Pro Forma Bills and Parliamentary Independence from the Crown

by Bruce M. Hicks

Historically, before the Speech from the Throne may be tabled, let alone debated, in each chamber of Parliament a private members' public bill was introduced 'pro forma' (meaning for form's sake). This tradition goes back 400 years in Britain and like many ancient traditions some of its significance has been forgotten over time. In 2008, the Canadian Government broke with that tradition and introduced government bills summarizing the claim of privilege it identified as being enjoyed by each chamber. This paper reviews the history of 'pro forma' bills, placing them in their original context so as to show that the claim of privileges and rights, all of which were fought for and obtained before the advent of responsible government and are the cornerstones of the legislative branch of government, are more multilayered than is described in these two new bills. It notes that the very act of substituting these new bills is reflective of the increasing domination of the legislative agenda by the Crown. It concludes by recommending that the new format be modified and that MPs and Senators who are not Ministers or Parliamentary Secretaries be selected as movers for the 'pro forma' bill, and that bills be chosen that better embrace the full breadth of rights and privileges claimed by the Commons, the Senate and members of Parliament.

The following exchange took place when the House of Commons met for the first time following the 2008 election and the Prime Minister moved for leave to introduce Bill C-1, respecting the administration of oaths of office.

> Mr. Harper: Mr. Speaker, it is a long-standing parliamentary tradition for the Prime Minister to present pro forma legislation that asserts the right of the House of Commons to present legislation and, following in the practices adopted in some legislatures and in some of our provincial assemblies, I am proposing today to actually table an actual document that asserts that right.
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> Mr. Goodale: Mr. Speaker, dealing with Bill C-1 in the proceedings at the opening of a Parliament is largely a symbolic gesture, as described in Marleau and Montpetit, to assert Parliament's right to act as it sees fit quite apart from what may or may not be in any Speech from the Throne.
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> While the process that the Prime Minister is now proposing may not change anything in substance, I would on this occasion like to ask for the assurance of the Prime Minister and, indeed, from the Chair, that this gesture does not change anything in substance.
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> Mr. Harper: Mr. Speaker, I can certainly give all assurances that this does not change any of our practices. In fact, it merely provides an actual hard copy documentation of our long established practices as is done elsewhere.[1]

Was the Prime Minister correct? Or could the summarization of a set of constitutional rights and

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privileges that had developed over centuries restrict the very rights and privileges being asserted? It is, after all, a central precept of constitutional law that once you define you limit.

One also cannot escape the irony that the *pro forma* bill asserting independence from the Crown was being changed by the person who most directly acts for the Crown and who almost singularly manages its prerogatives: the Prime Minister. In the Canadian Senate, simultaneous with this change, an identical change was being made also by a Minister of the very Crown from which that chamber's *pro forma* bill was equally intended to claim independence.

To fully understand the logic behind the *pro forma* bill, and thus the relevance, significance and possible consequence of these changes, we must first review the traditional English practice relating to *pro forma* bills.

The English Background

All matters were at one time Royal prerogative, though the authority of the English King had been challenged from the outset by the nobility and the church, to an even greater extent than occurred with his European cousins. In response, the English King began to convene great assemblies of magnates to give advice and to hear his decisions, a practice which legitimized Royal authority and co-opted competing interests. Concessions were sometimes necessary, and these concessions form the foundation for both the demand and grant of rights to the people and rights to Parliament, beginning with the first *Magna Carta*. The Tudors were perhaps the most effective at this management of competing interests, and were able to make the 'King-in-Parliament' far more powerful than the 'King' alone. As a result, the Tudor Kings and Queens are considered the most powerful monarchs in English history and the closest England ever had to an absolute monarch ruling by divine right.

By the end of the Tudor line, though, the House of Lords and the House of Commons were becoming self-aware. The break with the Roman Catholic Church under Henry VIII had created fault lines so that, with the Catholic Queen Mary I claiming the throne and marrying Philip II of Spain, claims of freedom of speech in debate, the right to express grievances against the Crown and the right to debate any matter, not just what the Queen told Parliament to deal with, began to emerge. It was in support of these claims (plural) that, during the first Parliament of Elizabeth I in 1558, the introduction of what we would today call a 'private member's public bill' came to be moved before any other matter in the House of Commons, even the matters that had caused Queen Elizabeth to summon Parliament.

This gesture was not simply a claim on the part of the Commons to determine its own priorities, as is now suggested. The Crown had been consistent in its rejection on principle suggestions that Parliament could legislate with respect to governance, which it still claimed to be Royal prerogative, and as for matters the Crown placed before Parliament, it was argued by the Crown that Parliamentary freedom only extended to the right to "say yea or no" and certainly not to raise grievances against the Crown which interpreted them as treasonous attacks on the Queen's person.[2]

In 1604, Parliament again tested the limits of a new King, the first of the Stuart line, who as James VI of Scotland had just become James I of England. During his first Parliament, the Commons not only introduced a bill that had not been sanctioned by the Crown, but it formalized this as a claim of 'right' by adopting a resolution stating "that the first day of sitting in every Parliament, some one bill and no more receiveth a first reading for form sake".[3] These early bills chosen to be moved first were proposed legislation introduced by members of the Commons who hoped that they would be adopted by both chambers of Parliament and assented to by the Crown, even if they knew the likelihood was small and that the very act of introducing this legislation would be seen as defiance. Some of these bills made genuine progress through Parliament.

