
Agents of Parliament: A New Branch of Government?

by Jeffrey Graham Bell

Recently scholars in the United States and Canada have questioned the traditional conceptions of government. They have drawn attention to certain institutions, both existing and emerging, that do not fit neatly into the three-branch (executive, legislative and judicial) paradigm. This article presents a brief theoretical discussion, followed by consideration of the history, role and function of various Officers of Parliament in Canada. It examines the agencies by the type of oversight they provide, and concludes that their increasingly prominent role is not a threat to the sovereignty of Parliament or ministerial accountability.

In the United States constitutional theorist Bruce Ackerman has argued that the bureaucracy constitutes and has long constituted a de facto 'fourth branch' of government. It warrants constitutional powers and protections sufficient for it to ensure its position within the ongoing jurisdictional skirmishes. He argues that the presidential 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.¹

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 sup-

portive 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, he or she must cultivate a reputation for neutral competence.²

In Canada, Professor David Smith, drawing inspiration from Ackerman, 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 has been the evolution of Agents of Parliament (APs) from being Parliament's servants to being Parliament's masters. Smith writes that APs "are in the process of becoming the integrity branch of government".³

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

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Ackerman's analysis of individual rights. 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' 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."

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.' 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 presidential 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 cer-

tain class of citizens in every state, and the corresponding lack of 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.

Who is an Agent 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. 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.'

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 Parlia-

mentary Librarian, the Associate Parliamentary Librarian, and the Gentleman Usher of the Black Rod. 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 Agents of Parliament 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-partisan ones in countries across the Commonwealth. 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. (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.)

In Canada, as elsewhere in the Commonwealth, confusion over the description of APs has meant confusion over their identity and nature which will probably remain until the legislatures lay down guidelines as to the nature and function of their respective cohorts of 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.

To be an Agent of Parliament, rather than a governmental agency, an agency must be sufficiently independent. Where New Zealand has taken a more coherent approach to empowering their APs, in Canada's development has been pragmatic and *ad hoc*. Nevertheless certain criterion may be used for determined what is an Agent of Parliament. For example:

- Is there reference in the enabling statute to a commission under the Great Seal affixed to the executive agent?
- Is it required to have the confidence of the chambers i.e. either the House or Senate or both to approve (or nominate and approve) the agency's executive candidate?
- Does the executive candidate have a statutory guarantee of a term at least five years in length?
- Is Cabinet required to have a resolution of the House and/or the Senate to remove a sitting executive agent?
- Is a report submitted, at least annually, to Parliament via the Speakers of one or both Chambers?

- Are the agency's estimates submitted to Parliament by the agency (via the Speaker) -or determined independently in some other fashion -rather than by a government department?
- Are staff, apart from officers named in the legislation, appointed by the agency's executive agent rather than by the government?
- Is the executive agent's salary fixed or pegged to a reference point in statute rather than being left to Cabinet discretion?

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 in the House and Senate 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 but clearly do not rank on the same scale as the others. Two other offices, the President of the Public Service Commission and the Chief Commissioner of the Human Rights Commission, deserve consideration as possible Agents of Parliament.

Lets us briefly summarize the status of each of the aforementioned Agents of Parliament.

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. 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 Office of the Auditor General has possessed the tools (full-time professional auditors) that Parliament needs in order to fulfill this duty. Its long history has meant that the Office of the Auditor General has been held as model of how accountability can be exercised. Its 2005-06 Report on Plans and Priorities 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." 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, objec-

tive and fair approach" to its work. Financial accountability and "good performance measurement and reporting" are germane to the OAG's value of good public management and accountability.

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. 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 Elections Canada'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.

Elections Canada 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 "maintaining the integrity of the electoral process." Its relationship with Parliament is therefore different than that of other 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." Its 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 its strategic framework.

The Office of the Privacy Commissioner (OPC) evolved with the position of a Privacy Commissioner (PC) that was originally part of the Canadian Human

Rights Commission in the 1977 legislation. 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 the *Privacy Act*, and the Privacy Commissioner became a separate Agent.

The Office of the Privacy Commissioner 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* (2000) 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 the Privacy Commissioner conducts audits and strives to be Parliament's window on issues that impact the privacy of individual 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).

The Information Commissioner 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. Office of the Ethics Commissioner 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. A parallel but distinct entity, the Office of the Senate Ethics Counsellor (OSEC), has even more recently come into being under the same law.

New legislation coming into force in December 2005 has strengthened the case for the President of the Public

Service Commission to be viewed as an Agent of Parliament. 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.

The Public Service Commission of Canada (PSC) has undergone an equally profound evolution from its origins as 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." The emphasis on accountability to Parliament follows the executive-driven *Public Service Modernization Act, 2003* and the new *Public Service Employment Act*. Interestingly, the newest President of the PSC (PPSC), Maria Barrados, has taken her position after 18 years with the Office of the Auditor General.

Barrados has stated, "At the heart of our mandate is protection and promotion of the merit principle in all our hiring and promotions."⁴ 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 Public Service Commission is undergoing major changes right now, inspired not least by the Office of the Auditor General as an AP. Responsibilities previously executed by the Public Service Commission 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.

The Canadian Human Rights Commission (CHRC) was created, with its Chief Commissioner (CCCHRC) at the head, in the 1977 *Canadian Human Rights Act*. The Commission'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 Commission has also become a centre for discrimination prevention and human rights research.

In contrast to the Office of the Auditor General and the Office of the Commissioner of Official Languages, there is no mention of a relationship with Parliament in the Canadian Human Rights Commission's Report on Plans and Priorities. Instead, it mentions a commitment to 'citi-

zen-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 the Commission's point of view. However, the CHRC mimics other accountability agencies by tailoring the 'audit' concept to its area of concern: 'employment equity audits.'

