down in writing and send your recommendations to our clerk before Friday, if possible, so that we can study them during the clause-by-clause consideration.

Here's my last question. You said you would like this act to be applicable at the provincial level as well. I believe that would cause an overlap problem and even a jurisdictional problem. The provinces already have their legislation and their system of protection. So I don't see how this act could be enforced at the provincial level. I'd like to hear what you have to say on the subject.

[*English*]

Mr. Shalom Schachter: On your first point, I apologize for not having copies of my comments for every member of the committee. I have given one copy to the clerk, who is going to arrange to translate it and distribute it, so I hope that meets your needs.

In terms of the duplication, the principle has already been applied, for example, with freedom of information legislation. The House of Commons and the Senate adopted legislation a number of years ago that dealt with freedom of information and protection of privacy, and it gave the legislatures of the different provincial jurisdictions a certain number of years to bring in their own legislation. If they did and it met at least the level of the federal protections, then they were to govern, but if they didn't, then the federal legislation would apply across the country, and I think that's an appropriate model here.

One of the problems is that governments promise whistle-blower protection. The current Ontario government has promised whistle-blower protection for a number of years. Members of my union have engaged in disclosure of situations where residents of long-term care facilities are not getting the care they need. They are getting disciplined for going public with those disclosures, and the government has not brought in whistle-blower protection.

So it's important for the House of Commons and the Senate to act to give a basic standard of protection for all whistle-blowers across the country.

[*Translation*]

Ms. Monique Guay: In Quebec, we already have protection for whistleblowers. So that would cause a very serious overlap problem between the two governments. I don't think that could be applicable. Of course, the provinces that have no whistleblower protection legislation would have to pass some, but that would cause a serious duplication problem in Quebec. This isn't desirable for us.

Thank you very much.

● (1600)

[*English*]

The Chair: We're out of time, Madam Guay. Thank you.

Mr. Martin.

Mr. Pat Martin (Winnipeg Centre, NDP): Thank you, Mr. Chair.

Thank you, witnesses. It's a real pleasure to see both of you. I come from a labour background myself, as a former business manager of the carpenters union in Manitoba. Labour isn't always invited to bring their point of view to this type of activity, so it's important that your voices are heard.

From what I've heard of the briefs you've put forward, I think your recommendations will be helpful and useful, and especially your experience.

I'll begin with the whistle-blower section, Mr. Schachter. Your point is well taken, especially in the health care field. I can imagine you would have ample experience where workers probably would have come forward but for fear of reprisal.

I remember one high-level case in Manitoba concerning the head of pediatric heart surgery. There were actually 12 children who died, and there was a public inquiry. Nurses in the operating room were observing things that they knew full well to be just wrong. No one could come forward. There was such a culture of commitment. The master-servant relationship was such that it was viewed as a breach of some ancient code of loyalty that they owed. So it is difficult to balance the public's right to know and that ancient relationship.

In the carpentry trade, the master-servant relationship is part of ancient common tradition, and is in fact part of common law—your duty of loyalty to your employer. So it's difficult.

But as a former union organizer and then business manager, I know the Public Service Staff Relations Board and the CIRB are often backlogged two or three years. Talk about justice denied and justice delayed.

Would you agree that it would be far better to go to a specialized tribunal for that reason alone, rather than making an allegation of reprisal and then having a two- or three-year wait, and then still it's a fifty-fifty chance, because once the lawyers get at it, you have to make your case? Is that a good enough reason for a separate tribunal?

Mr. Shalom Schachter: Again, the important thing is that the right of whistle-blowing exist, that there be effective protections against retaliation, and then it's a question of architecture, if you like, to design the mechanisms that will be most effective.

Certainly the delay that's involved—

The Chair: Excuse me, order. We have a lot of conversations going on in here. I'm being distracted, and I'm sure the witnesses are being distracted. So if you want to talk, please go outside.

Sorry, Mr. Schachter.

Mr. Shalom Schachter: The delay that's involved in workers getting their cases to arbitration is just atrocious. I find it remarkable that at 5:30 on Monday morning, the Toronto Transit Commission was able to get access to the labour board and get a ruling that the disruption was against the law. I have nothing against that quick access to justice, but it seems that only exists for employers and not for workers. So it's important to get quick access for both parties in the workplace.

The issue is whether the tribunal is a better entity as opposed to the existing labour boards. I think the issue is really going to be one of resources. If the new tribunal is not given the resources, there will be a backlog as well; and if the existing boards are given the appropriate resources, they will be able to deal with the backlogs.

Mr. Pat Martin: Yes, I certainly share that view.

Now, I know the expertise was one issue that you raised, that boards will have that expertise, but I don't see why that can't be developed. There are certainly leading arbitration cases that a new tribunal could draw from. They don't have to create their own jurisprudence. They can draw from the same arbitration cases that we deal with.

Mr. Shalom Schachter: If the committee is going to look at the tribunal mechanism, then they should also look at the process by which labour tribunals have been appointed in the past, that they are tripartite, that an effort is made to try to get appointments that have acceptability from both the employers' side and from the workers' side of the community. Without that acceptability, the tribunal process may be suspect, but if you do have that effort at acceptability, the tribunal process may be appropriate.

Mr. Pat Martin: Yes.

I notice that the Steelworkers' brief does make reference to the disappointment that there isn't greater attention paid to the Access to Information Act or reform, and I certainly concur with that. It was a great disappointment for us. We believe freedom of information is the oxygen that democracy breathes and people have a right to know.

Would you expand on how the Steelworkers came to this point?

● (1605)

Ms. Kristen Agrell: I'm afraid I can't. I only have an overview of that portion of the act, but I could get more information.

Mr. Pat Martin: I understand. It's perhaps hard to comment on something that's absent from the bill.

You've made your point that the Steelworkers are disappointed there wasn't more to it.

Ms. Kristen Agrell: I think the problem with accessing information on the areas that were already covered with the bill was something we'd been hoping would be covered, rather than simply adding more areas that would experience the same problems as had existed in the past.

Mr. Pat Martin: Yes. Good point.

Mr. Schachter, did you want to comment on that?

Mr. Shalom Schachter: Again, I'm not experienced with the federal practice, but in terms of provincial practice, the freedom of information legislation is only applicable to governmental bodies. What the current government has done is to create, if you like, arm's-length entities, which are still publicly appointed but are then exempt from freedom of information legislation. In the areas of health care, where our union operates, we need to have access to those so we can be proper advocates for the recipients of health care. Because of these limitations in the provincial legislation in not governing all providers of health care, we've been deprived of that access, and we think the public suffers.

Mr. Pat Martin: You raise a good point.

The Chair: That appears to be it, Mr. Martin.

Monsieur Petit.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): My question is for Ms. Agrell from the Steelworkers Union.

You've tabled a brief here in which you talk about lobbyists. You know what a lobbyist is: it's a person who approaches members or ministers on behalf of a specific group. When, for example, a union president goes to see the Minister of Labour, should he be considered a lobbyist and register, since what he obtains will be intended for a specific group, for specific purposes?

[*English*]

Ms. Kristen Agrell: I know the Steelworkers do engage in lobbying, in several different ways. I don't know about the exact definition, but we're certainly happy that any regulations imposed on other lobbyists also affect the union's activities.

I'm not sure I understand the question.

Mr. Shalom Schachter: If I could just make a comment on this. Obviously, if any official of the Ontario Nurses' Association were to meet with any government official, by virtue of the fact that they are with the association, the public would know that nurses have an agenda and are trying to adopt that.

The problem is that if I'm working as a lawyer in a law firm or some private company and I'm lobbying on behalf of clients, then the public doesn't know who those clients are. That's where there could be greater mischief if there isn't proper disclosure of who it is that is really the beneficiary of the discussions between the lobbyist and the government official.