So while the label *pro forma* reflects the symbolic act of introducing these bills before all others – for form sake – as a gesture of defiance against the Crown, it should not be confused with a directive (at least in the early days) that these not proceed beyond first reading. These were actual private members' public bills. That being said, the decision to limit this gesture to only one private members' bill on the first day, and to formalize the practice by resolution, was an attempt to placate the Crown, even as it was asserting a claim to rights the Crown was rejecting. This also was intended to insulate the member who had introduced the bill from the King's wrath through the cover of a formal resolution of a united House of Commons.

Throughout this era, Parliament found itself in constant conflict with the King over this right to deal with public legislation, and this repeatedly led to Parliament's prorogation and dissolution. James' son, Charles I, for example, refused to call Parliament for 11 years after his initial experience with this body and, when he finally summoned it in April 1640, he dissolved it three weeks later because it had failed to

deal exclusively with the issue of supply which he had laid before it. This is the so-called 'Short Parliament'.

As the Crown was arresting members of Parliament for these 'Acts' of defiance, and not wanting to place any one member of Parliament in direct danger, the practice emerged of choosing a bill for this first symbolic gesture that had already been under consideration in a previous Parliament. By 1661 this practice became routine as it had the additional benefit of supporting the legal claim of Parliamentary continuity; as each Parliament summoned was a new legal entity created by the Crown under its Royal authority, the reintroduction of a previously considered private member's public bill created a claim to the rights asserted by the earlier Parliament, even if that body had been dissolved by an angry King rejecting that right.

The relationship between Parliament, which was emerging as what Montesquieu would later define as the legislative branch, and the Crown, which was then (and is again now) solely interested in the executive branch, was its most adversarial under the Stuarts. The Crown only summoned Parliament because it needed money to operate the executive branch; whereas legislators felt that their primary role was to put grievances and petitions on behalf of the people before the King and to propose laws for better governance (of which the latter consumed a smaller portion of Parliament's agenda than the former). The conflict between Parliament and the Crown over what should be Parliament's duty was summed up by Sir Thomas Less during a debate over the *pro forma* bill in 1676 when he said "the Kings Speech is usually about Supply and that ought to be the last thing considered here".[4]

The Outlawries Bill and The Vestries Bill

In 1727, the *Outlawries Bill* was chosen by the British House of Commons as the *pro forma* bill to be used at the start of every Parliament. This choice is significant. It was designed to represent what was understood at the time to be the multilayered rights that Parliament had successfully won by that time, namely: that the Commons *can* deal with public bills not proposed by the Crown, that it *may* legislate in any area of governance including on matters concerning money, it *may* express grievances against the Crown, it *will* give priority to matters the Crown does not see as a priority and it *should* give priority to questions of fundamental justice before it deals with supply.

As legislation, the *Outlawries Bill* alleges that *some* officers of the Crown were denying people their fundamental rights, and yet it did so in a way that did not indict the monarch, a point buttressed by the fact that this was an area of public policy over which Parliament had already successfully legislated, so it could not be seen as sedition on the part of the mover.[5] The full title of this proposed law is the *Bill for the more effectual preventing clandestine Outlawries* and it would, if adopted by Parliament, levy a fine against a Crown prosecutor or sheriff who intentionally failed to serve papers on an accused so as to turn that person into an outlaw without due process. Failure to serve papers would mean that the accused would not be aware of the date they must appear in court to answer charges; failure to appear would automatically have that person declared an outlaw; and, once an outlaw, this person was forever denied access to the courts, subject in criminal cases to capital punishment without trial and prevented from receiving food or shelter from other British subjects who had the legal right to kill him on sight with impunity. Clearly, being placed 'outside of the law', thus an outlaw, is to be disenfranchised in the ultimate way and was the most serious threat to a person's rights at the hands of a state official at the time, and one with great potential for malfeasance. This made the bill a powerful symbol of not just the Commons' rights, but of its *obligations* – after all, with privileges there are always obligations.

The House of Lords made a similar thoughtful choice in the adoption of its *pro forma* bill. It chose *A bill for the better regulating of Select Vestries*. This was a bill aimed at reforming what we would now call local government. Some Vestries, so named because their boundaries were based on Church Parishes and their usual meeting place was in the Church vestry, had extreme property restrictions designed to limit voting to only a handful of people. In other words, they had 'Select' membership. Not surprising to us in a modern democracy, it turns out that 'Select Vestries' were more corrupt than other vestries, which were by no means ideal models of local government themselves. But this time in British history was in the wake of the French Revolution, so tackling this corruption and expanding the franchise was seen as a direct attack on the Crown. Debating societies had even been banned under the *Seditious Meetings Act* for simply discussing the corruption in Select Vestries and, while a private member's bill had been prepared for Parliament as early as 1794, it took another decade before Parliament began to tackle the problem.

