Agents of Parliament: 
The Emergence of a New Branch and Constitutional Consequences for Canada

Winner of the Institute On Governance’s 2005 Alf Hales Research Award

by Jeffrey Graham Bell
Parliamentary Intern
2004-2005
The Institute On Governance (IOG) is a Canadian, non-profit think tank founded in 1990 with the mission to improve governance for public benefit, both in Canada and abroad. We define governance as the process whereby power is exercised, decisions are made, citizens or stakeholders are given voice, and account is rendered on important issues.

We explore what good governance means in different contexts. We undertake policy-relevant research, and publish the results in policy briefs and research papers.

We help public organizations of all kinds, including governments, public agencies and corporations, the voluntary sector, and communities to improve their governance.

We bring people together in a variety of settings, events and professional development activities to promote learning and dialogue on governance issues.

The IOG’s current interests include work related to Aboriginal governance; technology and governance; board governance; values, ethics and risk; building policy capacity; democratic reform and citizen engagement; voluntary sector governance; health and governance; accountability and performance measurement; and environmental governance.

You will find additional information on our activities on our website at www.iog.ca

© Copyright 2006, Institute On Governance

All rights reserved

Agents of Parliament:
The Emergence of a New Branch and Constitutional Consequences for Canada

Published and distributed by:
The Institute On Governance
122 Clarence Street
Ottawa, Ontario
Canada K1N 5P6
Phone: (1-613) 562-0090
Fax: (1-613) 562-0097
Web Site: www.iog.ca
## Table of Contents

Alf Hales Research Award ........................................................................................................................................ 1  
Introduction ......................................................................................................................................................... 2  
The Four-Branch Model & The Case for a Fifth ................................................................................................. 3  
What are Agents of Parliament? ....................................................................................................................... 5  
Who are Agents of Parliament? ....................................................................................................................... 6  
APs in Federal and International Context ...................................................................................................... 13  
What is the proper role of Agents of Parliament? ............................................................................................ 14  
Has the rise of APs supplanted a Parliament-centred constitution? ............................................................ 19  
Works Cited and Consulted ............................................................................................................................. 21
Alf Hales Research Award

In recognition of the valuable educational experience that the Parliamentary Internship Programme provides, the Institute On Governance created The Alf Hales Research Award in 1999. The award, which seeks to promote research excellence and young people's understanding of governance issues, is handed out annually to the best Intern essay on a particular aspect of the Parliamentary system. The 2005 winning paper, Agents of Parliament: The Emergence of a New Branch and Constitutional Consequences for Canada by Jeffrey Graham Bell, reflects the originality and spirit that Alf Hales demonstrated when he created the Programme 30 years ago.

Jeffrey Graham Bell was one of ten Canadian graduates selected for the 2004/05 Parliamentary Internship Programme. Active in the student community and a multiple scholarship-winner, Jeff was named a Leader of Tomorrow by the Vancouver Board of Trade in 1999 and a Leader in Learning by the University of British Columbia in 2002. He co-created and directed the Chapman Discussions interdisciplinary seminar series from 2002 to 2004. After graduating from UBC with a B.A. (Hons.) in Political Science in 2004, Jeff’s primary research on disabilities and community resources helped to improve service delivery for people with disabilities in the Comox Valley. He is currently working as Legislative Assistant to David McGuinty, MP and was Policy Director of McGuinty’s 2006 campaign.
Introduction

In a recent article, David E. Smith surveys Canadian Parliamentary democracy and asserts that among the major changes witnessed in the past thirty years is a trend towards what he calls the ‘audit society.’ Its primary institutional reflection, he suggests, has been the evolution of Agents of Parliament (APs) from being Parliament’s servants to being Parliament’s masters. Drawing inspiration from American constitutional theorist Bruce Ackerman, Smith writes that APs “are in the process of becoming the integrity branch of government.”

Smith’s reference to Ackerman is prescient. Ackerman’s 2000 essay “The New Separation of Powers” reconceptualizes a fundamental constitutional motif in an attempt to address the challenges of Western democracy in the early 21st Century. His innovative formula combines both American and Westminsterian traditions in a model of ‘constrained parliamentarism’ that leverages both the institutional cogency of a British-style executive and the checks and balances of a traditional Madisonian division. To justify his model, Ackerman pulls apart familiar sketches of the executive, the legislature, and the judiciary and attempts to reveal an updated version of constitutional relations.

The reconceptualization in Ackerman’s essay, in particular the idea that other branches of government could exist, provides fertile soil for a re-examination of Canadian constitutional relationships. The increasingly prominent role of APs raises questions about their place in the ever-evolving constitutional equation. It is commonly asserted that APs render government more accountable. This paper will examine if, how, and why this occurs. One primary tack will address the independence of the Agents considered (taking into account the manner in which they achieve their position, their term length, and the conditions for their early dismissal among other factors). In what respects are current APs free from influence by the government of the day? Are they equally free from influence by Parliament? Does this independence mean that their critiques are neutral?

A second question of primary importance addresses the relationships between APs and other political actors. Does the maxim that the Auditor General comments on policy implementation – theoretically a neutral activity – but not policy itself hold true across the class of Canadian APs? If not, how do APs establish their legitimacy, and does their position erode the sovereignty of Parliament? Are they unbalancing the constitution under which the elected body must remain paramount, or offering welcome new safeguards?

To answer these questions, this paper begins with a résumé of Ackerman’s relevant arguments translated into Canadian constitutional equivalents. It proceeds to the issues complicating identification of the current federal APs. After placing the discussion in its international context,
the paper finally discusses the resulting current constitutional questions concerning the panoply of APs. It concludes that Agents of Parliament are beginning to constitute a branch in the same way that the bureaucracy already does. Changes in the last century have seen an incredible increase in support for the executive and its role: governance. APs may be seen as – at least part of – the ‘legislative administration’ rising in response to support Parliament in both of its traditional roles: scrutiny and legislation.

The Four-Branch Model and the Case for a Fifth

Separation of powers – the doctrine proposing clear operational boundaries between legislative, executive, and judicial branches – is paradigmatically embodied in the presidentialist American constitution. This theory is seen to have challenged the traditional Westminster paradigm of unified sovereignty. However, as a federal state from its inception, Canada was never a foreigner to judicial oversight, and thereby separation of powers, whether ultimately emanating from the Judicial Committee of the Privy Council in London, or later our own Supreme Court of Canada.

In the American context, Ackerman reasons, the bureaucracy constitutes and has long constituted a de facto ‘fourth branch’ of government. He argues that, as a branch, it warrants constitutional powers and protections sufficient for it to ensure its charism within the ongoing jurisdictional skirmishes. He argues that the presidentialist bureaucracy is caught in a crossfire that Westminster bureaucracies never are:

With the presidency separated from congress, high-level bureaucrats must learn to survive in a force-field dominated by rival political leaders. Because both the president and congressional leaders brandish powerful weapons for disciplining disobedient servants, only the most naïve bureaucrat would suppose that the ethic of ‘neutral competence’ can serve as the best survival strategy. … Rather than deliver the goods demanded by her minister, the bureaucrat’s first priority is to articulate a political mission that will attract the support of the contending powers responsible for legislative and funding decisions.

