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GRADE / DEGREE

Faculty of Law

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**Officers of Parliament :
Accountability, Virtue and the Constitution**

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**OFFICERS OF PARLIAMENT:
ACCOUNTABILITY, VIRTUE AND THE CONSTITUTION**

M. Ann Chaplin

**Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
In partial fulfillment of the requirements
For the LL.M. degree in Law**

**Faculty of Law
University of Ottawa**

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Your file *Votre référence*
ISBN: 978-0-494-65474-3
Our file *Notre référence*
ISBN: 978-0-494-65474-3

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TABLE OF CONTENTS

Title Page	i
Table of Contents	ii
Legend	iv
Abstract	v
Acknowledgements	vi
Dedication	vii
Introduction	1
Note about Terminology	10
1. Who are the officers of Parliament and why do we have them?	13
A Purposes behind the creation of officers of Parliament	13
B The result – the current officers of Parliament	16
(a) The Auditor General	16
(b) The Chief Electoral Officer	18
(c) The Commissioner of Official Languages	19
(d) The Information Commissioner	20
(e) The Privacy Commissioner	21
(f) The Conflict of Interest and Ethics Commissioner	22
(g) The Public Sector Integrity Commissioner	24
(h) The Commissioner of Lobbying	26
C Do the officers of Parliament form a unit?	27
(a) Federal Accountability Act	28
(b) Standing Order 111.1(1)	30
(c) Officers of Parliament Working Group	30
(d) Key similarities	31
D Conclusion	32
2. Why are officers of Parliament important?	35
A Impact on individuals	36
(a) Complainants	36
(b) Individuals who are the subject of reports	41
B Impact on management of departments	46
C Impact on Parliament and parliamentarians	50
D Impact on the public	54
E Conclusion	56

3. The Constitution and the legitimacy of officers of Parliament	58
A Which branch of government appoints and removes the officers?	61
B Where are the officers employed?	64
C Which branch of government do they work for?	69
D Who directs them?	75
E Which branch do they most closely resemble?	76
F Who is accountable for them and to whom do they account?	82
G On whose behalf do they act?	90
H Conclusion	94
4. The legitimacy of officers of Parliament – an alternative approach	97
A Perceived legitimacy	97
B Beyond the perception	99
C Alternate sources of legitimacy	101
(a) Democratic – but not through the ballot box	103
(b) Preserving the ethical structure and the rule of reason	109
(c) Efficacy: Are officers of Parliament the right tool?	118
D Conclusion	123
5. The legitimacy of officers of Parliament – lessons learned	126
A The reasons for their structure and mandates	126
B The need for a decision-making framework	128
C New officers of Parliament/new mandates?	130
D Matters for potential reform	137
E Conclusion	140
Appendix: Comparison of three executive agencies with the officers of Parliament	144
1. The Canadian Human Rights Commission	144
2. The Public Service Commission	146
3. The Security Intelligence Review Committee	148
Bibliography	151

LEGEND

Government bodies

AG: Auditor General
CEO: Chief Electoral Officer
CHRC: Canadian Human Rights Commission
COIEC: Conflict of Interest and Ethics Commissioner
COL: Commissioner of Official Languages
IC: Information Commissioner
LC: Commissioner of Lobbying
PC: Privacy Commissioner
PSC: Public Service Commission
PSIC: Public Sector Integrity Commissioner
SIRC: Security Intelligence Review Committee

Legislation (in footnote text only)

AGA: *Auditor General Act*
ATIA: *Access to Information Act*
CEA: *Canada Elections Act*
COIA: *Conflict of Interest Act*
FAA: *Financial Administration Act*
LA: *Lobbying Act*
OLA: *Official Languages Act*
PA: *Privacy Act*
PCA: *Parliament of Canada Act*
PSDPA: *Public Servants Disclosure Protection Act*

ABSTRACT

The officers of Parliament now form a group which includes the Auditor General and seven other “ethical regulators”ⁱ. Because of its independence and the nature of its members’ mandates, this group is thought to be key to restoring the public’s faith in government. However, the officers do not clearly fall within one of the three branches of government and are not fully subject to democratic accountability mechanisms, raising questions about the legitimacy of their exercise of authority. This thesis explores alternative theories for supporting the legitimacy of officers of Parliament and draws lessons from that exercise for the future development of this virtues-based institution.

ⁱ U.K., H.C. Library, “Officers of Parliament: recent developments”, SN/PC/04720 (London: House of Commons Library, 2008) at 8.