Again we have a private member's public bill that was designed to raise a grievance with the Crown over the behaviour of *some* officials, and while it in no way imputed the monarch directly, it was nevertheless a

Parliamentary challenge over the Crown's governance, and it was an issue of fundamental justice for the least represented in society. Vestries had the role of administering the so-called *Poor Law*, which was a series of laws that contained philanthropic (e.g. food banks), exploitative (e.g. workhouses) and even punitive (e.g. prison) measures to deal with the poor, so this legislation had potential for misuse and concerned the weakest in society. As the House of Lords is the chamber wherein the Church and wealthiest landowners are represented, this is a powerful symbol of the *obligation* for members of Parliament to deal with matters against self-interest, and for the powerful to protect the disenfranchised.

That the significance of the *pro forma* bill extends to rights *and* obligations of the House concerning questions of fundamental justice was clearly understood by members of the British Commons and Lords in the 18th and 19th Centuries, even if it has been forgotten by modern politicians. For example, in 1763, John Wilkes used the occasion of the *Outlawries Bill* to demand that the Commons address the issue of his imprisonment by the Crown. When a representative of the Crown asked to also present a message from the King on the same issue, the Speaker suggested that the *Outlawries Bill* should be moved first, something which was resolved by the House adding the words "a Bill prepared by the Clerk for opening the session" to the Bill. This did not prevent urgent matters from still being raised before items proposed by the Crown. It simply ensured that the *first item* would be the symbolic claim of rights by the Commons before all other matters. In fact, even though from this point forward the *pro forma* bill has been read a first time 'according to custom', this was still followed by a motion that the bill be read a second time, thus providing the opportunity to raise grievances against the Crown (and of course in the House of Lords there continues to be a motion that their *pro forma* bill be read a first time).

In 1794, one of the most senior Whig politicians, playwright Richard Sheridan, used the motion that the *Outlawries Bill* be read a second time to object to the suspension of *Habeas Corpus*. The *Habeas Corpus Act 1679* guarantees that any person detained by the Crown must be brought before a court of law to determine the legality of that detention. It has been suspended twice in England, the first being in May of 1793 in response to war with France, and the second was in January 1817 after a rock was thrown through the window of the Prince Regent's coach as he rode to the opening of Parliament. At the opening of Parliament in 1818, John Spencer[6] used the motion that the *Outlawries Bill* be read a second time to give notice that he would be introducing a Bill the next day to repeal the *Habeas Corpus Suspension Act*. At the same time, in the House of Lords, Lord Holland rose on the motion that the *Select Vestries Bill* be read a first time to propose that instead of this *pro forma* bill, he would like to move a bill to repeal the *Habeas Corpus Suspension Act*. In both Chambers, the Crown immediately responded by committing to introduce the next day a bill to restore *Habeas Corpus*.

This is not to imply that either House fully accepts that these sorts of items are in order at this time on the order paper. Certainly they would not be accepted today, as not only has this purpose been forgotten with time but second reading has been eliminated for the *Outlawries Bill* in the British Commons and thus there is no occasion to even raise these sorts of issues. What is significant for our purposes here is only that, on the broader question of the constitutional rights asserted, it was clearly understood by Parliamentarians in the past that the right was not as simple as the right to give precedence to matters not in the Throne Speech.

There is a danger in diluting the symbolism contained in these bills as Parliamentary rights and privileges may be diminished and even extinguished over time. By agreement that goes back to 1704, Parliamentary privileges cannot be increased, which is a principle also enshrined for the Canadian Parliament in section 18 of the *Constitution Act, 1867*.

Perhaps the largest surrender of one of the rights claimed by the *pro forma* bill concerned the issue of supply – that is the money needed for the annual operations of the executive branch. In 1706, when concern was raised about how the right to legislate on 'any matter' might impact on the country's finances, something that was a greater concern at the end of the 17th Century than by middle of the 18th Century, let alone today, the Commons adopted a resolution stating that "this House will receive no petition for any sum of money relating to *public service*, but what is recommended from the Crown". After all, it was not Parliament's intent to take management of the executive branch away from the King, something that ironically occurred later via responsible government, it was only to establish itself as the people's representative body operating unconstrained by the Crown. So, in 1713, Standing Order 66 was adopted which says the Commons can "not vote money for any purpose, except on a motion of a Minister of the Crown". This was a very modest accommodation to the Crown at the time, but it had the unintended consequence of letting the Crown regain control of Parliament over time.