On the other hand, in Westminster systems bureaucrats are exposed to a different dynamic as servants of a single, variable master. Their jobs are on the line if they are not seen to be supportive of the current regime. But, as Ackerman points out, they can take a longer view:

At some indeterminate time in the future, the cabinet will lose an election, and the next bunch of reigning politicians will exact retribution on bureaucrats who have ostentatiously committed themselves to the ideology of the previous regime. … If the bureaucrat is to avoid these sanctions, she must cultivate a reputation for neutral competence.

Westminsterian bureaucracies may not find themselves in the same kind of crossfire that their Presidentialist cousins are in, but they certainly constitute a breed of political actor distinct from their partisan superiors. Students of a political system with a history of fused powers will not find it too much of a stretch, one reckons, to conceive of the executive as an alliance of two branches, the Cabinet and the bureaucracy.

4 “The power to make laws must be constitutionally separated from the power to implement them.” Ackerman 2000, 689.
5 Ackerman 2000, 699.
6 Ackerman 2000, 698. It bears pointing out that though these contrasting dynamics may be seen to perpetuate themselves in the contrasting systems, their origins are dependent on a belief in the predominant ethic as democratic: pulling and hauling, in the Presidentialist case, and neutral competence, in the Westminsterian.
For Ackerman the four-branch model is a conceptual starting point. He goes on to argue for the constitutional recognition of several additional branches, coaxing them from under-valued functions within the original four and from entirely new functions to shore up democratic dynamics in the modern state. His suggestions are creative and intend to provoke debate on possibilities for progressive constitutional use of separation of powers. It is no surprise that these suggestions are linked to Ackerman’s analysis of individual rights.7 As becomes apparent below, the Canadian iteration of these institutions has been the object of criticism for supplanting a Parliament-centred constitution with foreign, individualist principles that undermine accountability. What may be more surprising is how many of his suggestions – novel to an American audience – are already taken up by APs in Canada.

Ackerman first suggests the addition of a ‘democracy branch’8 aimed at electoral impartiality. Every democracy must take the operation of elections extremely seriously. The security of fair elections should therefore rest in the hands of an independent, constitutionally protected body, according to Ackerman. Duties as minimal as the neutral administration of elections, or as extensive as boundary adjustment and electoral finance review (and even public party financing), could be accorded to agencies within this branch. Whatever the ideal embodied by the structure, Ackerman emphasizes the importance of constitutional assurances that there is “a mechanism to ensure the continuing force of its ideal democracy despite the predictable efforts by reigning politicians to entrench themselves against popular reversals at the polls.”9

An ‘integrity branch’ reflects in constitutional terms the belief that at the heart of genuine democracy is an abiding respect for the rule of law. Put inversely, corruption is a serious threat to the legitimacy and thereby the viability of a democratic regime. And, as citizens in Canada today (and every democracy for that matter) would attest, elected politicians are under electoral pressures such that they cannot be trusted never to engage in fiscal practices amounting to corruption. Corruption is a persistent and fundamental threat, Ackerman contends, so modern constitutions ought to provide for an ‘integrity branch’ “armed with powers and incentives to engage in ongoing oversight.”

Ackerman’s third new branch is the ‘regulatory branch.’10 Here a constitution could entrench guarantees of bureaucratic competence and legitimate the reality of normative decision-making by a supposedly ‘neutral’ bureaucracy. An example of a mechanism that would be of potential use to this branch is public participation in regulation creation, or judicial oversight. Ackerman is fairly vague about how these functions would cohere as a new ‘branch’ but points to the American Administration Procedure Act as a central example of the type of legislation he envisions as it would look in a presidentialist system.

The fourth, and most controversial, suggestion is a constitutionally protected ‘distributive justice branch.’ As a rationale for this branch, Ackerman cites the perpetual economic injustices systematically suffered by a certain class of citizens in every state, and the corresponding lack of

---

7 “[This version of separation of powers] doctrine, based on fundamental rights, cuts deeper and seeks to impose ultimate limits on the legislative authority of democratically elected politicians.” Ackerman 2000, 716.
8 Ackerman 2000, 716.
9 Ackerman 2000, 718.
10 Ackerman 2000, 694.
political mobilization it can muster. The remedy, Ackerman ventures, is a constitutionally
determined percentage of the domestic product dedicated to individual cash transfers benefiting
the most impoverished. Entrenched economic injustice will never be taken seriously by
politicians whose electoral constituents are mostly well-off, so a creative implementation of the
separation of powers should defend an efficient, straightforward redistributive agency.
The diversity of APs reflecting Ackerman’s new powers will be considered in the following
section. His constitutional building blocks may be seen as a quartet of distinct powers, or more as
variations on the single theme of a fifth branch. Given the institutional pluralism we will witness,
perhaps this has yet to be resolved in Canada.

What are Agents of Parliament?

Recent Canadian literature on the subject of APs agrees fundamentally on one thing: the
difficulty of establishing the unifying characteristics of the existing cohort of Agents. A great
deal of confusion has resulted from the application of the term ‘officers of Parliament’ for the
offices and commissions that this paper refers to as APs. The first ‘Officers of Parliament’ were
the Servants of the Houses (the Commons and the Lords) in Britain, beginning specifically with
the Clerks, whose lineage remains unbroken since 1363.11 There remains linguistic and
conceptual confusion around the difference between these internal, non-partisan Officers, and
the later, independent genus of officers forming the subject of this paper.

The tenure and importance of the non-partisan servants warrant the title ‘Officer’ but it
appears that in Canada, and throughout the Commonwealth, the contemporary literature both
political and academic has settled on overwriting this term. For one prominent example, the
1985 (McGrath) Report of the Special Committee on Reform of the House of Commons
called the clerk and sergeant at arms ‘House of Commons officers,’ referring to independent
Officers as ‘other officers.’ For another, the Special Committee on the Modernization and
Improvement of the Procedures of the House of Commons’ 2001 report referred to both non-
partisan officers and independent Officers as ‘officers of Parliament.’ Virtually all of the
academic references cited below refer to the independent entities as ‘Officers of
Parliament.’12

Notably, however, the Formal Documents Regulation specifies the following as Officers of
Parliament: the Speaker of the Senate, the Clerk of the Senate, the Clerk of the House of
Commons, the Sergeant at Arms, the Parliamentary Librarian, the Associate Parliamentary
Librarian, and the Gentleman Usher of the Black Rod.13 With the debatable exception of the
Speaker of the Senate, these officers fit the traditional definition of an Officer of Parliament as a
non-partisan, internal Servant of the Chambers. The Regulation affixes these Officers a
commission under the Great Seal under a single article, and leaves APs for a catch-all category.