At least two of the nine above-mentioned institutions 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 Chief Electoral Officer and the Auditor General respectively. However, 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 Commissioner of the Environment and Sustainable Development as she or he is required to report to Parliament (albeit on behalf of the Auditor General).

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.

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 they can best be characterized as junior APs.

Beyond this, the classification of APs becomes tenuous. Professor 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."⁵ The Public Service Commissioner fits into the concept of his 'regulatory branch', offering a check against bureaucratic incompetence. The Canadian Human Rights Commissioner can be seen as an example of a

distributive justice branch. The Chief Electoral Officer would clearly fit the description of a democratic branch.

Another way of understanding APs is that they elevate values – e.g. bilingualism, bureaucratic transparency, or human rights – above the partisan fray but not beyond political debates. If a value or set of values become so entrenched against partisanship (consider human rights, for example) that the AP (the CHRC in this case) develops a closer relationship with the courts than with Parliament, then the agency might be denied AP status.

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 government accountability, and/or independent public administration. Thus, for the remainder of this study the term AP will include all the bodies discussed in this section.

The Debate over 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,"⁶ in other words, 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 Auditor General exclusively, but the principle is sometimes extended to APs in general.

Professor Peter Aucoin, for example, challenges the Auditor General'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.'"⁷ Financial audits conducted by the Office of the Auditor General 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 parti-

san 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 Auditor General's performance audits are limited, however, to commenting on the government's record in measuring its own results (not on results themselves). 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 that public administration is a complex art full of trade-offs, he appears to downplay the benefits of the Office of the Auditor General promoting the use of policy indicators within government wherever possible. As with other APs, Auditors General 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 Auditor General 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.

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

Professor S.L. Sutherland. Sutherland is gravely concerned that the power and esteem of the Office is a threat to representative government. The current Auditor General, 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.⁸

This doctrine marks the Public Accounts Committee as home of Parliament's financial expertise and charges it with holding the government to account on its financial performance. The Committee, however, has had difficulty establishing its own credibility until relatively recently. Conventionally chaired by an Opposition backbencher to demonstrate its independence from government, the Public Accounts Committee is foremost charged with studying the reports of the Auditor General. A history of the OAG written in 1979 described the Public Accounts Committee as "a committee with chronic difficulties to secure a quorum."⁹

More significantly 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 with the passage of the 1977 *Audit Act*, which vastly expanded OAG powers by giving the AG discretion to conduct performance audits.

The Office of the Auditor General, 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.

It is interesting to note that Sutherland's critiques have roots as far back as the first Auditor General. In 1879 Auditor General John Lorne McDougall 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 en-

quire 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."¹⁰

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 Auditor General 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, Commissioner of Official Languages 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, new Commissioner Max Yalden proposed the creation of a Special or Standing Committee of Parliament to review the office's Annual Report.

Throughout the 1990s, Chief Electoral Officer Jean-Pierre Kingsley was seen by some as the key factor 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 Elections Canada was "at the centre of an explanation of the changeover." The Office of the Privacy Commissioner played a central role in moving the federal government from public-sector privacy protection to public-and private-sector protection thereby doubling the Office's mandate. In his 1998-99 Annual Report to Parliament, John Reid advocated the relocation of responsibility for his reports on Access to Information to a different House committee. In 2002, he critiqued the *Access to Information Act* and proposed specific reforms in a special report to Parliament.

One clear constitutional question regards the degree to which the independence of APs is compromised by funding mechanisms. For many years APs have complained about the process by which they receive their budgets. More than one Auditor General had concerns about perceived or possible governmental interference

in audits by way of funding blackmail. John Reid repeatedly highlighted the same concern stating in his 2005 Annual Report that “due to its control of the purse strings, the government has control over the effectiveness of Parliament’s officer. 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 United Kingdom 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.”¹¹ 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.

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.¹² A concurrent initiative of the Treasury Board Secretariat to negotiate funding mechanisms for the APs was expected to produce options by Fall 2005.

Conclusion: 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 Professor 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 some scholars portray is 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.

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, John 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. Opposition backbenchers were responsible for adding a new AP to the government’s whistleblower protection legislation in the Fall 2005. And as Professor Aucoin suggests, the vast reach of the Auditor General 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.

Notes

1. Bruce Ackerman, "The New Separation of Powers", *Harvard Law Review*, vol 113, January 2000, p 699.
2. *Ibid.* p. 698.
3. David Smith, "A Question of Trust: Parliamentary Democracy and Canadian Society." *Canadian Parliamentary Review*, Spring 2004, p. 25.
4. Maria Barrados, "Protecting Merit and Fostering Accountability: The Role of the Public Service Commission of Canada in Ensuring a Fair, Efficient and Non-Partisan Public Service." June 16, 2004.
5. See Ackerman, *op. cit.* p. 694.
6. Megan Furi, *Officers of Parliament: A Study in Government Adaptation*. M.A. Thesis, University of Saskatchewan, Saskatoon: 2002.
7. Peter Aucoin, "Auditing for Accountability: The Role of the Auditor General." Institute on Governance Occasional Paper Series, p. 15.
8. S.L. Sutherland, "The Office of the Auditor General of Canada: Government in Exile?" School of Policy Studies: Working Paper 31. September 2002, pp. 16-17.
9. Sonja Sinclair. *Cordial but not Cosy: A History of the Office of the Auditor General*. McClelland and Stewart Limited: Toronto, 1979, p. 73.
10. *Ibid.* pp. 20-21.
11. Paul G. Thomas, "The past, present and future of officers of Parliament." *Canadian Public Administration*, Autumn 2003, p. 301.
12. See Kristen Douglas and Nancy Holmes, "Funding Officers of Parliament", *Canadian Parliamentary Review*, Autumn 2005.