Parliament had just won its supremacy, which was recognized by the Crown in the *Bill of Rights* (1688), the *Act of Settlement* (1700) and the *Succession to the Crown Act 1707*, so by letting Ministers of the Crown, of whom there were very few in the Commons (and the ones there had no significant following among fellow MPs) exclusively initiate requests for supply, was in no way seen to be a reduction in Parliamentary privileges or independence. As was noted in the quote by Less, above, Parliament saw supply as the least important of its duties. Additionally, this was following restoration of the monarchy, and there was fear of anything that might again lead to a republic. Members of Parliament thus concluded that involving themselves too directly in supply would involve them in the management of the executive branch and thus compromise Parliament's independence from the Crown.

Ironically, this olive branch lay the very ground work for the Crown coming to dominate the Commons and the merging of the two branches of government. While it was probably inevitable that Parliament would be 'captured' by the Crown once it gained supremacy, the specific decision to give Ministers of the Crown control over proposing supply created a very straight forward trajectory. Before long the Crown was appointing all of its ministers from within Parliament and then, with the *Reform Acts* and the shift of the tax base, to appointing most ministers from within the House of Commons. Another unintended consequence of the *Reform Acts*' expansion of the electoral franchise was to increase the cost for elections, and this led to the rise in political parties. So it was nothing more than good politics for the King to appoint the leadership of the political party which could obtain supply from the Commons to the ministry, a practice which fully emerged under the Hanoverians who spoke German, not English, and had little interest in the day-to-day matters of governance.

Under the House of Windsor, the electronic era of radio and television has seen the *loci* of the Crown's power shift even further away from the Crown in Cabinet to the Prime Minister personally and, concurrently, the influence of the party leader over members of Parliament has grown.

The Crown (now essentially the PM and Cabinet) has again won control over the legislative agenda. Supported by MPs and Senators of the same political party which, more often than naught, form the largest block of votes in both chambers of Parliament, and the successive tightening of the standing orders they have sanctioned, Crown legislation is now virtually assured of passage while private members' public bills, like the ones originally chosen for the *pro forma* bill, rarely see the light of day. Even the strategic moves of an independent Parliament from the time of the Stuarts, such as attaching controversial items to supply and the use of omnibus bills to avoid the King's veto, have now become tools of the Crown to get its legislation through minority Parliaments.

In short, the emergence of responsible government has restored to the Crown the level of power enjoyed by the Tudor Kings, even if the Crown is now the Prime-Minister-in-Parliament and not the King-in-Parliament. It is therefore not surprising that the symbolism of the *pro forma* bill, which at its core represents the rights and privileges that ensure Parliamentary supremacy over the Crown, and of the legislative branch over the executive branch, and which also speak to the obligations of members of Parliament to the people, would be forgotten, misunderstood and even actively diminished by the Crown itself.

Canadian Practice

In importing the Westminster model, many of the traditions were recreated on this side of the Atlantic.

The Legislative Assembly of Lower Canada, probably due to the direct influence of Lord Dorchester as Governor of Quebec and Governor General for British North America, adopted the practice of introducing a *pro forma* bill upon the legislature's return from the upper chamber (and this bill was ordered translated which itself was a symbolic act), before the Speech from the Throne was tabled and debated. The Legislative Assembly of Upper Canada had no such practice, but when the two Canadas were united into a single province, beginning in 1843, a *Bill to provide for the Administration of the oath of office to persons appointed to be Justices of the Peace in this province* emerged as the *pro forma* bill for the lower legislative chamber.[7]

Oaths of office have been a historic battlefield between Canadians and the British Government. It was only with the *Quebec Act, 1774*, which replaced the oath to Elizabeth I and her heirs with one to George III and his heirs without reference to the Protestant faith, that French Canadian Catholics could hold public office in Quebec and in Canada. That being said, as no actual bill is tabled or printed, the actual rights being asserted have been lost over time, and as oaths are about allegiance to the monarch, this practice cannot be seen to parallel the thoughtful choices of *pro forma* bills made in the U.K. Parliament.

Following Confederation, Sir John A. Macdonald presented a *Bill respecting the Administration of Oaths of Office* in the Commons, where it has been used as the *pro forma* bill almost continuously ever since.[8]

While in the Senate a *pro forma* bill was equally moved before the tabling of the Speech from the Throne at the opening of the first session of the Parliament of Canada, this was only identified as the Railroad Bill in the second session.[9] While the Railway is undoubtedly an important undertaking and was one of the reasons for Confederation, it is hard to see where this bill reflects any of the traditions surrounding the struggle for Parliamentary rights and legislative independence from the Crown or in the protection of the citizens against the excesses of government undertaken in the name of the monarch or of the obligations of these chambers to put the interests of the least fortunate citizens before all other matters. Additionally, the deviations from even these hollow *pro forma* bills on this side of the Atlantic are significant.

The first time the federal Prime Minister deviated from the historic custom of introducing a *Bill for the Administration of Oaths* was in 1926. At the occasion where this bill would normally be introduced in the Commons, Mackenzie King instead introduced a motion stating that in the opinion of "this House, in view of the recent general elections, the Government was justified in retaining office and in summoning Parliament; and the Government is entitled to retain office unless defeated by a vote of this House equivalent to a vote of want of confidence".[10] This was the year of the 'King Byng Thing'.