The term ‘Agent of Parliament’, as applied in this paper, may be preferable for several reasons.
First, it readily distinguishes the newer independent genus of entities from the older non-

11 Marsden 1979, 26.
12 For a noteworthy counterargument see Thomas 2003.
partisan ones in countries across the Commonwealth.\textsuperscript{14} Second, the agencies referred to sometimes call themselves Offices, other times Commissions or other descriptors; ‘Agency’ would be an intuitive, inclusive term. Third, and echoing this paper’s thesis, the word Agent better evokes the identity of these bureaus as active political entities bearing the sanction of Parliament.\textsuperscript{15}

**Who are Agents of Parliament?**

In Canada, as elsewhere in the Commonwealth, confusion over the description of APs has meant confusion over the identity and nature of APs. The identity of Canadian APs will probably remain contested until the legislatures lay down guidelines as to the nature and function of their respective Agencies. In the absence of such guidance, this paper will evaluate the most likely AP candidates by statutory provisions for independence. It will then introduce the prospective APs with reference to the agency history and activities promulgated in their respective Reports on Plans and Priorities (RPPs) for 2005-06.\textsuperscript{16}

To be an AP, rather than a governmental agency, an agency must be sufficiently independent. Where other countries, notably New Zealand, have taken a coherent approach to empowering their APs, Canada’s AP development has been pragmatic and ad hoc. Appendix 1 charts eleven AP candidates against eight criteria drawn from the existing literature on AP independence. The appendix illustrates the decided mélange of institutional parameters to which the APs are subject. These criteria were selected to avoid judgment on the basis of type of work performed. They emphasize the statutory independence of the offices from the government, not from Parliament itself.

The first criterion is somewhat symbolic, asking whether there is a reference in the enabling statute to a commission under the Great Seal affixed to the executive agent. The second criterion speaks to whether the AP candidate is required to have the confidence of the chambers relevant to his or her post, i.e. either the House or Senate or both resolve to approve (or nominate and approve) the agency’s executive candidate. Third, does the executive candidate have a statutory guarantee of a term at least five years in length?\textsuperscript{17} Fourth, is Cabinet required to have a resolution of the House and/or the Senate to remove a sitting executive agent? Fifth, is a report is submitted, at least annually, to Parliament via the Speakers of one or both Chambers? Sixth, are the agency’s estimates submitted to Parliament by the agency (via the Speaker) -or determined

\textsuperscript{14}Though it must be admitted that Commonwealth usage currently prefers the term ‘Officers of Parliament’ for both generations. The use of ‘Officers’ may be found in contemporary documents from UK House of Commons reports on ‘Officers of Parliament’ to the ‘New Zealand Officers of Parliament Committee’. A consensus set on prolonging the confusion or displacing the earlier definition of the term appears almost irreversible. However, the authoritative work on parliamentary procedure, Erskine May, follows a more traditional usage of the term. (Gay and Winetrobe 2003, 12.)

\textsuperscript{15}The May 2005 Report of the Standing Committee on Access to Information, Privacy and Ethics notes that the Privy Council Office and the public service use the term Agents of Parliament.

\textsuperscript{16}Reports on Plans and Priorities are forward looking documents on expenditures and objectives prepared by federal departments and agencies to be tabled by the President of the Treasury Board each year. ‘General Info 2005-2006 Part III - Reports on Plans and Priorities’ http://www.tbs-sct.gc.ca/est-pre/20052006/g3a_e.asp.

\textsuperscript{17}One reason for this criterion is that five years represents the minimum term over which an appointee is assured to be independent from a given Parliament with regards to renewal of term. Renewal is not always an issue, so five years also represents a defensible period over which an appointee can develop independent positions on the fundamental issues related to his or her post.
independently in some other fashion -rather than by a government department? Seventh, are staff, apart from officers named in the legislation appointed by the agency’s executive agent rather than by the government? And finally, eighth, is the executive agent’s salary fixed or pegged to a reference point in statute rather than being left to Cabinet discretion?

The table confirms conventional wisdom in most respects. The five consensus APs until recently were the Auditor General, Chief Electoral Officer, Commissioner of Official Languages, Privacy Commissioner, and Information Commissioner. The new Ethics officers also demonstrate that they are linked to their respective chambers, and remarkably well insulated. The Commissioner for the Environment and Sustainable Development and the Commissioner of Canada Elections are special cases (discussed in the following section), but clearly do not rank on the same scale as the other nine.

As previous literature would suggest, the two more complicated cases are the President of the Public Service Commission and the Chief Commissioner of the Human Rights Commission. New legislation coming into force in December 2005 has strengthened the case for the President of the PSC. She is now appointed with Parliamentary approval and is protected from arbitrary dismissal. Though her report is tabled by a minister, the minister is required by the new law to place it before Parliament within 15 days of receiving it. The President is also guaranteed a fixed term, but the length is at the discretion of Cabinet. Like most of the AP candidates, there is no independent budget setting mechanism for the PSC, nor does the statute provide protection for the executive’s salary.18

The position of Auditor General (AG) was first established in 1878 by Alexander Mackenzie’s Liberals in the wake of the Pacific Scandal, which had earlier claimed the first premiership of Conservative Sir John A. Macdonald. Opposition and government alike publicly supported the nomination of an auditor holding office “during good behaviour,” rather than at the discretion of the government.19 The evolution of the Office of the Auditor General (OAG) over time has been remarkable, evolving from a small 19th Century bureau of one to a contemporary 21st public bureaucracy with 590 full-time equivalent employees.

While Parliament bears the constitutional duty to vigilantly observe the government’s finances on behalf of the citizens, for 127 years the OAG has possessed the tools (full-time professional auditors) that Parliament needs in order to fulfill this duty. Its long history has meant that the OAG has been held as model for other APs of how accountability can be exercised.20 The OAG’s 2005-06 RPP spotlights the special relationship between the House Public Accounts Committee (PAC) and the OAG, suggesting that committee hearings “help gain department and agency commitment to implement our recommendations.”21 The single program activity admitted to in the report is legislative auditing. The office proclaims its status as “an Officer of Parliament, independent of government,” suggesting that it brings “a non-partisan, objective and

18 Bill C-11 (38th Parliament, first session) will likely create another Agent of Parliament, the Commissioner of Integrity for the Public Service. Details of the parameters of this position were not available in time for this paper.
19 Sinclair 1979, 17.
20 A (UK) House of Commons Research Paper looking at Agents of Parliament across the Commonwealth argues that core characteristics of APs can been derived from the British Comptroller & Auditor General (C&AG). The C&AG inspired the inception of the Canadian AG in the late 19th Century.
21 OAG RPP 2005-06, 5.
fair approach” to its work.\textsuperscript{22} Financial accountability and “good performance measurement and reporting”\textsuperscript{23} are germane to the OAG’s value of good public management and accountability.