[*Translation*]

Mr. Daniel Petit: Thank you.

[*English*]

The Chair: Mr. Lukiwski.

Mr. Tom Lukiwski (Regina—Lumsden—Lake Centre, CPC): Thank you very much, Mr. Chair.

Just by way of background, Ms. Agrell, I also have a family connection with unionism in Canada. As a matter of fact, my father was the head of the United Steelworkers of America in the western Canadian region for many years. I note with interest that Ken Neumann's name is on your brief. My father trained Ken Neumann and brought him into the union movement.

First, I have a point of clarification. You mentioned in your brief that you would like to see the Accountability Act extended to cover leadership races. It does. That's my first point.

The point that I want both your opinions on is the fact that you agree—at least in the Steelworkers brief—that union contributions as well as corporate contributions should be eliminated altogether. You also mentioned, quite correctly, that unions contribute to political campaigns and political parties in many different ways. One of the most common ways that I'm aware of is that the union will pay the salary of one of their employees who then takes the month off to work on a particular campaign.

Do you agree that this should also be contemplated in this act in the same manner as it would be for a cash donation?

● (1610)

The Chair: There's no need to worry. If you don't know, just say so.

Ms. Kristen Agrell: I don't know.

Mr. Tom Lukiwski: Do you have no opinion on that? I would suggest perhaps you give it some—

The Chair: I say that all the time, and they get away with it, so it's perfectly okay.

Mr. Tom Lukiwski: My only point is that I would suggest this very method is indeed the same as giving a cash donation. I believe the act has covered it and I believe it is appropriate.

I will cede the rest of my time to my colleague, Mr. Poilievre.

The Chair: You have about three minutes.

Mr. Pierre Poilievre (Nepean—Carleton, CPC): On this question of the tribunal of judges versus the existing staff relations board, we're dealing with two issues here. One is that the staff relations board only applies to staff, whereas you've proposed, rightly, that protections ought to go beyond staff of the government to contractors and grant recipients, and other unions have proposed, for example, that federally funded researchers be protected.

Do you believe it's realistic to put all those different categories of potential whistle-blowers into a staff relations board for whistle-blower protection?

Mr. Shalom Schachter: I think I've answered that there are already labour tribunals in each of the jurisdictions that could deal, for example, with non-unionized workers. If there is a unionized workplace, then the collective agreement would have an arbitration process. So it's not our position that all complaints from across the country should have to come to either the Public Service Staff Relations Board or the CIRB. What is important is that this protection exist.

Let me again give the example of our members, who are involved with the use of billions of federal dollars in the delivery of health care. It seems to me the Parliament of Canada has an interest in making sure those billions of dollars are spent appropriately, and that can't happen if health care workers in the provincial jurisdictions don't have whistle-blower protection.

Mr. Pierre Poilievre: That's a fair point. The second issue is that right now public servants already have access to the staff relations board for whistle-blower protection. If this bill passes they'll continue to have that access; there's nothing stopping them from choosing to go to the staff relations board.

What's being contemplated by some members of the committee, though, is amending the bill to force whistle-blowers to go to the staff relations board and take away the choice of going to a judge-led tribunal.

Do you believe this committee should take away the choice from whistle-blowers to go before a judge-led tribunal and force them all to go to the staff relations board whether they want to or not?

Mr. Shalom Schachter: If the choice is a true choice, an equal choice with equal access to remedies and with equal access to action on the part of the tribunal, board, or whatever, to ensure that the retaliator knows its actions were wrong, then why would we be opposed to choice?

There may be some issue in terms of appropriate use of resources. The member from the Bloc caucus was mentioning the duplication between federal jurisdiction and provincial jurisdiction. I think we want to make sure our tax dollars are spent efficiently, and before we set up parallel tribunals we should make sure it would be done in such a way that resources are not wasted.

The Chair: That appears to be it. Our time has expired. We thank you both for coming. Ms. Agrell, Mr. Schachter, thank you kindly.

We will have a break for a few minutes before the next witness. Thank you.

● (1614)

(Pause)

● (1619)

The Chair: I'm going to call the meeting to order.

Our next witness is Professor C.E.S. Franks from Queen's University.

Good afternoon, Professor Franks. We're glad to see you here today. As you probably can see, you have an opportunity to make some introductory comments, and then members of the different caucuses will, I'm sure, have some questions for you.

Prof. C.E.S. Franks (Professor Emeritus of Political Science, Queen's University, As an Individual): Yes.

Thank you very much. It's an honour to be here. I have a longstanding interest in accountability to Parliament and within government. I've met some of the people here before at other committee meetings, and it's nice to see familiar faces.

The focus of my remarks today is going to be on the Gomery commission recommendations in relation to the Federal Accountability Act. I thought I would take that approach, because I was senior research adviser to the Gomery commission, so I've had a chance to observe how it works, what it came up with, and the reasoning for the recommendations. That's what I'd like to address in the context of the Federal Accountability Act. I will talk about three major things, and probably some more minor ones, and there are more in the written submission that I provided last week.

One, I wanted to talk about deputy ministers, the deputy ministerial community, and deputy ministerial accountability. Two, I want to talk about the Public Appointments Commission. Three, I would like to make some general remarks about the broad issue of agents of Parliament and the role of Parliament in accountability. I say all of this in the context that the main focus of my academic research has been on Parliament. I think the role of Parliament is often under-stressed and under-appreciated in these sorts of things. Parliament has a right to define who is accountable to it, and how, and in what manner they are accountable to it.

It seems to me that what is happening in the Federal Accountability Act in relation to the accountability of deputy ministers and heads of agencies is a matter of identifying them as holding responsibilities in their own right and Parliament wanting to see how they perform their functions and their duties. This is not unusual in parliamentary government. In fact, Canada has been almost at the extreme end in its thinking about ministerial responsibility, saying that ministers must be responsible for everything and the only persons who can be responsible before Parliament. I didn't agree with that, and neither the Gomery commission nor the Federal Accountability Act agrees with that.

So the recommendations on the accountability of deputy ministers and heads of agencies as accounting officers before parliamentary committees, primarily the Standing Committee on Public Accounts, is similar in the two. There is some difference in the process through which disagreements can be resolved, but that is not terribly important. The important thing is that it's recognized that senior public servants have responsibilities and duties in their own right, and these duties and responsibilities, at least many of them, do not belong to ministers, and that they should be accountable before parliamentary committees in their own right and not on behalf of ministers.

The place where this becomes difficult is in trying to define the boundary between the responsibilities of public servants and those of ministers. The procedure through which ministers, as the Treasury Board has proposed in the act, can overrule the accounting officers, the deputy ministers and heads of agencies, is a means of establishing that boundary. If a deputy minister objects to a proposal and is overruled by a minister, then the responsibility belongs to the minister. It's very clear, if a deputy minister feels it's within his or her purview and is not overruled, then the responsibility rests with the deputy ministers.

I want to emphasize that to make this system work is going to involve a lot of work on the part of the Treasury Board, a lot of work on the part of Parliament, and particularly the Standing Committee on Public Accounts. They're going to have to reach some understanding of what the responsibilities of the accounting officers involve. It will involve what's normally called regularity, in other words following the rules and the laws that will involve propriety, acting in a proper manner, and to some extent it will involve economy, but it will not involve questions of effectiveness or even of value for money, or the purpose of programs or the policies behind programs.

● (1620)

In the initial stage, I think the responsibilities of accounting officers should be clearly in the areas of regularity and propriety. As the committee and the public servants and the Treasury Board learn to work together, they can go further if it's the wish of all sides.

Many of the recommendations of the commission dealt with the length of tenure of deputy ministers in offices and departments and with the method of appointments of deputy minister. Without going into details, the concern behind them was that the commission felt, as Justice Gomery has made very clear, that deputy ministers did not in his opinion pay adequate attention to their management duties.