That Constitutional Crisis occurred when Liberal Prime Minister Mackenzie King, having chosen to try to continue governing even though he had won fewer seats in the election than the Conservative Party, recommended that Parliament be dissolved and a new election called so he would not have to face defeat on a motion of confidence, a request that the Governor General Lord Byng refused. It is significant for our consideration of the *pro forma* bill that during this perceived constitutional crisis, Governor General Lord Byng did not dismiss Mackenzie King, that Conservative Leader Arthur Meighen was not appointed Prime Minister until after the resignation of Mackenzie King following defeat on the confidence vote, and that the dissolution of Parliament finally occurred only after being recommended by then Prime Minister Meighen who had equally been defeated on a confidence motion. These are often forgotten facts from this crisis, but they are significant because they speak to the fact that the Crown is the Cabinet in Canada and not the Governor General or Queen. Mackenzie King was thus trying to use the *pro forma* bill to change constitutional convention, not to assert Parliamentary privilege, and even then the Governor General followed the course of action identified in this *pro forma* motion.

The monarch is only Head of State in our model of responsible government. The Head of State, pursuant to what A.V. Dicey identified as constitutional conventions, is obligated "to secure the ultimate supremacy of the electorate as the true political sovereign of the state".[11] This limits the Monarch's (and thus Governor General's) role with respect to the executive branch. In Walter Bagehot's often quoted saying, he or she has only the right to be consulted, to encourage and to warn.[12] Lord Byng was doing nothing more than that, so the motion introduced by Mackenzie King in lieu of a *pro forma* bill was not a symbol of the Commons' defiance of the Crown but rather was the Crown's intended defiance of Parliament and the electorate which is embodied in the person of the Sovereign. Since this motion was treated as a *pro forma* bill, it never proceeded to a vote. Had it proceeded, it would have had the unfortunate consequence of redefining the Governor General's reserve powers as Head of State, since Parliamentary supremacy means that Parliament has every right to limit or extinguish Royal prerogatives.

The other changes to the *pro forma* bill have occurred first at the provincial level, which it has already been noted were alluded to by Prime Minister Harper when he recently altered the federal *pro forma* bills.

Provincial Practice

Only two provinces do not have *pro forma* bills. The first is Quebec, which now eschews much of the formal processes surrounding the Throne Speech. A *pro forma* bill had historically been introduced in this province's legislative assembly, but since reconstituting itself as a National Assembly, the Throne Speech is now followed by an equally lengthy speech by the Premier, who shares the duty of opening the session. The sitting then adjourns and at the next sitting of the Chamber debate continues with speeches from the opposition leaders.

In Alberta, following the reading and then tabling of the Speech from the Throne, the Premier introduces and speaks to a bill that has been designated as the government's 'signature legislation', and as this bill had been specifically mentioned in the Speech from the Throne as the Crown's first priority, there is no way to interpret this gesture other than a rejection by the Crown of the legislature's right to prioritize its own agenda.

In all other provinces, the *pro forma* bill is replicated in form, though with varying degrees of substance.

The closest to the historic practice at the federal level are Nova Scotia, Manitoba and Saskatchewan. These provinces use some variation of *An Act Respecting the Administration of Oaths of Office*, which was the title of the *pro forma* bill used in the Canadian House of Commons, moved by either the Premier or the Government House Leader.

British Columbia variously uses *An Act to Perpetuate a Parliamentary Right* or *An Act to Ensure the Supremacy of Parliament* as the name for its *pro forma* bill. Prince Edward Island has also used this latter title for its *pro forma* bill, but it more often takes this occasion to commemorate historical moments in the province's history. For example, at the opening of the 2nd session of the 63rd Assembly (2008), the Premier moved *An Act to Commemorate the 100th Anniversary of the Publication of Anne of Green Gables* and at the 4th session of the 62nd Assembly (2006) it was *An Act to Acknowledge the Year 2007 as the 75th Anniversary of the RCMP as the Provincial Policing Service on Prince Edward Island*.

In Newfoundland, a Minister of the Crown tables one piece of government legislation that was not mentioned in the Speech from the Throne. This is actual government legislation which then proceeds through the Assembly and becomes law. It is hard to see what right is being asserted by this practice, except perhaps the right for the Government to introduce legislation that it forgot to mention in its Speech from the Throne.

New Brunswick, until 1963, also tabled once piece of government legislation prior to the tabling of the Speech from the Throne, a practice followed since 1789. In 1963, Premier Louis Robichaud changed this practice and introduced a bill entitled *An Act to Perpetuate a Certain Ancient Right*. This bill, which continues to be introduced before consideration of the Speech from the Throne, is printed though not proceeded on further. Its content is not in the form of a bill, but rather contains five paragraphs of explanation noting that this moment on the legislative agenda had been used in the past to table priority legislation, including in 1856 when four bills were introduced before debate on the Speech from the Throne, and then goes on to identify that the introduction of a *pro forma* bill is intended to assert the right of Parliament "to sit and act without leave from the Crown" and "to give precedence to matters other than those expressed by the Sovereign" and that "this assertion of independence from the Crown for purposes of legislation" goes back to 1603. This is not entirely accurate, since it is only by act of the Crown that Parliament can be assembled and it only has the right to sit until prorogued or dissolved.[13] Further, back in 1603, the demand of right was less about legislation and more about giving priority to putting petitions and grievances before the Crown; and even if this were not the case, the *pro forma* bill now asserts many more rights, privileges and obligations than simply independence for the purposes of legislation.