The Public Service Commission of Canada (PSC) has undergone an equally profound evolution from being the Civil Service Board established in 1868 to hire for the government in the Ottawa region. In its own words, it is currently “mandated by Parliament to ensure a public service that is competent, non-partisan, representative of the Canadian population and able to serve the public with integrity and in the official language of their choice.”\textsuperscript{24} The emphasis on accountability to Parliament follows the executive-driven Public Service Modernization Act, 2003 and the new Public Service Employment Act\textsuperscript{25} coming into force on December 1, 2005. Interestingly, the newest President of the PSC (PPSC), Maria Barrados, has taken her position after 18 years with the OAG.

Barrados has stated, “At the heart of our mandate is protection and promotion of the merit principle in all our hiring and promotions.”\textsuperscript{26} This has been the case for a long time, roughly since the introduction of the Civil Service Commission in 1908. But the accountability framework of the PSC is undergoing major changes right now, inspired not least by the OAG as an AP. Responsibilities previously executed by the PSC such as staffing and recruitment are being formally delegated to other agencies, and the agency is developing measurement and reporting capacity to engage in overseeing the success of these delegations. For example, a comprehensive audit strategy is being developed.\textsuperscript{27}

The Chief Electoral Officer of Canada (CEO) was first appointed in 1920 under the Dominion Elections Act. This act, later the Canada Elections Act, fixed criteria for determining who could vote and who could run in federal elections following suspicions that the extension of the franchise to some women during World War I was politically motivated.\textsuperscript{28} In the early 1980s, the Office of the Chief Electoral Officer acquired the more friendly name Elections Canada (EC). The last three decades have seen continuous growth in EC’s mandate. Originally responsible for administering elections, it now administers boundaries readjustment, a national register of electors, referenda, registered parties, election advertising, and political finance laws on individuals, parties, and third-parties during by-elections, elections, nominations, and leadership contests.

EC has to be particularly independent of political interference, not just by the government, but by all elected and non-elected officials. The agency is committed to “maintain[ing] the integrity of the electoral process.”\textsuperscript{29} Its relationship with Parliament is therefore different than that of other

\textsuperscript{22} OAG RPP 2005-06, 3.
\textsuperscript{23} OAG RPP 2005-06, 2.
\textsuperscript{24} Public Service of Canada. ‘Legislation, By-Laws and Operating Principles.’ \url{http://www.psc-cfp.gc.ca/centres/bylaw_e.htm}.
\textsuperscript{25} [2003, c.22]
\textsuperscript{27} \url{www.psc-cfp.gc.ca/speech/2004/mb_2004-06-16_e.htm}
\textsuperscript{28} OCEO 1984 records the timing.
\textsuperscript{29} EC RPP 2005-06, 11.
APs (except perhaps the Ethics officers). It submits reports to Parliament to establish transparency, rather than accountability. As such, it describes itself as “an independent body set up by Parliament.”

The Office of the Commissioner of Official Languages (OCOL) was established in the 1969 Official Languages Act, in response to the Royal Commission on Bilingualism and Biculturalism. The Commission’s preliminary report four years earlier had asserted that “Canada, without being fully conscious of the fact, is passing through the greatest crisis in its history.” Such a statement compelled extraordinary action, and the role of commissioner was to ensure that the demand for proactivity would not be neglected.

Thirty-six years later, the Commissioner of Official Languages (COL) still describes its role as being “an officer of Parliament and an agent of change.” OCOL’s mandate is to promote and defend the equality of English and French in federal institutions and in Canadian society, and to promote the vitality of official language minority communities in Canada. Linguistic audits, ombuds work, court interventions and research and education make up OCOL’s strategic framework.

The Canadian Human Rights Commission (CHRC) was created, with its Chief Commissioner (CCCHRC) at the head, in the 1977 Canadian Human Rights Act. The CHRC’s mandate is “to investigate and try to settle complaints of discrimination in employment and in the provision of services within federal jurisdiction.” It is responsible for federal employment equity legislation. The CHRC has also become a centre for discrimination prevention and human rights research.

Perhaps reflecting its results on the independence matrix in Appendix 1, and certainly in contrast to the OAG and the OCOL, there is no mention of a relationship with Parliament in the CHRC’s RPP. Instead, the CHRC mentions a commitment to ‘citizen-focussed service,’ though even this reference is not treated as a central facet of the institutional structure. Administration of the complaint process appears to define CHRC’s point of view. However, the CHRC mimics other accountability agencies by tailoring the ‘audit’ concept to its area of concern: ‘employment equity audits.’

The Office of the Privacy Commissioner (OPC) evolved with the position of a Privacy Commissioner (PC) that was originally part of the CHRC in the 1977 legislation. Privacy expert Prof. Colin Bennett remarks that “no notable crisis precipitated anxiety over privacy, as happened in other countries,” but rather this move was pre-emptive, following a debate on the recommendations of a Department of Justice task force report in 1972. The debate over Access to Information legislation in the early 1980s compelled harmonization of Access legislation with

30 EC RPP 2005-06, 3.
31 Heroux 1991, 1.
32 OCOL RPP 2005-06, 5.
34 CHRC RPP 2005-06, 23.
35 CHRC RPP 2005-06, 11.
36 Bennett 2002, 2.
the Privacy Act, and the PC became a separate Agent.

OPC is mandated to ensure the application of the Privacy Act (1983) in the public sector and the parallel Personal Information Protection and Electronic Documents Act (PIPEDA) (2001) in the private sector. It states more succinctly that its “mission is to protect and promote privacy rights of individuals.” Complaint investigations make up the majority of its work, but it also seeks to “promote fair information management practices.” To this end, OPC conducts audits of personal information management practices. OPC describes the PC as its public face, acting “as Parliament’s window on privacy issues… that have an impact on the privacy rights of Canadians.”

The Office of the Information Commissioner (OIC) was created in 1983 with proclamation of the Access to Information Act, and Canadians’ right to government information. Current Information Commissioner (IC) John Reid credits backbench MPs from across the spectrum with its creation. Reid contends that “the Access to Information Act is the statute that shifts the balance of power from the state to the individual.” It is not coincidence that this Act arrived not long after the Charter, reversing the traditional Westminster burden of secrecy (that is, secret until publicly necessary).

While the CHRC’s area of expertise (employee rights) may have caused it to neglect its relations with Parliament and pay more attention to citizen relations, the OIC’s area of expertise (government information management) has focused its attention squarely on Parliament. The attention has not, for the most part, been reciprocal. Like the CHRC the OIC investigates, provides advice, and pursues judicial enforcement for citizens. “Governments continue to distrust and resist the Access to Information Act,” the IC writes. Report cards on departmental performance serve as a form of audit.