The intention was, through the accounting officer approach and through the longer tenure of deputies and through the appointing procedure, to make a system in which deputy ministers were clearly assigned duties, stayed around long enough to make sure they had some power and could exercise it over management of a department, and then were ultimately held accountable and had to defend themselves in public for what they had done.

This was an effort, as I say, to refocus the deputy ministerial community and heads of agencies more towards their management duties. Something would have to give in that, but that was not a worry in the commission's sense.

The next point I want to talk about is the Public Appointments Commission, which is very much in line with the appointments proposal for boards and chief executive officers of government agencies proposed by Gomery.

The thinking there was that these appointments have to be made in an open and transparent way that recognizes the principles of merit and non-partisanship and recognizes the diversity and variety of the Canadian nation.

I will give you an example of appointments I think should be made that way but have not been in the past, and that's of the chairman and members of the board of the Public Service Commission. The duty of the Public Service Commission is to ensure that appointments in the public service are made in an open and transparent way, are advertised, that all Canadians have equal access to them, that they meet the principles of merit and non-partisanship, and that diversity is recognized in them. Yet at present there is no guarantee in the procedure for appointing the members of the commission who are supposed to ensure this that they are made in that manner. I think the Public Appointments Commission is a very important part of the act.

The last thing I will remark on relates both to Parliament and to thinking about accountability generally. I have a concern—this is a personal concern—that the act asks too much of Parliament in terms of the number of agents of Parliament that Parliament will wind up with and in terms of the efforts to keep their own agents accountable and in line.

I express it as a concern, and it fits into another concern I have, that the thinking behind the Gomery commission on responsibility and accountability was, to rephrase an old expression, that you should choose wisely and entrust liberally. In other words, you choose the right people and give them the powers in the belief and faith that they will act responsibly, and then you hold them accountable at the end.

The Gomery commission boiled down its views on the accountability and responsibilities of deputy ministers by saying that if they are faced with an issue they're doubtful about, they should ask themselves two questions: first, can I defend this adequately before the public accounts committee, and second—since the public accounts committee represents Parliament, which represents the people of Canada—the question could be phrased as, can I defend this decision satisfactorily in a public forum?

What's implied in here is a sense of responsibility. The commission did not recommend any more regulations, rules, or oversight agencies; it felt that we had enough. The problem was that these weren't observed, not that we needed more. I have a concern that the Federal Accountability Act goes too far in the direction of more oversight agencies, more varieties of accountability and more mistrust of public servants, more efforts to control and command and punish, and less attention than I would like to see on ensuring that the public servants themselves have a sense of responsibility that they follow in their work.

● (1625)

Thank you, Mr. Chairman.

● (1630)

The Chair: Thank you.

Mr. Owen.

Hon. Stephen Owen: Thank you very much for being here, Professor.

I would like to address these three points and receive some reaction from you.

Certainly, the public appointments committee concept could be, I think—and I would like your opinion on it—contained within and, with appropriate amendment, administered by the Public Service Commission if the Public Service Employment Act were appropriately amended so that the president and the commissioners were appointed in ways that effectively made the president an officer of Parliament. I realize this goes to your proliferation concern. But rather than having a separate body set up, this would then set out the merit criteria and the diversity considerations and process and present a non-partisan front, but also draw on the expertise and more general responsibilities of that commission to deal with employment in the public sector.

That's one idea to which I welcome and value your response.

With respect to the deputy ministers and ministers, I'd like to put a simple proposition to you. First of all, I see responsibility and accountability with respect to ministers as a minister being responsible for his or her mandate and the administration of the department and accountable to the public through Parliament, as those two concepts can be applied. But the major issue, it seems to me, between ministers and deputy ministers and all of their departmental administrators is that there is a dividing line between the political side and the administrative side of governance. The political side is inherently partisan. Whether it's being elected on a platform or whether it's debating legislation or even appropriating funds in Parliament, those are appropriately partisan. They're open; they're debated; they're voted on.

However, as soon as you have that policy set and your legislation in place and the money appropriated, you cross a line into the administrative side, and there you have a duty of fairness. The duty of fairness simply cannot be contested with the partisan side, on the more political and legislative side. It seems to me that if we had some simple rules that very clearly said that the political side should not interfere politically in that duty of fairness because that would offend it.... Ministers, of course, have a particular challenge because they straddle the line and they're, in a sense, administrators. But we need clear direction to ministers and to their public servants where those boundaries are and that the duty of fairness must maintain when you cross the line.

The third point is on the number of officers of Parliament, and I agree with the concern. As a former officer of a legislature, I am in favour of the model, but I hear the proliferation, not only because of the extra work it gives in holding them accountable to the legislative branch, but I think it also detracts, in some cases, from the power of legislators. As well, it's also a tremendous drain on the public bureaucracy, on the public itself, trying to deal with what sometimes can be mixed messages, where there are overlapping boundaries, when you start to get too many legislative officers.

Those are my comments for your observation.

Prof. C.E.S. Franks: I'll go at them in reverse.

On the parliamentary officers, the Privy Council Office prefers to call them parliamentary agents because the officers are the clerk, the Sergeant-at-Arms, etc., but the common term is a parliamentary officer, so I'll use that.

I've often wondered if we shouldn't go the route of lumping them together instead of having so many discrete ones. For example, we could have a parliamentary commissioner and put under that the Privacy Commissioner, the Information Commissioner, the Commissioner of Official Languages, the Public Service Integrity Officer...I keep forgetting how many there are going to be, but a lot of them have fairly logically related functions. I think they'd work very well as one organization if Parliament were prepared to do it.

On the deputy ministers and ministers, I would be the first one to say that the boundary between administration and policy is not always clear. I think it is very clear in retrospect that it was the duty of deputy ministers to prevent the things that went wrong in the sponsorship program, or to ensure there were good records in the HRDC issue, or to ensure that the estimates were accurate in the gun control program, etc. The point of the recommendations is to make sure that over time, the area of responsibility and duty of the public servant is clarified, and that Parliament has some means of assuring itself that they obey their duties.

The public service has a legal identity, it has a statutory identity, and it has a responsibility to the laws that govern it—the laws that tell it what it may and may not do, and how it may do things. My concern is that more times than we need in Canada, the public service has not adhered to the laws it's supposed to respect. That causes a loss of faith in the public service; the ensuing scandals are harmful to government, harmful to the public service, and I think harmful ultimately to people's faith in how they're governed.

The final one, or the first, was on the Public Service Commission. As you will know, the Public Service Commission recently changed its role profoundly, from one of actually doing much of management to one of having an audit and accountability function. I've often thought that the Public Appointments Commission could comfortably fit within the Public Service Commission, although one—the Public Appointments Commission—is dealing with Governor in Council appointments and the other is dealing with the tens of thousands of routine appointments made every year to the public service in Canada, the promotions within the public service of Canada, the deployments, and everything else, so in that sense they have quite different clientele and a somewhat different function.

The Public Appointments Commission, as far as I can see, is modelled on the British Office of the Commissioner of Public Appointments. It oversees something between 3,000 and 5,000 appointments a year with a staff of ten. It does that through an ingenious method of having assessors who sit on appointment boards. This is for our equivalent of Governor in Council positions.

The point is that they have different clientele and would probably have different ways of operating, but in the sense that they're both trying to ensure the same standards in their different clientele, there is a logic for linking them. That's as far as I can go on that question.

● (1635)

The Chair: Thank you, Professor Franks.

Madam Guay.

[*Translation*]

Ms. Monique Guay: Thank you, Mr. Chairman.

Thank you for being with us today, Mr. Franks. It's a change to meet someone from the university, who has no direct link to the political aspect of the bill, but who is interested in its impact.