ACKNOWLEDGEMENTS

I would like to acknowledge the assistance of so many gracious colleagues and friends who agreed to speak to me, share their expertise, and in some cases read the thesis and provide me with their comments. Among these were people who have served in the offices of the officers of Parliament, both in Canada and in the U.K., colleagues from the Department of Justice and professors at the University of Ottawa. I would like to particularly name my supervisor, Prof. Craig Forcese, as well as Dr. Peter Oliver, Ryan Rempel, James Stringham, Mylène Bouzigon and Henry Molot. I would also like to express appreciation for the excellent administrative support I received from the Office of Graduate Studies at the Faculty of Law, particularly from Mme. Nicole Laplante, and to my superiors at the Department of Justice for allowing me to take education leave to complete this thesis. The views expressed and the errors committed are, of course, my own.

To Steven

Officers of Parliament: Accountability, Virtue and the Constitution

Introduction

Crises and pressures in the real world are the force behind developments in government. They create situations in which legislation which follows traditional jurisdictional and institutional patterns may be inadequate. It is at such times that an opportunity is presented for creativity and institutional innovation. Innovation, however, carries its own risks, including the possibility that fundamental constitutional principles will be left behind.

The crisis in these early years of the twenty-first century has been one of trust. Political scientists, pollsters, citizens' groups and politicians themselves have charted and bemoaned the public's lack of confidence in its elected officials and the governments they lead. As noted by Donald Savoie, "[p]olitical institutions, politicians and civil servants have all fallen sharply in recent years on the public trust scale."¹ Paul Thomas points out that this loss of trust or "'anti-politics' mood" has a variety of causes, and traces its beginnings to the 1970s.²

Another powerful pressure which has mounted in tandem with this loss of faith in government is the increasing scale of complexity in government itself. As a 2004 Treasury Board publication pointed out:

[T]he government ... is the single largest organization in the country, with annual expenditures of approximately \$200 billion and over 200 departments, agencies, and institutions that operate in every region of Canada and in over 100 other countries. The federal public sector employs more than 450,000 people, delivering over

¹ Donald J. Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom* (Toronto: University of Toronto Press, 2008) at 3.

² Paul G. Thomas, "The Emerging World of Accountability and Ethics: Parliamentary Scrutiny and Redress of Grievances" (Paper presented to the Canadian Study for Parliament Conference, Winnipeg, 9 December 2006) [unpublished].

1,600 programs and services. Consequently, while every transaction can be important, ministers and senior officials find it a real challenge to remain fully informed about all matters for which they are accountable.³

If ministers and senior civil servants have difficulty keeping track of the business that comes within their responsibilities, other institutions, notably Parliament, face an even greater challenge. Under our Constitution, the legislative branch has, as one of its duties, “holding the government to account”.⁴ In practice, this function takes a variety of forms, from questions put to ministers in Question Period, to studies by parliamentary committees of the estimates and performance reports of departments. But however diligently these tasks are undertaken, there is no effective means for 308 members of the House of Commons and 106 Senators to oversee the work of 450,000 people, nor 1,600 programs and services. As noted by Craig Forcese and Aaron Freeman, “[w]ith all the goodwill in the world, a handful of parliamentarians, charged with a busy legislative task, cannot possibly monitor the minutiae of government administration.”⁵

These two realities, an unwillingness in the public to rely on the honesty and public spirit of bureaucrats, ministers and parliamentarians, together with the inability of Parliament to carry out its oversight task effectively, have led to the recent emphasis on “accountability” in government. In 2006, they provided the context for the introduction and enactment of the *Federal Accountability Act*.⁶ This 314-provision statute amended 46 federal laws and introduced two new ones. On second reading, the sponsoring minister explained that the goal

³ Treasury Board Secretariat, *Review of the Responsibilities and Accountabilities of Ministers and Senior Officials – Meeting the Expectations of Canadians*, (Her Majesty the Queen in Right of Canada, represented by the President of the Treasury Board, 2005) at section 3.3, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/report/rev-exa/ar-er_e.asp>.

⁴ *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at para. 46.

⁵ Craig Forcese & Aaron Freeman. *The Laws of Government* (Toronto: Irwin Law, 2005) at 405.

⁶ S.C. 2006, c. 9.

of the Act was to improve Canadian's level of trust in their government and elected officials.⁷ One of its key features was an expansion in the mandates, independence and number of officers of Parliament.