The Commons’ Office of the Ethics Commissioner (OEC) was established by Bill C-4 of the 37th Parliament, 3rd Session, amending the Parliament of Canada Act. This office has its roots in allegations of conflicts of interest against ministers during the Mulroney government’s tenure. OEC evolved from an ethics counsellor’s office that itself grew from an attempt to render the 1988 Lobbyist Registration Act more visibly impartial. The [House] Ethics Commissioner’s (HEC) responsibilities (to administer the Conflict of Interest Code for Members) are assigned by the House itself. The OEC has not published its first RPP at this point. Finally, a parallel but distinct entity, the Office of the Senate Ethics Counsellor (OSEC), has even more recently come into being under the same law.

37 OPC RPP 2005-06, 5.
38 OPC RPP 2005-06, 6.
39 OPC RPP 2005-06, 7.
40 The push for creation of a Commissioner for Integrity of the Public Service under C-11 (see above footnote 16) has also been driven by the increased leverage of backbench MPs in a minority government. Major changes likely to occur in report stage were demanded by government and opposition members alike during committee stage. (See Hansard for the Commons Committee on Government Operations and Estimates during Fall 2004 and Spring 2005 for details.)
41 Reid 2001, 5.
42 IC Reid has regularly mentioned in his speeches and reports that the first eighteen Annual Reports of the OIC to Parliament received exactly zero committee hearings.
43 OIC RPP 2005-06, 9.
44 Thomas 2003, 293, 295.
While these nine offices exhaust the literature’s suggested AP candidates, at least two of these offices have non-executive officers that could also contend for AP status. The Commissioner of Canada Elections (CCE) and the Commissioner of the Environment and Sustainable Development (CESD) have been overlooked as Agents by studies to this point, most likely because they are not directly appointed by Parliament but are instead appointed by the CEO and AG respectively. A case can be made for consideration of these two commissioners as APs on the following grounds: First, both commissioners are established in the primary statute creating their respective offices. Second, both commissioners exercise judgment independent of the executive AP according to statutory provisions. Third, and more subjectively, both commissioners furnish the kind of independent accountability that other APs tend to, on a subject matter that is related to, but distinct from, that of their executive APs. The stronger case may rest with the CESD as she or he is required to report to Parliament (albeit on behalf of the AG).

The Commissioner of Canada Elections was introduced in the 1970s to ensure that the Canada Elections Act and the Referendum Act are followed and enforced. Complaints are directed to the CCE and he or she decides whether to investigate and, later, prosecute offenders. The Commissioner of the Environment and Sustainable Development was added to the OAG in 1995. The CESD’s primary responsibilities are to monitor the creation and implementation of sustainable development strategies of some 28 federal departments and agencies, to conduct ‘environmental audits’ on federal performance, and to observe environmental petitions addressed to the government that were provided for under the same legislation that created her office. Somewhat like Cabinet ministers serving specific functions at the pleasure of a Prime Minister, who thereby shares his or her popular legitimacy with the administration, these two commissioners serve specific functions at the pleasure of executive APs, who in so doing share the legitimacy of being Parliament’s agents. Still, given the indications of their non-conformity in Appendix 1, the CCE and the CESD are not APs without qualification. Perhaps they can best be characterized as junior APs.

The existing APs respond generally to some of the branches preconceived by Ackerman. The Canadian CEO reflects the full spectrum of duties he envisioned for a democracy branch. From the fair management of electoral events (including referenda) to oversight of independent boundary adjustment, from electoral finance law review to public party financing, EC is mandated with guarding the impartiality of Canadian federal democracy. A case can be made that both the HEC and SEO are APs in the same vein. The HEC and the SEO are mandated to scrutinize the scrutinizers – Parliamentarians – by their own rules, much as the AG scrutinizes government spending by government’s own standards, or the COL scrutinizes government language performance by its own policies. Scrutiny of Parliamentarians could be the definition of a ‘democracy branch’ in Canada. This would recognize that some APs need to assert their independence from Parliament, not only government.

Beyond this, the stratification of APs à la Ackerman becomes tenuous. Scrutiny of government is

---

45 Canada Elections Act [2000, c. 9, s. 509], and Auditor General Act [RSC 1985, c. A-17, s. 15.1]
46 See Canada Elections Act [2000, c. 9, ss. 511, 513, 516-19], and Auditor General Act [RSC 1985, c. A-17, s. 23]
47 It should be noted that the way that the CEO has to enforce these laws includes both legal and political recourse. The threat of exposure of electoral crimes by a credible agent may do more to deter these crimes than the penalties ever would.
a unifying theme, yet it does not fully encapsulate the roles of APs such as the PC who oversees legislation for the private-sector as well as the public-sector. The OAG should be the foundation of an integrity branch in Canada. As the keystone of government’s financial accountability to Parliament, the OAG provides Parliament with independent and therefore credible information with which to do its central job. The OAG now provides more than financial accountability, however. For example, the CESD’s domain of environmental reporting is a clear example of non-financial accountability provided by the OAG.

Ackerman writes, “A serious constitution for the modern state should take aggressive steps to assure that bureaucratic pretensions to expertise are not merely legitimating myths, but hard-earned achievements.” The PSC fits into the concept of his ‘regulatory branch’, offering a check against bureaucratic incompetence. It is enlightening that the PSC sought to establish itself as independent from government and earn responsibility for implementing new whistleblower protections (C-11, 38th Parliament) that opposition parties are not willing to entrust to the government itself. The prospective Commissioner of Integrity of the Public Service may supplant the PSC as the Canadian paragon of such a branch.

Could the CHRC be an example of a distributive justice branch? And where do the OIC, OPC, and OCOL fit in? After the CEO and the ethics commissioners each of the APs looks at government through a particular value lens. This value – bilingualism for the OCOL, bureaucratic transparency for the OIC, for example – is so elevated above the partisan fray. Government in and government out, an institution exists to defend and promote this particular value despite shifting political winds. Yet these values remain balanced with political exigencies in this equation. When a value (or set of values, such as human rights) is deeply entrenched against partisanship, it becomes too clearly legalistic (rather than political), relationship with courts stronger than with Parliament. The CHRC might be denied AP status for this reason. In sum, APs facilitate accountability by providing Parliament with the information it needs, and furnish transparency about their Parliament and government so that citizens may hold elected officials accountable.

Currently AP candidates operate in a constitutional nether-region. Like the bureaucracy and its service to the political executive, APs are too distinct and too important to be considered mere ‘servants of Parliament’ any longer. There is an unanswered question as to what AP candidates may be if they are not APs. One resolution would be to define all as APs, but suggest that some have achieved enough independence to be considered ‘independent APs’ while others remain ‘constrained APs.’ Often the definition of variables in the social sciences can be validly accomplished in more than one way. Given the variety of characteristics possessed by AP candidates, this paper argues that a multitude of useful categories may be suggested in further study, but for our purposes the candidates share fundamental characteristics: independence from executive control (to a greater or lesser extent) and a value-centred approach to 1) government accountability, and/or 2) independent public administration. Thus, for the remainder of this study the term AP will be used inclusively.