There are a number of topics. You talked about ministers and deputy ministers. Deputy ministers are very often appointed for a much longer period than ministers. Ministers depend on elections and the Prime Minister, who gives them ministerial responsibility for a year or two, at most. They are responsible for their department, but the deputy ministers are often in place for much longer periods of time, because their positions are considered apolitical, and they have much more work experience in a particular department. When you are appointed minister, you are responsible for your department and you are accountable. If there's every a scandal, of course, you're responsible for it. That's my opinion.

Some groups talked a lot about confidentiality. They have a lot of fears about the confidentiality of their clientele's information. How do you perceive that? The bill could have an impact in this area, when they have to keep their clients' information confidential. Then there's the entire matter of the $1,000 reward for a whistleblower. Our party is opposed to that. A whistleblower should make an honest disclosure because it is his or her duty to do so, not for money.

I'd like to hear your opinion on those two questions.

● (1640)

[*English*]

Prof. C.E.S. Franks: Thank you. Forgive me for speaking in English, but I'm not familiar with the French terminology for much of what I have to say.

[*Translation*]

Ms. Monique Guay: That's fine.

[*English*]

Prof. C.E.S. Franks: *Merci.* The deputy ministerial community in Canada is quite interesting. One of the very good political scientists who has studied this, you might conclude, took a turn up in profession or down when he became a politician—Stéphane Dion—but his findings were that deputy ministers in Canada, in comparison with their counterparts in Britain, France, the United States, Germany, and so on, are younger when they are appointed, have less experience in government, less experience in the department, and stay in a department a shorter time than their counterparts in the other countries.

For example, in Britain most people at the deputy ministerial level —permanent secretary—have that as their last appointment before retiring, and they are normally appointed on the expectation that they serve five to six years.

In Canada, the last statistics I was satisfied with suggested a stay of deputy ministers of about two and a half years. Now it's perhaps slightly longer, but it depends which department you look at how long it is.

The only figures I've seen on the average time of the tenure of one minister and one deputy together was in a study by a former Clerk of the Privy Council, Gordon Osbaldeston. He found the average “marriage”, if you could call it that, of a minister and deputy minister lasted for approximately one year, which in terms of how long it takes to develop a policy and get it into action is what I would call a one-night stand rather than a real marriage. It again might be longer, but I'm not convinced of it.

I don't think it's right to overstate the length of experience in office or the length of experience in departments of deputy ministers in Canada. That was something that concerned the Gomery commission—as it has many other observers who have looked at it—and that is going to have to be dealt with.

Concerning whistle-blowing, the Gomery commission did not make any recommendations on the whistle-blowing aspect, although that wasn't in its terms of reference. One of the reasons is that the research that was done for it suggested that whistle-blowing is a necessary last resort but really not a very good thing, in the sense that most whistle-blowers are not happy they did it; they regret having done it afterwards. I'm not saying it's not needed, but I am saying there should be ways of resolving differences other than whistle-blowing.

I have a terrible worry about the $1,000 reward for whistle-blowing: that it's going to look more like 30 pieces of silver.

Excuse me, I have forgotten your last point, I regret. *Je deviens peut-être plus âgé.*

[*Translation*]

Ms. Monique Guay: My final question concerns confidentiality. Businesses are very concerned about the disclosure of certain clientele information.

[*English*]

Prof. C.E.S. Franks: First of all, we must recognize that access to information is limited, that there are some things that aren't in it, that the Federal Accountability Act itself says that draft internal audits should be concealed for a period of years, should not be available I think it's 15 years—I'm not certain on that.

But one thing that is confidential at present, and I think always would be, is the advice of deputy ministers to ministers. There was no intention in anything Gomery did and there's no intention, as far as I can see, in the Federal Accountability Act to change that. The advice a deputy minister gives to a minister on policy or anything else is confidential, and then the minister's informal comments to the deputy minister are also confidential.

In a parliamentary committee, deputy ministers and other public servants at present can only answer about what a policy is. They do not say it is a good policy or a bad policy, they do not discuss alternative policies, and they do not say what they would prefer in policy. There's nothing that will change that. So the confidentiality of the relationship between minister and deputy minister would remain.

The issue would be only if there is something on which the minister and the deputy minister disagree that is within the responsibilities of the deputy minister that the process for appealing to the Treasury Board and the Secretary of the Treasury Board would be invoked—not on policy issues, just on administrative matters that are the responsibility of the deputy minister, the accounting officer.

● (1645)

The Chair: Thank you, Professor.

Mr. Dewar.

Mr. Paul Dewar (Ottawa Centre, NDP): Thank you. I did have a chance to read your brief. I apologize for coming in late.

I have heard you speak before on this issue, and I'd like to turn my attention to perhaps juxtapose this act with the work you did on the Gomery commission.

I'd like to get your take on recommendation 2 of the commission report—and just for those who might not have committed it to memory, it says, "The Government should adopt legislation to entrench into law a Public Service Charter." There are references in the recommendations about what that is and the intent of that.

In fact, what this piece of legislation was to address was not specifically Gomery, but to take a look at what parts of Gomery they thought were applicable and certainly to fold them in.

Could you speak to that recommendation? We haven't talked a lot about it, and certainly, in my opinion, and from what I've seen in this town, it has been talked about a lot, the idea of inducing ethics into the way government operates. I think this was an attempt to do that.

Could you just speak to what the public service charter was to do and how we might see it come into place?

Prof. C.E.S. Franks: On that one I feel that I really should talk about what's in the report, because as a commission, we did not commission research into that area. Justice Gomery was very concerned about the need for a simple, straightforward statement of ethics that would apply to perhaps not even just the public service, but public appointments generally, including the boards, corporations, and so on.

The problem is finding one like that. For instance, the current code of ethics of the public service is really chunks of the report of John Tait's task force, put into codified form. Tait himself said in the introduction to his report that it wasn't meant as a code of ethics. It winds up as a fairly long and cumbersome thing. It covers an enormous amount of territory, and you give it credit for that, but it isn't short and inspiring like, say, the Ten Commandments.

The one that's mentioned in the report on that is the British "Seven Principles of Public Life", and that I think is well worth looking at.

But there's a real risk, you see, in entrenching these things in laws, because then the courts make the decision on what's right and wrong and it might well be that Parliament would rather retain that right to itself than give it to the courts.

Mr. Paul Dewar: In the time remaining, I'd like to turn to public appointments. It's been talked about, as of late, and even tried.

In a motion passed through the House last May, we as a party put forward an ethical appointment process, and competence-related criteria were put front and centre so people could see that. The government would submit the criteria and have an oversight so that the committee could look at it and say, yes, the criteria make sense, and the government publicly released the criteria. The criteria would be there, if you will, to measure the basis of appointments, taking the appointment process out of the PMO and allowing it to be done by another party.

When we look at the Public Service Commission, you mentioned that it has changed in scope. One of the things I had considered is to not have it solely in their domain. I think it's important enough to have someone do it and to have a separate committee do it, with the commissioner separate from government, but to perhaps have the Public Service Commission provide an audit to make sure it's being done.

I think you mentioned that there are over 3,000 appointments. We certainly don't want to have one committee making those appointments an oversight, but to have an audit function that already seems to exist, in terms of the skill sets of the Public Service Commission, to allow them to do that. I'd like your comments on that.

● (1650)

Prof. C.E.S. Franks: Well, I think the real question that comes out of it is this. How do you want to do it? What sort of procedure do you want?

As I say, in Britain, most of these appointments are made by ministers, they're ministerial appointments. In Canada, they're Governor in Council. We have a more centralized structure in Canada, and have had since day one. It's part of the need to recognize the diversity in the regions, languages, and so on, in Canada. Whatever we would do would be different. But for the procedure in Britain, if you're going to go through something like this, a committee is set up. An assessor, appointed by the Office of the Commissioner for Public Appointments, sits on the committee and makes sure it adheres to the rules. The committee then makes a recommendation of three qualified persons, and the minister chooses from those three.