This N.B. innovation was adopted by the Harris Government for Ontario in 1998. Ontario had begun Confederation by using the *Administration of Oaths Bill* which had been used in the united province of Canada. However, the tradition became less automatic in the early 1900s and, beginning in 1939, it became the practice to introduce other bills either *pro forma* or with the intent of adopting them as government legislation. The Harris Government made two innovations of its own.

The first was to use as the *pro forma* bill *An Act to amend the Executive Council Act*, an initiative it made when it came to power in 1995. Ontario has an *Executive Council Act*, which empowers the lieutenant governor to appoint specific ministers, and parliamentary secretaries for them, and this Act sets their remuneration. The amendment would have reduced the list of possible ministers to reflect the exact configuration of the Harris Cabinet. In introducing this bill, Deputy Premier Ernie Eves stated at the time that the *pro forma* bill "symbolizes the Assembly's independence from the Crown and reflects the collective right of Members to address the Legislature's own priorities before attending to other business."[14] This choice for a *pro forma* bill is an interesting one. The appointment of Ministers is a Royal prerogative, and while in Canada the creation of ministers has been largely codified through legislation (this is less true in England), it remains as a reserve power where, for example, the prime minister is chosen without noteworthy statutory directive. So the *Executive Council Act* is an illustration of legislative supremacy over Royal prerogatives, even if it lacks some of the other symbolism of its British counterparts.

But at the start of the 2nd session of the 36th Legislative Assembly of Ontario, this was replaced by *An Act to Perpetuate an Ancient Parliamentary Right*. Like the New Brunswick bill, this Ontario *pro forma* bill is little more than an information sheet, though it takes the form of legislation in that it begins with the words "Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows". The four clauses which follow leave it unclear what exactly would be enacted if this law were adopted by the legislature. This flaw is perhaps its saving grace, since were the legislature to

pass this bill, it would have no impact on the rights of the legislature.

At its core, the Harris Bill suggests that the *pro forma* bill "asserts the right of the Legislative Assembly to give precedence to matters other than those expressed by the Sovereign". The word Sovereign equally is used in the New Brunswick bill. The use of the word sovereign has a particular irony for the *pro forma* bill since it is precisely because of changing views of where sovereignty resided that Parliamentary rights came to be asserted, that Parliamentary supremacy came to be recognized and that, later, responsible government emerged through constitutional convention.

The background sheet produced by the Ontario Legislative Library to explain this change is particularly illustrative of the confusion which surrounds the *pro forma* bill and around sovereignty, the Crown and from whom independence is being asserted by the legislature. The document cites a previous statement by the Speaker of the Ontario Legislature asserting the "ancient custom" that once Parliament has been opened, the House can proceed upon any matter at its discretion. As the Phillips and Jackson tome *Constitutional and Administrative Law* notes, a custom is "(i) regarded by those subject to it as obligatory; (ii) certain; (iii) reasonable; (iv) of immemorial antiquity; and (v) it must have been in existence continuously."[15] So the very act of changing a custom renders it no longer a custom. The paper also notes that "Governments have honoured this convention by introducing a bill containing an initiative not mentioned in the Throne Speech" and equally notes that "Canadian legislatures generally honour this convention" by either using a *pro forma* bill or "a government initiative not mentioned in the Throne Speech".[16] A convention is not a custom in constitutional law, though both are binding (to varying degrees).

Sir Ivor Jennings in his classic rule for identifying constitutional conventions, a rule adopted by the Canadian Supreme Court, notes that in addition to precedent and reasons for that precedent, there must be *agreement* by the monarch and the constitutional actors to be bound by these precedents.[17] Noting exceptions and suggesting that governments simply 'honour' these conventions suggests that this claim of privileges is not binding on the Crown. Besides, as has already been noted, it is unclear how a government initiative not contained in the Throne Speech is an assertion of independence by Parliament from the Crown.

Mr. Harper's *Pro Forma* Bills

As a number of ministers in the Harper Government, including the Government House Leader, were ministers in the Harris Government, it is the Harris Bill which most informs the recent change at the federal level. The Harper Government's bill does not suffer from the same drafting defects as its Ontario counterpart, though this poses a different problem since it is actually possible for Parliament to enact this legislation and thus limit the Parliamentary rights being asserted. The 'new' *pro forma* bills maintain the names of the older bills (Oaths in the Commons and Railways in the Senate) and has moved most of the informational facts contained in the Ontario bill to a preamble, leaving the bill to legislate: "the right of the House of Commons to give precedence to matters not addressed in the Speech from the Throne."