---

48 Ackerman 2000, 694.
APs in Federal and International Context

Federal Canadian APs may be better understood in the wider context of similar bodies in the provinces and territories and in other Anglo-Westminsterian democracies. Familiar themes have arisen in the United Kingdom, Australia, and New Zealand, and at the provincial-territorial level in Canada. The status of offices that correspond to Ottawa’s APs remains an open question in most jurisdictions.

A haphazard array of AP candidates work for the legislatures throughout Canada. For example, in British Columbia there are six likely APs, known as Statutory Officers of the Legislature: an Auditor-General, Chief Electoral Officer, Ombudsman, Conflict of Interest Commissioner, an Information and Privacy Commissioner, and a Police Complaints Commissioner. In Ontario, there are no Conflict of Interest or Police Complaints offices, but instead there is an Environmental Commissioner, a Lobbyist Registrar, and an Integrity Commissioner (to enforce the Members Integrity Act 1994). L’Assemblée Nationale in Québec receives four typical candidates: an Auditor-General, Chief Electoral Officer, Lobbying Commissioner, and an Ombudsman (known as the Protecteur de la citoyenne).49

Frequent changes to the enabling legislation of candidates makes a comprehensive study onerous and, to this point, unaccomplished. Even subtle changes can have important consequences for the nature of positions. For example, in 2002 the BC legislature terminated the Child, Youth, and Family Advocate’s office and replaced it with a seemingly identical Child and Youth Officer. The first annual general report of the new Officer continued to describe its role as a ‘statutory independent office.’ However, the new legislation ensured the new Officer could not make reports public without the prior approval of a minister, severely reducing independence and qualitatively changing the nature of the AP candidacy.50

Internationally, it makes sense to begin with the United Kingdom, as the first AP was the Comptroller and Auditor General (C&AG) at Westminster in 1866. Since then APs in the UK, as elsewhere, have evolved in a pragmatic, ad hoc manner, such that they may be described as “a set of bodies which have been established without any overall thought as to their proper relationship with Parliament.”51 Even the recently devolved Scottish parliament, with an opportunity to start from scratch, has not determined coherent principles.

The UK PAC preceded the creation of a C&AG by five years, demonstrating the parliamentary origins of oversight in the British tradition. Until 1983 reforms, the C&AG faced many of the same challenges the early Canadian AG faced to his independence. The 1983 National Audit Act, however, created a statutory Public Accounts Commission (in addition to the PAC) – composed of the Chairman of the PAC, the (government) Leader of the House, and seven backbenchers – to oversee the Audit Office’s budget and appoint the auditor of the auditors.52 This committee

49 Scholars interested in the Commissioner of Official Languages at the federal level might also be interested to know of the Languages Commissioner in Nunavut whose responsibilities include protection and promotion of Inuktitut dialects as well as use of French and English in the territory.
50 See Article 6(2) of the Office for Children and Youth Act [RSBC 2002] that states, “the Attorney General … may determine whether the report should be made public.”
ensures the independence of the C&AG by removing control of his budget from the government, a remedy that speaks to the now greater constitutional independence of the C&AG.

The C&AG is considered to be in a class with two other ‘constitutional’ APs: the Parliamentary Ombudsman and the Parliamentary Commission for Standards. The Ombudsman was created in the 1960s and like many Canadian APs, the office’s relations with Parliament are not sufficiently defined and it has reported to committees that do not have the senior status of the PAC. The Parliamentary Commission for Standards is not statutorily mandated but is instead enabled by its employment by the House of Commons and by standing order to oversee the behaviour of public officials. Several other AP candidate equivalent positions exist, including an Information Commissioner and a Health Services Commissioner, but again, as in Canada, these positions lack both a constitutional designation and clearly legislated assertion of independence.

Australia has only two recognized AP equivalent positions: the Auditor General and the Ombudsman. Still, research suggests that Australia has not systematically treated these bodies. As recently as 1997 the Auditor General did not have statutory discretion for exercise of his functions. Other watchdogs in the republic, such as a Human Rights commission, a Privacy Commissioner, and an Electoral Commission, report to Cabinet ministers.

Of the jurisdictions examined, only New Zealand has developed criteria for identifying and creating APs. New Zealand has likewise been ahead of the curve with its evolution of an Officers of Parliament Committee, tasked with the oversight of all APs, their budgets and their interactions with one another. This progress followed the watershed 1989 Report of the New Zealand House of Representatives’ Finance and Expenditure Committee ‘On the Inquiry into Officers of Parliament.’ This report raised many important issues worthy of more extensive treatment. Centrally, the committee – on the suggestion of the Clerk of the House – recommended that:

1. APs be created only to check the arbitrary use of power by the executive;
2. APs only discharge functions that the House itself could carry out (i.e. non-judicial); and
3. Parliament should only rarely create APs.

The creation of Canadian APs throughout the 1990s contravened each of these guidelines, illustrating the utility of public deliberation and clarification of the role of APs in this country.

What is the proper Role of Agents of Parliament?

In her pioneering 2002 MA thesis, Megan Furi contends that the exercise of accountability by APs is an affront “to the very principle on which Canadian government is based,” in other words,

---

53 Most Canadian provinces and all of the Anglo-Westminsterian systems treated here have an ombuds post (including most notably, federal Australia). For a consideration of the remarkable absence of an ombudsman in federal Canada see Rowat 1995-96.
54 Gay 2003, 34.
55 Gay and Winetrobe 2003, 10.
56 House Finance and Expenditure Committee (NZ) 1989.
responsible government. Other commentators have forwarded similar theses. For the most part the tangible aspect of these critiques are based on analyses of the role of the AG exclusively, but the principle is sometimes extended to APs in general.

Prof. Peter Aucoin, for example, challenges the OAG’s role in performance auditing on several grounds. Principally, he distinguishes the “general duty of the Commons to hold ministers to account” from “the specific duty of the Commons to provide an assurance that monies appropriated from the public purse have been properly ‘administered.’ Financial audits conducted by the OAG pertain to the latter duty, and have probably reinforced the former (ministerial accountability) by remaining particular to public accounts’ compliance with transactional and reporting requirements. Performance audits, on the other hand, “assess the extent to which policy has been realized,” and as such enter into nebulous, potentially partisan territory. Aucoin is concerned that public servants are put between a rock and a hard place, trying to implement policies with vague, or controversial, objectives – that often conflict with other government objectives – while being held to specific ‘results’ targets that may or may not reflect the essential goals.