The concern of the Office of the Commissioner for Public Appointments is not that non-partisan people are appointed, but that every appointment meet the criteria of merit, due process, equity, and diversity, and that the end result be one that meets those general standards. The process itself is open and transparent. But I would think that for a lot of these, it would be unreasonable to expect the government or an individual minister to not want to appoint somebody whom he or she likes and wants in the office.

The Chair: Thank you.

Monsieur Petit.

[*Translation*]

Mr. Daniel Petit: Thank you.

Mr. Franks, I'd like to ask you a question. You're a professor at Queen's University. I believe you're still a professor now. The question I would like to address with you is the following.

Prof. C.E.S. Franks: I'm retired, sir.

Mr. Daniel Petit: That's fine.

You know the university, and that's important. A number of people have come to see us, particularly students who receive research money from the federal government. They told us that, because major funding comes the federal government, they would like to be subject to the provisions of Bill C-2. It's a matter of accountability. I know that the question of federal research funding is a major problem across Canada. Do you agree with this idea that university student researchers should be subject to the controls provided for by Bill C-2 in its present form?

[*English*]

Prof. C.E.S. Franks: I have always had a strong belief in the need for independence of academic research. I'm old-fashioned in that way. Ultimately, academics get tested by their peers, by other people. You can't publish a paper unless it's been looked at by two or three, normally many more people than that, and they write reactions to it and so on. All universities, or all reputable ones, have ethics officers and ensure that their research meets the ethical principles in dealing with human subjects, etc.

I have never been sympathetic to the notion that government itself should look after research or hold individual researchers accountable. There are some fundamental freedoms, which include freedom of speech, freedom of religion, and freedom of politics, but I also include in that, as do most people who look at it, freedom of artistic expression and freedom to do research. One has to be careful, in patrolling the boundaries of those freedoms, that one doesn't intrude too far into government doing things or preventing things that it doesn't approve of, rather than simply ensuring that the basic standards and rules are observed.

The whole process of grant-giving to universities through SSHRC and the National Research Council is a matter of peer review and granting of money. This is a very heavily entrenched process. Its equivalent in government is the process through which the Public Service Commission reviews appointments and promotions and tries to ensure that the principles of merit are observed and that there is no bureaucratic patronage or personal favouritism in appointments and in promotions.

● (1655)

[*Translation*]

Mr. Daniel Petit: Thank you.

[*English*]

The Chair: That appears to conclude our time, Professor Franks. Thank you kindly.

Mr. Paul Dewar: May I seek a point of clarification with respect to Mr. Petit?

The Chair: Yes, you can.

Mr. Paul Dewar: The concern that was brought forward by the students was not per se with the universities; it was with companies who were involved in the research. They were being, I would say, duct-taped about their concerns about the research and where it was going.

I would be the first one to stand up and say that's not on, when you have researchers who are involved and are being funded with product dollars and they have concerns and they're being told they can't speak out. I think the concern that was raised wasn't about universities per se, but when there's a funding component from the private sector and the research that's being done affects citizens... that's what I think their concern was. That's a point of clarification from my perspective.

Prof. C.E.S. Franks: The answer there I think is quite different. I do not believe that universities, inside their borders, should be sponsoring or permitting research that is private in nature and is not going to become part of the public intellectual world. That's a very harsh thing to say, and I know most universities, probably my own, don't follow that. But I think we have a real problem when publicly funded institutions, whose duty is the pursuit of knowledge and truth, are under somebody's thumb in what they can reveal publicly. If it is privately sponsored, I think there should be a guarantee of publication of results and a guarantee of the independence of the researchers. I think we fail on those grounds sometimes, though.

The Chair: Is everybody happy?

Thank you, sir.

We'll break for a few minutes.

● (1658)

(Pause)

● (1704)

The Chair: Our last witness of the day, our guest, is Mr. Kroeger. Thank you very much for coming. I think you've been watching, so you know the rule. You can make a few comments, and then members of the four different caucuses may have some questions for you.

Mr. Arthur Kroeger (As an Individual): Thank you for your invitation, Mr. Chairman. I am glad to have an opportunity to come by and see if I can be of some help to the committee.

I won't have a long opening statement. The way I come at this subject is that this bill is really the third of three attempts to respond to the sponsorship scandal. The first attempt was made by Mr. Alcock as President of the Treasury Board immediately after the Martin government was sworn in, and Mr. Alcock's approach was to focus on officials. His way of trying to ensure the sponsorship scandal couldn't happen again was to apply a lot more controls and regulations and financial oversight.

My own perspective was that there were two problems. One, the implication of this was that sponsorship had come about because of the public service, which I think was not the case. I think it was politically driven, with a very small number of officials involved, and the Auditor General and Justice Gomery both said we don't actually need more regulations. In any event, that was Mr. Alcock's approach: put lots of rules in the public service and it can't happen again.

When Justice Gomery's second report came along, it's interesting that he took the exact opposite view to Mr. Alcock. Mr. Alcock said officials are the problem and Mr. Gomery said no, they are the solution. What he meant was the sponsorship scandal had come about because ministers have had an unfettered ability to do more or less what they want. So the way to make sure that doesn't happen again is to put officials in positions where they can check the power of ministers, place greater constraints on what ministers can do, and in fact the judge said that officials have an independent constitutional personality that is independent from that of the elected government.

So his solution was that ministers and indeed members of Parliament should focus on policy issues, and once those have been settled they should leave officials to get on with the job without what he would have termed “political interference”.

There's a problem with Justice Gomery's recommendation, just as there was with Mr. Alcock's, in the sense that it really would have taken us into a very different system from what we have today. That is to say, it would have taken us in the direction of government by the unelected. It would have broken the chain of accountability that starts at the lowest levels of the public service and goes on up to the minister and from the minister through to Parliament. It would have created officials with an independent accountability to Parliament.

There are two problems with that. One of them is it's very difficult to create a permanent distinction between policy and politics on the one hand and administration and management on the other. They're all mixed up together, at least in Canada, and of course when officials appear they can be questioned very extensively, and they have been for decades, about all aspects of management. Committees quite often will give you a pretty frank opinion of what they think of your management, which is fine. It's well established in Canada that officials are accountable before committees. Where I became uncomfortable was when Justice Gomery said, yes, but they should actually have an accountability independent of their ministers, because that really does take us in a different direction.

Turning to the legislation you have before you, it's the third of the three attempts to respond to the sponsorship scandal, and in my view it's the most successful. This is a bill that has some problems in it I think, but it also has a number of positive features, and in particular—I'm only going to talk about one aspect of what is a very long bill—how the bill treats the relationships between ministers, officials, and Parliament. I think it's quite ingenious.

You just heard from Ned Franks. Ned and I have had our disagreements about the accounting officer principle, and one of the achievements of this bill is that we agree with each other now.

● (1705)

The problem I had with the accounting officer principle is that, again, it breaks that chain of accountability that's supposed to run through the system, where you're accountable to your minister for everything because the minister, by statute, has responsibility for everything.

The bill says that officials are now going to be accounting officers within the system of ministerial accountability. That solves it. That keeps Professor Franks and me equally happy.

The other thing it does, which eliminates a worry I've had.... The British system on which the accounting officer model is set says, well, you know, if a minister really insists on doing something you think is a bad idea, you make the minister give you a written instruction and you give that to the British treasury and the auditor general. If you're a deputy minister or a senior official, you deal with the minister all the time—nights, Sundays, mornings. You go to meetings together and you travel together. If you're going to work well, you have to have a solid working partnership. It doesn't mean you always have to agree, and in fact you shouldn't. But the idea that every time the minister does something you think is a bad idea you ask for a written instruction I think would be quite destructive of the kind of partnership arrangement that is essential.