What is an officer of Parliament? They are (in the order of first appointment):

1. The Auditor General of Canada (1878)
2. The Chief Electoral Officer (1920)
3. The Commissioner of Official Languages (1970)
4. The Information Commissioner (1982)
5. The Privacy Commissioner (1982)
6. The Conflict of Interest and Ethics Commissioner (2007)
7. The Public Sector Integrity Commissioner (2007)
8. The Commissioner of Lobbying (2008)

Most of these officers oversee a category of government activity, or else the extent to which all activities are undertaken while upholding certain values. They examine the government's finances, conflicts of interest, management practices, information management, language practices and administrative activity generally in order, one could say, to "keep government honest". These officers were considered, as a group, to be a key tool for accomplishing the goals of the *Accountability Act*. In reference to this aspect of the government's legislative agenda, the 2006 Speech from the Throne stated: "The Government will strengthen the capacity and independence of officers of Parliament, including the Auditor General, to hold the Government to account."⁸

⁷ *House of Commons Debates*, Vol.141, No. 002 (25 April 2006) at 1010 (Hon. John Baird).

⁸ *House of Commons Debates*, Vol.141, No. 002 (4 April 2006) at 1625 (Speech from the Throne).

Why are they called “officers” or sometimes “agents” of Parliament? Because what they do is what Parliament, under the Constitution, is responsible for doing. The term also refers to the fact that Parliament has a role in appointing and dismissing them and that they report directly to Parliament (not through a minister). In both respects officers of Parliament are not unique. A few other government entities report directly to parliament or have similar appointment mechanisms, for example the Public Service Commission (PSC), Canadian Human Rights Commission (CHRC) and the Security Intelligence Review Committee (SIRC). However, as will be examined in more detail later, the officers of Parliament have attributes and responsibilities that distinguish them, as a group, from any of these institutional comparators.

We have officers of Parliament because of a belief that only non-partisan people of integrity, who are independent from all three branches of government (the legislature, the executive and the judiciary) can be entrusted with the role of overseeing government. This formula, however, represents an unusual development in the institutional and accountability framework which is currently in place under our Constitution.

I intend to explore the question of the constitutional and theoretical significance of the role, powers, functions and status of officers of Parliament at the federal level in Canada, with a view to establishing the following:

1. That there is a wide-spread belief that this group of officers provide an effective mechanism for restoring and preserving the public’s trust in government.

2. That, despite their significant differences from one another, recent developments have formed the eight officers of Parliament into a unit within the federal government which shares certain unique attributes;
3. That their mandates and powers give the officers the opportunity to have a significant influence on the operations of government and the interests of Canadians;
4. That these bodies do not really “fit” within the current institutional structure of our government, with its three branches: executive, legislative and judicial. Further, accountability for their own activities differs from that which applies to other government entities, as they occupy space in which supervision by the legislature, the executive and the judiciary is minimized. These facts raise questions about the legitimacy of the exercise of government authority by the officers.
5. That alternative arguments can be advanced to support the legitimacy of these officers and their authority, stemming from their capacity to advance fundamental principles underlying our system of government and because they can be seen as an expression of the general will of the populace that integrity in government must be protected.
6. That questions about whether there should be more officers of Parliament, and whether their mandates should be extended, should be addressed with their accountability structure, constitutional status and basis for legitimacy in mind; and
7. That, as much as possible, the reality of their accountability and status should be reflected in how they are presented to the public, including in legislation.

The idea that these eight officers can be examined together as a group is not without controversy. Despite some consistency in their titles (most are called “Commissioner”) and

the common purpose ascribed to them by the Government at the time the *Accountability Act* was introduced, they are a disparate group. Although most oversee government activities, Lobbying Commissioner, the Chief Electoral Officer and, in part, the Privacy Commissioner have mandates that are primarily directed at people who are outside the government. All are investigative bodies, but some adjudicate individual complaints as well as conducting audits of government institutions. The remedies available to them are usually reports with findings and recommendations which are provided to the “complainant”, to public servants, to ministers of the Crown, to Parliament and to the public, but some have additional enforcement powers.