The AG’s (and the CESD’s) performance audits are limited, however, to commenting, not on results holistically, but on the government’s record in measuring its own results. This seems to be a lesser burden than Aucoin makes it out to be. While he wants to see performance audits sharply curbed and explicit recognition made that public administration is a complex art full of trade-offs, he appears to downplay the benefits of OAG promotion of the adoption of policy indicators within government wherever possible. As with other APs, AGs promote a specific value – financial and policy accountability – that may well become partisan, but that has been deemed worthy of independent promotion despite prevailing political gales.

Aucoin also pits performance accounting against reform of the Parliament-centred accountability function inherent in ministerial responsibility. He clearly favours the latter as a strategy to improve accountability, though it is not clear that the two are mutually exclusive. Auditing is not a public process because auditors are unelected and unrepresentative of Canadians, one presumes he would argue. Whereas an arguably stronger form of ministerial accountability, such as a division of accountabilities between ministers and deputy ministers, is about holding publicly elected ministers to a higher standard, he might suggest.

But it is again unclear how APs, in this case the AG, who furnish politically relevant knowledge to the publicly elected Parliament, undermine ministerial accountability. Furthermore, his critique appears to completely ignore the benefits of an independent body of professionals exercising toothless oversight of specific policy targets. Whether or not the OAG is right in its findings, and each chapter of its reports publishes the government’s response to the contents, the very process of identifying policy objectives and trying to measure results brings transparency to corners of the public service that would otherwise never receive public attention. If this attention, as interpreted by the opposition or the media, is sometimes overly harsh or unfair, the burden carried by a tacit public service left undefended by a self-interested government is painful but not pathological: unpopularity.

58 Aucoin 1998, 23.
Aucoin is not the only academic concerned about an AP’s effect on the accountability function; the most vociferous critic of the Auditor General’s constitutional role, is Prof. SL Sutherland. Sutherland is gravely concerned that the power and esteem of the OAG is a threat to representative government. The current AG, Sheila Fraser, asserted in her 2000 annual report that “Canadians have the right to control how public funds are collected and used.” This statement marked for Sutherland a serious “lack of understanding of representative government.” Calling on the doctrine of responsible government, Sutherland argues that the elected representatives should be the ones to hold the government responsible; neither citizens nor their popular auditors have this right.59

This doctrine marks the PAC as home of Parliament’s financial expertise and charges it with holding the government to account on its financial performance. The PAC, however, has had difficulty establishing its own credibility until relatively recently. Conventionally chaired by an Opposition backbencher to demonstrate its independence from government, the committee is foremost charged with studying the reports of the AG. A history of the OAG written in 1979 described the PAC as “a committee with chronic difficulties to secure a quorum.”60

Sutherland charges that the OAG has colluded with the Treasury Board Secretariat (TBS) to supplant the PAC as the overseer of the government’s finances. The defining moment came, Sutherland charges, with the passage of the 1977 Audit Act, which vastly expanded OAG powers by giving the AG discretion to conduct performance audits.61 But a similar bill had been suggested by the previous AG, Max Henderson, as early as 1967. When it reached the PAC in 1970, the backbench Opposition were in full support of the expanded OAG powers. An unfavourable report only emerged because they were politically outmaneuvered when influential PAC Chairman Alfred Hales was abroad with a parliamentary delegation.62

The OAG, whether or not it appropriates the voice of the Canadian public to criticize government spending, has not and cannot appropriate public power to ‘control how public funds are collected and used.’ Ultimately, the OAG, like other APs, retains the right to report to Parliament and the ability to testify in committee on its findings. In so doing, it is able to exercise influence. How the committee and Parliament react to these findings, including any attempt to defeat the government, is the exercise of power. APs do not undermine the constitution. Parliament has delegated to them the authority to promote certain values, and Parliament can take this authority back.

This is the crux of the constitutional debate. Division of Parliamentary sovereignty has long been a source of distress for constitutional theorists. Yet, many such divisions have taken place. Federalism itself was once regarded as heretical. Ackerman’s constrained parliamentarism is a theory recognizing a further separation of powers that has already taken place.

59 Sutherland 2002, 16-7.
60 Sinclair 1979, 73.
61 Sutherland 2002, 12.
62 Sinclair 1979, 73.
It is interesting to note that Sutherland’s critiques have roots as far back as the first Auditor General. The AG has always had the incentive and desire to insinuate him or herself more prominently into evaluation of government expenditure. Appointed in 1878, by 1879 Auditor General John Lorn McDougall had received a letter from the Deputy Minister of Finance, Z.A. Lash, asserting that McDougall’s

“duties and powers as Auditor General are confined to seeing that any moneys which the Government seek to expend have been voted to Her Majesty for the purpose, and that you have no right to enquire into the legal right of the Government to do that for which they seek to expend the money which has been voted to them by Parliament.”

This letter did not deter McDougall, who clearly envisioned his office as responsible to Parliament and to the spirit of accountability, more than to government and the strict interpretation of his enabling legislation. He responded that, “The view which would confine the duties of the Audit Office to those directly laid down in the Audit Act seems to me narrow.” He published Lash’s letter, along with his rebuttal, to ascertain the wishes of Parliament, and hearing none expressed felt empowered to continue unabated.

It would be a mistake to presume that the history of the AG speaks adequately for the history of the other APs. Still, there is plenty of evidence that other APs have likewise insinuated themselves in their own mandates, and in doing so crossed from commenting neutrally on the administration of certain values, to actively advocating for these same values in the political sphere. In his Annual Report for 1976, COL Keith Spicer recommended to Parliament that it amend the Official Languages Act to counteract a Federal Court judgment of January 1977 that he viewed as too restrictive in its interpretation of the important section 2. In the 1977 Annual Report, COL Max Yalden proposed the creation of a Special or Standing Committee of Parliament to review the office’s Annual Report.

Throughout the 1990s, CEO Jean-Pierre Kingsley could be seen as the key actor forwarding new elections policies into the political arena. One result was a monumental and controversial transition from national enumeration to a national voter’s list. A detailed analysis of this shift explicitly concluded that EC was “at the centre of an explanation of the changeover.” The OPC played a central role in moving the federal government from public-sector privacy protection to public-and private-sector protection with PIPEDA, doubling the OPC’s mandate. In his 1998-99 Annual Report to Parliament, the current IC John Reid advocated the relocation of responsibility for his reports to a different House committee. In 2002, he critiqued the Access to Information Act and proposed specific reforms in a special report to Parliament.
The clear constitutional question remaining regards the degree to which the independence of APs is compromised by funding mechanisms. Prof. Craig Forcese argues that at least six APs – the AG, IC, PC, COL, HEC, and SEC – must “meet court-like standards of independence” from the government, as they have the power to compel testimony. For many years APs have complained about the process by which they receive their budgets. More than one AG has had concerns about perceived or possible governmental interference in audits by way of funding blackmail. IC John Reid has repeatedly highlighted the same concern, even more emphatically. While in 1998 the OIC had a six-month backlog of cases to attend to, by 2005 the backlog had reached a full year. Reid did not mince words, stating that “due to its control of the purse strings, the government has control over the effectiveness of Parliament’s officer [the IC]. So much for independence!”