So what your bill says, which I think is very good, is that if a deputy finds him or herself dealing with a minister who wants to do something that looks improper, for example, you go and see the secretary of the Treasury Board and the secretary gives you an opinion. You tell the minister, and the minister says, "I don't care, I want to do it anyway". At that point, the minister has to talk to his or her colleagues at the Treasury Board. What I like about that is that it is elected people providing rulings about elected people rather than an unelected official somehow throwing roadblocks in the way of what a minister wants to do. I don't mean you always agree with your minister. You have a duty to disagree and to warn and all the rest, but at the end of the day, elected people should be in charge and should be accountable for what they decide.

Those are my main comments on the bill.

If I may, Mr. Chairman, I'd like to offer just one last observation. This runs contrary to all my years of conditioning as a senior official, when I always thought that what parliamentarians did was none of my business—you didn't give them advice. But since I'm now a private citizen and some other private citizens have given you advice, maybe I can too. I hope you'll take enough time with this bill. This is a major piece of legislation.

One of the great advantages you have, as far as I can tell from the outside, is that this is not really a matter in which there are intense partisan divisions. When I was in government, my observation was that Parliament was at its best when a committee did not have a situation in which one side was dug in on one position and another was dug in on another. Instead of that, you had members of Parliament putting their heads together and trying to figure out what kind of outcome would best correspond to the public interest. As parliamentarians, you have unique responsibility in that you are the ones who have the last word about the public interest.

So I'm not going to tell you what should and shouldn't be in the bill, but I do think it's really important that you not rush it, and that when you get into clause-by-clause, you take as much time as you need to work it out. It's complicated. There are some things in the bill that I think show some haste. There are some things that a more experienced government probably wouldn't have done. In putting your heads together on this committee, I hope you'll be able to sort those out and arrive at improvements. It's a good bill, and I think you have the opportunity to make it better.

Thank you, Mr. Chairman.

● (1710)

The Chair: Good presentation.

Mr. Owen.

Hon. Stephen Owen: Thank you, Mr. Kroeger, for being here. We all are well aware of your background and reputation and are grateful to have your advice. And I think your presentation was very clear, so I won't get into those issues.

There are two issues we touched on with Professor Franks; then Professor Franks raised one of them briefly at the end, and I would be grateful for your opinion on it. It is that the codification of a code of conduct can put the legislative branch literally into the courtroom. That's obviously what we're doing or are faced with having done in Bill C-2. I'm not asking you as a parliamentarian but as a long observer of these interactions amongst branches of government whether you feel that having it legislated poses any particular dangers, as against the advantages it might have.

The second was a point we got into a little with Professor Franks as well. I won't apply the word "proliferation", because it has a negative connotation, but we are adding more and more parliamentary agents, as Professor Franks said. That can be confusing to parliamentarians—and can as well overburden them, perhaps, in their responsibility to oversee their agents—but also to the news media, who often popularize and personalize these offices around the incumbent, and also to the bureaucracy.

This is perhaps where you could give us some good advice, because often their mandates, particularly as they multiply, will inevitably overlap, and that will cause confusion and at least duplicity—I mean duplication....and maybe duplicity as well, but it can cause confusion.

In the interests of time, I would ask my colleague Mr. Tonks to ask a question as well, and then perhaps you could address them together. I know he has one.

● (1715)

The Chair: You only have about four and a half minutes left.

Mr. Alan Tonks: Thank you to my colleague.

To the two professors, similarly to dividing policy from administration and management, the accounting officer concept attempts to entrench responsibility in the area of administration. But internal audits and whistle-blower issues spin off into other jurisdictions: internal audits into the Comptroller General, various whistle-blowing aspects into other oversight bodies.

It seems to me that where you didn't go is where we need to know: how can the accounting officer and the deputy minister...? Within what both of you say is the context of ministerial responsibility, how can the accounting officer be responsible to Parliament? Would you support the notion that, as the Auditor General reports on matters in her domain four times a year, the accounting officer should report to Parliament on whistle-blowing issues that have been raised and have been brought to his or her attention, and extreme incidents of administrative shortcomings that come as a result of internal audits or whatever? It would seem to me that each deputy minister should be a member of the internal audit committee that has been put forward by the legislation.

My question is, Professor Kroeger, how would we tighten up that accountability? How would we close the accountability loop through the accounting officer who is responsible for administration?

Mr. Arthur Kroeger: Just as a point of clarification on Mr. Owen's question, is it about the public service code or a code of conduct?

Hon. Stephen Owen: It's a code of conduct.

Mr. Arthur Kroeger: I don't have any particular hesitations about a code of conduct for public servants. If you want to put it in legislation, that's fine.

A code of conduct is mostly what you carry around in your head. You don't pull out a little book every once in a while to see what you ought to do, but if it is useful as a general way of establishing an operating environment, I don't worry about it. I don't think it should get you into court very often, but perhaps I'm overlooking something.

On the question of the functioning of an accounting officer and responsibility to Parliament, I'm going to see if I can combine my response to Mr. Tonks and Mr. Owen.

When you go to a parliamentary committee, you really have to be ready to provide information about anything the committee wants, within obvious limitations of confidentiality. You have to be prepared to answer questions about whatever the committee raises; again, certain questions are off limits for an official, but I think you should be able to have very wide-ranging discussions with parliamentarians, because that's how you get them to understand better what you're trying to do. If that gets into the operations of the department—how well your policies are working, whether your programs are well designed—that's all part of it. You should be able to discuss that, as well as the nuts and bolts of the last financial report the Auditor General brought in.

On the question of audit, the legislation says you have to have an internal audit committee. I think all departments have internal audit committees. I know that every department in which I served as a deputy minister had an internal audit committee. I chaired it. The Auditor General was always invited to have a representative at the table. The Comptroller General was always invited to have a representative at the table. I always assumed that anything in our audits was going to become public, as it should. I have no problem with any of that.

The one rider is that you still I think need to preserve the principle that elected people are in charge. It doesn't mean they're to blame for everything that happens, but you work for the minister. The minister is the boss; the minister is elected and has prerogatives that you don't have.

● (1720)

The Chair: Thank you.

Next are Monsieur Sauvageau and then Madame Guay.

Monsieur Sauvageau.

[*Translation*]

Mr. Benoît Sauvageau (Repentigny, BQ): Mr. Kroeger, thank you for your presentation.

At the end of your presentation, you said you hoped we would examine it thoroughly. You said we should take the time to do things properly in the clause-by-clause consideration because it's necessary to prepare a good bill. You were a senior official, and you therefore probably have considerable knowledge about bill. Between 1988 and 2000, 14 bills containing more than 300 clauses were tabled. According to one document from the library, the average time between first reading and royal proclamation for one of these bills is 196.6 days, or 200 days, if you round up the figure. We're being asked, we're being required to study Bill C-2 and pass it in more or less 40 days. Do you think, after reading Bill C-2, that legislators like us can do what you want, that is to say study the bill thoroughly and take the time to improve it in the clause-by-clause consideration with a schedule like the one I've just referred to?

Mr. Arthur Kroeger: It is up to you, the members, to judge how much time that takes, but this is a very complex bill.

The President of the Treasury Board said this morning, in his speech to officials, that it had taken nine weeks to prepare this bill. That's very little time, in view of its considerable content.

You must judge what changes to make and how to discuss them. For my part, I hope that your members won't feel rushed and that you won't feel obliged to finish your proceedings on June 15 at all costs.