As has been pointed out in this paper, this is an extremely minimalist view of the rights being asserted by Parliament and represented by the *pro form*a bill. While it does not appear to be an intentional attempt by the Crown to limit Parliamentary rights, as the Bill has not been advanced through Parliament using the government's control of the legislative agenda, it does reflect a reductionist understanding of Parliament's rights and this could, in turn, undermine the very rights this bill originally asserted.

In fairness, this minimalist view of Parliamentary rights is not unique to the Crown in Canada, and can equally be found in the authorities, which variously suggest that the *pro forma* bill simply represents the right "of deliberating without reference to the immediate cause of summons"[18] and of "passing legislation".[19]

The danger with a minimalist approach is that it can, even if these bills are not preceded on further, result in a reduction of rights as they become increasingly forgotten by the constitutional actors. These bills suggest that the constitutional actors, specifically those who act for the Crown in Parliament and offer advice to the Governor General as *de facto* Head of State in the use of her reserve powers relative to Parliament, may not have a full understanding of the precedents and the reasons for these precedents. Privileges, customs and conventions require acquiescence by the constitutional actors for their continued enjoyment, as they for the most part are not judiciable.

Future Practice

It would be easy to link the decline in understanding and significance of the *pro forma* bill in Canada to the specific premiers and prime ministers who made changes. But the truth is that there is real confusion about the essential features of responsible government in Canada.

Most MPs and Senators refer to themselves as 'the Government' when the leader of their party happens to be Prime Minister, even though the Government is only the Cabinet. Supply now dominates the work of Parliament and takes precedent over all private members' public bills and the 'Royal recommendation' has been accepted as necessary for a plethora of legislative initiatives. It is unlikely that in the Canadian Commons today, an *Outlawries Bill*, as a private member's bill, would make it through the lottery to the floor of the House and, even if it did, it would run the risk of being challenged by the Crown since its fines for punishing Crown prosecutors and sheriffs would likely be construed as an imposition of a tax. Not only has the intent of the *pro forma* bill been forgotten, but the rights of legislators have been diminished.

There are of course two parts to the *pro forma* bill which I have referred to as 'form' and 'substance'. To remedy form is the easiest.

The *pro forma* bill – any *pro forma* bill – should be moved by someone who is not a Minister of the Crown. In fact, privy councilors, even in opposition or in the Senate, should not be entitled to move this bill, and neither should parliamentary secretaries as they receive a stipend from the Crown. This bill was intended to assert the legislative branch's independence from the Crown, and that can only be done by persons unattached to the Crown. This is the same principle behind who gets to ask questions in question period (Ministers have always been prevented from asking questions and it has been the opinion of the law officers at Justice in recent years that Parliamentary Secretaries should not ask questions in QP or introduce private members' bills, and while this is perhaps too severe a restriction, the principle which underlies it should equally apply to the assertion of Parliamentary rights and privileges).

As for substance, this becomes more challenging. Some of the privileges claimed by Parliament, such as that its proceedings may receive "the most favourable construction" (a privilege claimed by the Speaker at the opening of Parliament), no longer have relevance in the era of responsible government. Additionally, choosing a bill that *simultaneously* conveys the message that each chamber of Parliament *can* deal with public bills not proposed by the Crown, that it *may* legislate in any area of governance including on matters concerning money, it *may* express grievances against the Crown, it *will* give priority to matters the Crown does not see as a priority and it *should* give priority to questions of fundamental justice, even *against* self-interest, before it deals with supply, is no easy feat.

If only one of these matters could be emphasized, then perhaps the obligation of Parliament to give priority to matters of fundamental justice against self-interest should be the primary focus of the document. This is, after all, frequently forgotten by legislators. Now with a *Charter of Rights and Freedoms* protecting Canadians, which allows private citizens to seek redress via the judiciary, Parliament has largely abandoned its role as a defender of individual rights. To remind Parliament that this is in fact its role, a private members' public bill could be chosen from the hundreds that have been tabled over the years that are close to the symbolism of the *Outlawries Bill* and *Select Vestries Bill*. Canada has no shortage of governmental disenfranchisement and maltreatment of citizens from the Chinese 'head tax' to the internment of Japanese Citizens in World War II to residential schools and much of the *Indian Act*, and there has been no shortage of private members' bills introduced to remedy these. Selecting one such bill would be parallel to the British example and remind MPs and Senators that this is, in fact, *their* obligation to defend the rights of the most vulnerable citizens even in the *Charter* era.

Another possibility would be to, instead of trying to summarize the privileges, rights and obligations in a few paragraphs, to actually enumerate all Parliamentary privileges in a bill. In Australia, the *Commonwealth Parliamentary Privileges Act 1987* codifies privileges in that legislature. This bill was necessitated to clarify whether or not testimony used in a Parliamentary hearing could be used at trial (a matter that arose in *R. v. Murphy*). For the Canadian Parliament, this would be an opportunity to clarify the privileges around which confusion exists (of which there are several), even if it sacrificed the lesson conveyed by the British *pro forma* bills that with power comes responsibility – that the reasons MPs and Senators have privileges not enjoyed by other citizens is so that they can defend the less fortunate against the Crown and its government.