Bolstered by the constitutional principle that Cabinet must initiate spending, Canadian governments have been extremely reluctant to allow Parliamentary committees to negotiate budgets with APs. But as Thomas writes, this has not caused great harm in other Westminster Parliaments: “In both the U.K. and New Zealand there is provision for parliamentary involvement in setting the budgets for their national audit offices, and this has not resulted in serious constitutional problems.” Perhaps even more compelling is the Canadian experience where the EC’s expenses have been paid directly from the Consolidated Revenue Fund. This has ensured no political pressure can be exercised on behalf of either government or Parliament. Too widely mimicked, this practice might encourage irresponsible spending, and especially in the wake of the Radwanski affair one must submit to some checks on the independence of APs. The new Ethics bodies, the OEC and the OSEC appear to have struck a good balance. They submit their estimates to the Speaker, who approves them by forwarding them to the President of the Treasury Board who is in turn legally compelled to table them with departmental estimates.

In May 2005, the Standing Committee on Access to Information, Privacy, and Ethics reported on funding mechanisms for APs. This committee recommended that a permanent Parliamentary body (the Board of Internal Economy, on a trial basis) be created as the budget-determination mechanism for the funding of all APs, including EC. A concurrent initiative of the Treasury Board Secretariat to negotiate funding mechanisms for the APs is expected to produce options by Fall 2005.

---

71 Thomas 2003, 301.
72 Standing Committee on Access to Information, Privacy, and Ethics 2005, 8.
74 See OIC Annual Report 2001-02, 35; Standing Committee on Access to Information, Privacy, and Ethics 2005, 7, for examples.
75 OIC Annual Report 2004-05, 12.
77 Thomas 2003, 301.
Has the rise of APs supplanted a Parliament-centred Constitution?

The earlier defence of performance auditing and the expansion of AP powers in various domains betrays this paper’s conclusions. It is natural for institutions intended in spirit to aid Parliament in its scrutiny of government bureaucracy to attempt to ensure that their enabling legislation (and ultimately their constitutional location) maximizes their capacity to engage in this scrutiny. APs have not undermined Parliament as the locus of federal political power.

If APs have engaged in ‘mandate creep’, as Prof. Aucoin fears, this is neither shocking nor, on the whole, detrimental. The government has long provided itself with recourse to an expert bureaucracy (the ‘executive administration’) in order to ensure that the political decisions taken by elected politicians are well implemented. Bureaucratic ‘mandate creep’ from this initial theory has meant that, in practice, bureaucrats are responsible for both policy proposal as well as administration.

Parliamentarians can be safely consigned to a similarly minimal, yet profoundly essential role, in their actions as legislators and scrutinizers. AP mandate creep is the rational maximization of public expertise finally freed from the defence of the government of the day. The political power exercised by APs is influence. Even when APs use the courts to achieve their ends, Parliament retains the ultimate power of rewriting legislation to override undesirable interpretations.

Part of the conceptual clash that Smith, Sutherland, Thomas, and others portray is the based on the view that APs have outstripped their role as servants of Parliament. Paradoxically, this paper affirms this evolution as a natural progression for a branch that is growing to help Parliament remain the organ of responsible government. As the bureaucracy provides neutral expertise to its political leadership, APs must retain their independence from their partisan ‘clients’ in order to furnish effective, politically-sensitive yet expert knowledge about the bureaucracy and its leadership – or in the case of ‘democracy branch’ institutions, about Parliamentarians themselves – to Parliament.

Unlike under the Presidentialist model that Ackerman contends with, a stronger assembly in the Parliamentary system does not necessarily mean a stronger opposition to the executive (though given opposition’s traditional weakness in Canada, it probably would in the short term). While the institutional implications of an executive that controls the lower house -as it does in Westminster bodies during majority government -is important, perhaps equally important to the long term dynamics of the legislature with regards to APs is the institutional reality that at any point backbench members are virtually guaranteed to make up the majority of the House. Parliament is a multi-faceted creature, and responsible government is an ingenious political device worth guarding.

One might expect the ‘legislative administration’ to evolve in the offices of Parliamentarians themselves. The first constituency offices were opened in the late 1960s, at a time when Members’ staff were so few that MPs shared them. Since then offices have grown, to a usual size of between four and six, split between Ottawa and the riding. But given the scope of work many MPs undertake they could justify a far greater administrative allowance for themselves.

---

78 MacLeod 2004.
The missing piece that explains their frugality may well be party discipline. Party leadership, in government or opposition, has no interest in being challenged on policy matters by backbenchers. The limited individual resources keep MPs dependent on party-generated policies and communications materials. Senators, of course, face an equally strong check on the expansion of their own supporting administration. The skeptical public are even less keen to finance activities of unelected Parliamentarians than they are to do so for their elected ones.

That said, APs as an evolving ‘legislative administration’ are slowly making Parliament stronger. Each AP is a headquarters for a specific area of policy knowledge that backbenchers appreciate. In his most recent Annual Report, IC Reid emphasizes that a government backbencher proposed a Private Member’s Bill strengthening the Access to Information Act, and that backbench MPs from all parties have inspired attempts to update the Act in recent years. And as Prof. Aucoin suggests, the vast reach of the OAG is probably due to the void left at the federal level in the absence of an Ombudsperson; every province has an AP with the responsibility to follow up on citizen complaints and report to the legislature.

APs are a source of politically relevant knowledge, but they, like the bureaucracy, must be seen to be above partisan disputes. This can be accomplished by the ‘democratization’ of the specific value centres institutionalized as Agencies; in other words, by emphasizing the value of bilingualism to the country as a democratic right, for instance, the value of bilingualism is elevated above partisan discourse and the AP can shed policy neutrality and promote the value without becoming partisan.

Smith’s ‘audit society’, Ackerman’s ‘integrity branch’, and the role of Agents of Parliament are overlapping and potentially positive developments. Yes, they change the dominant policy networks, the political discourse, and citizens’ impressions of government. But they leave our fundamental democratic mechanism intact. As always, vigilance is warranted and welcome as the Canadian constitution gathers more experience. Still, we must not allow precedent and constitutional idealism to prevent new toolboxes from being opened.

---

Works Cited and Consulted


Dobell, Peter C., editor. ‘The Relationship with Parliament of Agencies that Report to


PSC website ‘Legislation, By-laws and Operating Principles.’ http://www.psc-cfp.gc.ca/centres/bylaw_e.htm

Public Service Commission timeline: http://www.psc-cfp.gc.ca/research/timeline/psc_timeline_e.htm


---

*Please note: Annual Reports, RPPs, and websites footnoted for the reader’s benefit are not included in this list.*