I appeared before a committee when I was Deputy Minister of Transport. The bill was at the clause-by-clause consideration stage. Four weeks were devoted to it, at a rate of about 40 hours a week. That totalled 150 or 200 hours. During that period, I believe 84 amendments were made to the bill.

All bills are different, but this is very important: what you establish here is a framework for the operation of government and officials. So I would say, without wanting to prescribe anything, that it would be good for you to take the necessary time.

● (1725)

Mr. Benoît Sauvageau: What do you think would be the danger in rushing it?

Mr. Arthur Kroeger: One of these dangers is part of the question that Mr. Owen asked me, I believe: are we trying to do too much? Are we increasing the number of officers of Parliament? Are we increasing the number of processes? That could indeed undermine the proper operation of government.

It is also possible that you may find, after some studies are done, that some provisions of the bill are not practical. So it's up to you members to judge that. The fact remains that these questions are very important.

Mr. Benoît Sauvageau: You're right; it's up to the members. Unfortunately, the NDP, to name only it, with the Conservatives' consent, will impose a motion on us this evening, that we complete the hearing of witnesses tomorrow, that we proceed with the clause-by-clause consideration next week and that we complete it as soon as possible. It appears we're not trying to make a good bill, but rather to keep an election promise before June 23.

What's quite curious is that everyone on this committee agrees on the principle of Bill C-2. However, it's the most dysfunctional committee I've ever sat on, despite the fact that everyone is in agreement.

So, Mr. Kroeger...

[*English*]

The Chair: Mr. Sauvageau, actually we have agreed to sit into the summer, so be fair to the committee.

I don't appreciate you calling this committee “dysfunctional”. I think it's a very good committee.

[*Translation*]

Mr. Benoît Sauvageau: You're right, Mr. Chairman: it's not the committee, it's Mr. Poilievre.

[*English*]

The Chair: Well....

[*Translation*]

Mr. Benoît Sauvageau: Pardon me, Mr. Chairman, for including you in that dysfunction. I'm sure your health is good.

So I was telling you that I agree with your remarks, but unfortunately we can't apply your judicious advice because the contrary is being imposed on us. So we'll have to live with an imperfect act.

Thank you.

Mr. Arthur Kroeger: That's the business of the members on the committee. Nevertheless, I believe you've heard a lot of witnesses.

From my experience, next week, when you begin the clause-by-clause consideration, it will be very important and it will be helpful for you to take the necessary time to ensure you know what you want, and that you find the best way to address the problem.

As you'll understand, I must stick to more or less general observations, since it is you, the members, who must judge the matter.

[*English*]

The Chair: Time has expired.

A point of personal privilege.

Mr. Pierre Poilievre: Mr. Sauvageau has again spent most of his time talking about how he doesn't have enough time and, in the process, attacked other members of the committee. This is a pattern, Mr. Chair, where the Bloc consistently says it doesn't have enough time, but yet spends all of its time talking about the time that it doesn't have. If they are truly truthful when they say they want and support the principles of this bill and that they want to clean up corruption, they will stop wasting the committee's time by arguing about how much time they do or do not have.

Thank you.

Ms. Monique Guay: That's what you're doing right now.

The Chair: I want people to stop provoking each other.

Mr. Sauvageau, I don't want to get into any more of this.

Try to refrain, everybody, from provoking everybody.

Mr. Dewar.

● (1730)

Mr. Paul Dewar: Thank you.

Mr. Kroeger, in our party, we had actually proposed before the election some concerns that we had about what was going on. Ethics and accountability, and putting those two together, were pretty apparent in this town and across the country. We put forward a kind of mission statement, if you will, that Canadians were demanding changes in ethics and accountability. We wanted a strong Canada that had institutions, if you will, based on sound, ethical, and accountable mores and ideas. Having honesty, fairness, and transparency were critical.

My predecessor, Mr. Broadbent, put forward a seven-point plan. Part of it had to do with Parliament and the government, and part of it had to do with the democratic system itself. We were concerned and still remain concerned. This says a lot about the accountability of government and Parliament, but there's one component missing, and that's the accountability to the public. We've talked about some other concerns we have about proportional representation and concerns about other institutions, like the Senate.

That's background from our perspective as a party

But when we got into this bill—and we think we share some of your sense of the bill—there were some really good things and there were some things that we think can be improved upon. Access to information is an obvious one, and we'll put forward proposals and amendments on that. But there are some institutions that are unchartered waters, and I would like your comments.

I'd turn your attention to the parliamentary budget officer. There's an interesting component to the parliamentary budget officers. They would have the ability to cost private members' bills but not to really do a costing or evaluation of the government bills, as I read it. I find that interesting.

I don't know if you've looked into that part of the bill at all or if you can look at other jurisdictions as to what that kind of office would provide and what the need would be. I understand the need, and we certainly wanted to have that. It was mostly to do with concerns around the Department of Finance: how the surpluses would be out of whack with what everyone else was saying, therefore the money that was available to government and Canadians wasn't there, and alas, every year the government would say, oh, look, the surplus was a lot larger than we had anticipated. We wanted some transparency there, and that's why we thought an oversight was important.

I'd like to mention a couple of other points, if I have time.

On that one particular component of the bill, it's curious to me that you would cost private members' bills, in which traditionally you can't spend money, and then have the government bills not costed. What do you think the intent is? What could this do?

Mr. Arthur Kroeger: I'd thought the intent was probably fairly innocent in the sense that when the government does a bill, the Department of Finance, the Treasury Board, or whomever, are going to have to satisfy the cabinet as to what it will cost. Presumably, it's the kind of information that could be made available to Parliament.

If a private member designs the bill, there isn't anybody around to say, here's what this is going to cost. In that sense, I had interpreted it to be a service to private members and to parliamentarians generally.

Of course, if the parliamentary budget office had doubts about the costing that was attached to a government bill, I believe your legislation gives that officer access to all the data in the department. If there were cause, the office could check it out and perhaps give you a different opinion.

I had assumed that the costing of a private member's bill had an innocent intent.

Mr. Paul Dewar: I might receive clarification now, but traditionally I've been told to steer away from anything that has to do with finances, as a private member putting a bill forward. If it's an extra service, so be it.

If we go back to where the source of this was—I'd actually, just as a comment, say that this committee has been going on for quite a while—you mentioned Mr. Alcock and his remedies, and I heartily agree with you. Particularly for the people in this town, the effect would have been paralysis to government if they had been enacted, in my opinion, and from what I was hearing from public servants. You did have the Gomery commission, and here we are. So I think, with respect, we've been at this for a while. We had an election on it.

There's a perceived rush. I'm not wanting to rush. We want to make sure good things get done.

But when you look at the public accounts committee and at the estimates process, we haven't talked about that enough, in my opinion. It's strange to me—and I'm wondering if you see it in this bill or another tool—to allow Parliament to be more vigorous in looking at spending at the front end and not at the back end.

In other words, if we look at some of the concerns that came out of Gomery, and before that, other programs, it was after the money had been spent, and *voilà*, look here, we had some misspending or account problems, and so on. Sometimes, indeed, the problems were exaggerated, and we found that out after the headlines.

Some provinces are much more rigorous in their estimates process. We have the blue book here. I've looked through it. This year was a bit of an anomaly because it came out before the budget. So I'm no stranger to—

● (1735)

The Chair: You have one minute, Mr. Dewar.

Mr. Paul Dewar: Could you comment on how we could better serve Canadians by the estimates process?

Thank you.

Mr. Arthur Kroeger: That's an important question. It is one of the fundamental functions of Parliament, obviously.

I'm a little surprised. There was one recommendation that Judge Gomery made that I thought was very good that hasn't been picked up in the legislation, but it hasn't been picked up in anything else that I've heard the government say. Justice Gomery said to increase the resources available to parliamentary committees.