Ultimately, the choice of bill and any changes to it should be determined by a committee and not by House leaders and definitely not by the Crown. In England, the *possibility* of changing the *pro forma* bill was raised in the 2003 session and this was immediately turned over to the Procedure Committee, which recommended that it remain unaltered.[20] This bill is a symbol of rights expressed by the Chamber and only the Chamber itself, uninfluenced by the Crown, should be in control of this piece of legislation.

And if this is true for Parliament, it is even more necessary at the provincial level where other safeguards like bicameralism have all disappeared.

At the very least, the Legislatures of Newfoundland and of Alberta need to move to stop the practice of Government legislation, whether or not it is mentioned in the Speech from the Throne, becoming the first item on the legislative agenda. This is not only contrary to the symbolism of the *pro forma* bill, it poses a direct attack on parliamentary supremacy and independence.

Notes

1. House of Commons, *Debates*, November 19, 2008. The process was repeated, without any objection, for the Second Session which began on January 26, 2009. The text of the Bill is included only on the Website for the Second Session, where it appears as a 'Government Bill'.
2. Geoffrey R. Elton, *Tudor Constitution: Documents and Commentaries* (New York: Cambridge University Press, 1982), p. 274.
3. House of Commons Information Office, *The Outlawries Bill* (London: House of Commons, 2008), p. 2.
4. This has been wrongly interpreted as being only a claim that the Commons was asserting its right to debate matters not in the Speech from the Throne [see, for e.g., House of Commons Information Office, 'Outlawries Bill', *Fact Sheet* G21 (House of Commons, 2007)].
5. Bills with respect to Outlawries had been passed in 1331 and in 1588. This particular Outlawries Bill has been read the first time at the outset of every Parliament except for 1741-2, and, in 1747, it proceeded as far as committee stage.
6. It should be noted that where this occurs, in *HC Deb 27 January 1818 vol 37 cc18-9*, he is referred to as Lord Althorp and not by his full name. This was his courtesy title, being the son of an Earl, but as his father was still the Earl he was eligible to be elected to the House of Commons.
7. Debates of the Legislative Assembly of the United Canada, Vol. III, p. 17.
8. House of Commons Debates, 1st Session, 1st Parliament, p.5. In 1937, *An Act Respecting Alteration in the Law Touching the Succession to the Throne* was used, and it was ordered to be read a second time at the next sitting of the house.
9. Debates of the Senate, 2nd Session, 1st Parliament, p. 3.
10. Alistair Fraser, W.F. Dawson and John A. Holtby (eds.), *Beauchesne's Rules & Forms of the House of Commons of Canada with Annotations, Comments and Precedents* (Toronto: The Carswell Company Limited, 1989), p. 75.
11. Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 10th edn, 1965), p. 422.
12. Walter Bagehot, *The English Constitution* (New York: Cambridge University Press, 2001), p. 111.
13. The only occasions where the British Parliament met on its own authority was before the restoration of King Charles II in 1660 and at the Revolution in 1688; and it could only not be adjourned, prorogued or dissolved from 1641 to 1660 pursuant to the *Act against Dissolving Parliament without its own Consent*, something that led to the 'Long Parliament' and the civil war.
14. Debates of the Legislative Assembly of Ontario, 1st Session, 36th Parliament, p. 7.
15. Paul Jackson and Patricia Leopold, O'Hood Phillips and Jackson, *Constitutional and Administrative Law* (London: Sweet & Maxwell, 2001), p. 20.
16. "Re-affirming an Ancient Right: Bill 1", *Note 19* (Toronto: Ontario Legislative Library, October 19, 1999).
17. Ivor Jennings, *The Law and the Constitution* (London: University of London Press, 1960), ch.3; Supreme Court of Canada, *Reference re: Amendment of the Constitution of Canada* 1 S.C.R. [1982] 753, p.888; and *Re*: Objection by Quebec to a Resolution to amend the Constitution 2 S.C.R. [1982] 793, pp.803-818.
18. C.J. Boulton (ed.), *Erskin May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (London: Butterworths, 1989), p. 233.
19. Alistair Fraser, W.F. Dawson and John A. Holtby (eds.), *Beauchesne's Rules & Forms of the House of Commons of Canada with Annotations, Comments and Precedents* (Toronto: The Carswell Company Limited, 1989), p. 74.
20. Procedure Select Committee, *Sessional Orders and Resolutions* HC 855 2002-03 (London: House of Commons, 2003). Of course the paradox of responsible government meant that even in this instance, the Government had to respond to this committee report (as it must to all committee reports), so the impression is left that the British Crown agreed to allow Parliament to continuing asserting its rights from the Crown through the *pro forma* bill [*Government response to Sessional Orders and Resolutions* HC 613 2003-04 (London: House of Commons, 2004)].