By most standards—of the United States, I won't even speak, but most other countries have far greater support for their parliamentarians and their parliamentary committees than we have in Canada. So you're really trying to operate on a shoestring. The Library of Parliament does a formidable job for you, but there aren't all that many of them.

So, number one, if the government and the parliamentarians saw fit to increase resources for committees, I think that could do quite a lot. That could give you good research reports.

I used to be responsible for the main estimates, but I was a Treasury Board official. The thing is that thick. You can't as parliamentarians get into that unless somebody has done some research and says, “Hey, take a look at this”. You need the staff support and the analysis before you come to the table. So that's number one.

Number two is a question of how Parliament wants to organize itself. This is something that has always kind of puzzled me, because historically—I'm not just talking about the present government, I'm talking about governments that I've known over a period of time—there was not very much system. Somebody is appointed parliamentary secretary, they serve two years, and then their term is up. So, okay, we'll make you chair of this committee; it doesn't matter if you know anything about it or not, and whoever is the chair of that committee goes off to do something else. You get random substitution of members on committees.

There are a number of practices that are actually, to some degree, I think, within the control of Parliament itself, and there, parliamentarians have to make a judgment call as to which of these functions is the most important—because there are reasons you do substitutions. If you really wanted to get into the financial structure of the department, you could organize a series of hearings, and officials, I can tell you, would really enjoy coming and giving you a two-hour briefing, saying, “Look, here's how we're organized. Here are the main programs. Here is the budget. Here is our history. There's the background. Now, what do you want to get into?” At future meetings you could say, “Well, you know what? We're really curious about your regional programs.” So you'd start burrowing into those.

But that's a question of how a parliamentary committee chooses to organize its work. Officials can't do that for you, and to some extent, even the government can't do it for you. It's parliamentarians themselves.

The Chair: Thank you.

Mr. Lukiwski.

Mr. Tom Lukiwski: Thank you very much, Mr. Chair.

Mr. Kroeger, welcome. I enjoyed your presentation very much.

I want to go back for a few moments to a fairly popular subject, it seems this afternoon, and that's the time required to deal with this bill.

With all the greatest respect in the world, I have to disagree with my colleagues, Mr. Sauvageau and Madam Guay, and I think they both know I respect them very much. But their implication is, or their assessment is, that we are trying to rush this bill and not give it the due consideration, the rigorous examination, required. But I think we've struck a fairly happy marriage, because, for a couple of reasons, there is some need for speed, if you will.

We've heard from a number of witnesses who have stated that they are asking us to deal with this and get this bill through committee quickly so it can be enacted into law, for a number of reasons. A more primary reason, in my opinion, is the fact that because this is a minority government that could fall at any time, should we not deal with this expeditiously, we could be faced with yet another situation where a good attempt to get a necessary bill passed is derailed because of an impending election. So we have the challenge then of how to deal with things expeditiously, yet still give it it's due diligence. And I think what we're doing here is the best compromise, and that's to extend the sitting hours.

I noted with interest that you said that when you were on the transport committee you dealt with a bill 40 hours a week; right now we're dealing with this bill 24 hours a week. By the time we reach the end of the session, June 23, we will have spent over 120 hours or so discussing this bill. As you would well know, a normal standing committee of Parliament meets four hours a week, and over the 28-week period that Parliament usually sits, that would be about 112 hours. So in fact in a short and compressed period of time, we will have met the equivalent of a year of a regular standing committee.

Should we go beyond that—and we have a motion that has been approved by all of us at this committee to keep sitting until this bill is done—I suggest that we can probably increase the sitting hours to approximately 40 hours a week, starting the week following the rising of this House, and if we sat for another three weeks after that, it, in effect, would be the equivalent of yet another year of a normal standing committee. I think we're all quite prepared to do that, because we all agree that this bill needs to be passed, but we need to give it its due diligence and all of the rigorous examination of every clause.

I'm not asking for you to say yes or no on this, but I would ask for your comments, given the parameters that I've just described to you, on the need for some urgency, and the fact that we're putting an intensive amount of work into this bill through examination and interventions by witnesses, and then when we go into the clause-by-clause, whenever that may occur—and I'm not sure if it's going to occur next week or not. Do you suggest that if we end up getting approximately 200 hours of examination, that might be considered adequate?

● (1740)

Mr. Arthur Kroeger: I wouldn't feel competent to put a number on it. Let me tell you how I think about the bill.

These are institutional questions you're dealing with. You're creating new officers of Parliament who are going to be there for the long term, or so you hope. You're creating new procedures. And again, this isn't a quick fix. This is something that you, as parliamentarians, and officials, and ministers, are going to live with for the foreseeable future. It's not as though it was really urgent to pass this bill because people were stealing money hand over fist. Canada is not that kind of a country. You're not trying to deal with larceny or fraud in regional offices or on the part of anybody in politics.

Coming back to Mr. Dewar's comment about morals and values, every year there's an organization called Transparency International that publishes a so-called corruption perceptions index. It's got 170-plus countries on it, and Canada is always in the top 10, with the Scandinavians, the New Zealanders, and the Dutch, and good folks like that. So it's not as though we have a question of rampant corruption that it's urgent to deal with; you're dealing with longer-term matters.

I don't know, I have no idea, what the right number of hearings is. I might venture a suggestion just from my own experience of some past legislation. Once you get into clause-by-clause, and where you're not having partisan arguments but you're actually figuring what the best way to do this is, you may find that's more complicated than you have thought. But that's speculation on my part.

I would not want to prescribe to parliamentarians what is the right amount of time to give this. I would express the more general opinion. This is long-term legislation. I hope you won't feel that you've got to come to too many conclusions in the short term, but I wouldn't go further than that.

Mr. Tom Lukiwski: Thank you.

Mr. Chair, I'll cede the rest of my time to my colleague Mr. Petit.

The Chair: Yes. He has about a minute and a half.

Mr. Petit.

[*Translation*]

Mr. Daniel Petit: Mr. Kroeger, I heard your evidence, and I found it excellent. I would like to know your opinion on one important point.

You worked as a senior official in the federal public service. I want to be sure that an honest official subject to this act will have the necessary instruments to disclose a problem. We're not just talking about problems like the sponsorship scandal. There are all kinds of problems, whether it be illegal cost overruns, fraud and so on. These problems arise across the public service. It seems to be a habit in the federal government.

In your opinion, will Bill C-2 enable an official who has seen million dollar cheques pass before his eyes every week to say that that is unacceptable and to take the necessary steps to put an end to that problem? It's hemorrhaging, and it has to stop.

● (1745)

Mr. Arthur Kroeger: When someone comes to the conclusion that a situation is really unacceptable, and he or she speaks to the director general and the director general nevertheless responds that everything is fine, the decision is a hard one to make. However, it is very important that every individual dealing with a crisis of conscience caused by a situation making him or her uncomfortable has access to an organization or a person who will enable that individual to discuss the problem without it being a risk to him or her.

This isn't the kind of initiative you take without reflecting on it at length. It is, in a way, a last resort. Some provisions in other bills contain very subtle measures that can undermine the interests of an official. I haven't done a detailed study of the bill, but I believe this one is better, that it is a positive step and that it can encourage people to disclose problems which they feel are unacceptable and should be corrected.

[*English*]

The Chair: I'm sorry, Monsieur Petit, we've run out of time.

Mr. Kroeger, I thank you very much. You obviously know your way around this place. I think the committee enjoyed your comments and appreciates your counsel. Thank you very much.

Mr. Arthur Kroeger: Thank you, Mr. Chairman. You're all engaged in a really important exercise. Perhaps because I live in government I think it's really important.

Good luck.

The Chair: We thank you.

The meeting is adjourned until 6 o'clock.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

Also available on the Parliament of Canada Web Site at the following address:
Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante :
http://www.parl.gc.ca