Given this variation, the fact that this list can be put together with reasonable confidence is a new development, which also owes its existence to the *Federal Accountability Act*. The Act took several steps to establish a body of such actors. Five of the positions listed above already existed. Three more, the Conflict of Interest and Ethics Commissioner, the Lobbying Commissioner and the Public Sector Integrity Commissioner were created by the new legislation. All eight officers then had their appointment, tenure and removal provisions standardized, to a great extent. The procedures by which these officers report to Parliament were likewise made more consistent. And, as a group, almost all of them were made subject to certain legislation – notably the *Access to Information* and *Privacy Acts*. Since the passage of the *Accountability Act* there have been further developments, which will be considered in more detail in the first chapter, that indicate the officers are now being treated as a unit.

If they are now to be considered a body, what unites them becomes more important than the distinctions between them. In addition to the details of consistency in appointment

and reporting, the bigger picture of the community formed by these eight officers is one which focuses on their common purpose and status. The theory is that they act on behalf of Parliament and, indeed, they provide valuable support to Parliament for its oversight function – arguably making that function possible where the complexity noted above would otherwise threaten to frustrate this essential aspect of our Constitution. However, the duties assigned to, and assumed by, these offices go beyond Parliament’s traditional activities. It is also obvious that they are intended to have a relationship with, and an impact on, the public, whose trust in government they are intended to restore.

For the most part, the people in whom these jobs are confided take them very seriously. Through the diligent and vigorous exercise of their mandates, they have the capacity to influence the administration of government departments, the redress of grievances against the government, the interaction between Parliament and the executive and the ways in which government is seen and evaluated by the media and the public. In short, officers of Parliament can have a significant, if usually indirect, role in the government of this country.

It becomes more important, therefore, to know who and what they are, in a deeper sense. In particular, critics have raised questions relating to the legitimacy of giving this kind of authority to officers whose institutional home, and avenues of accountability, are increasingly hard to trace. Most of these bodies do not serve inside the legislative branch of government. They are widely accepted to be independent, as well, from the executive. They are not judges, and do not form part of the judiciary.

What are the implications of this status and structure for the legitimacy of their authority? A simple answer is that they are empowered by Parliament who, being sovereign under the Constitution, can confer responsibility on anyone. But until now powers as

significant as those held by the officers of Parliament have been wielded by people who hold a position in one of the three branches of government named in the Constitution. Further, with the exception of the judiciary (who have a recognized role in the written Constitution) those who exercise governmental powers in this country do so either because they are elected or because they are responsible to the people's elected representatives under our system of responsible government – i.e. through a minister of the Crown. Arguably none of these three sources of legitimacy, the structure of the Constitution, an electoral mandate or responsible government as we know it, applies to the officers of Parliament.

Why, then, is their role considered legitimate? These are people who hold the trust of government and the governed precisely because of their independent status and their mandate, titles and expertise. Their authority seems to derive from the values they protect, and are assumed to embody: values such as probity, transparency, justice and integrity. A system of government based on trusting a small number of persons whose characters are above reproach closely resembles one of the “true forms” of government espoused by Aristotle in his works on politics and ethics. It may also be seen as a necessary response to our attempts to construct a value-neutral society, one in which government is placed beyond the belief structures that originally supplied the values or “virtues” on which many of our governing assumptions are based. As traced by virtue ethicists like Alasdair MacIntyre, this attempt at neutrality may have taken us “beyond virtue” to a place where government, like society, has become disconnected from the ethical traditions necessary to underpin a strong value system. The advent of a influential class of officers of Parliament or “ethical

regulators”, which is a phenomenon occurring in many jurisdictions world-wide, may be an attempt to re-establish a values-based community in our current ethical “dark age”.⁹

The development of a values-based institution within our largely value-neutral government may be no bad thing, in fact a necessary response to the challenges facing our times. But it may also yield troubling inconsistencies – areas in which a lack of transparency as to which system is really in operation can lead to confusion, inappropriate expectations or even to injustice. It is therefore necessary to analyze the real relationship of officers of Parliament with the executive, the legislature and the courts, as well as with the public, in order to ensure that the legislation and surrounding structures accurately reflect the reality of these relationships.

This analysis may yield criteria for any future expansion of the mandate or numbers of officers of Parliament. These offices, with their high profile, non-partisan credibility and unique constitutional status, are an attractive model for proponents of each of the various interests or causes affected by government activity. All are going to be of the view that their subject-matter is both sufficiently important and sufficiently subject to interference or indifference to merit such a structure. How should policy-makers distinguish between the competing voices? An exploration of the status that has been given officers of Parliament, and the underlying assumptions that justify their authority, may suggest some parameters for additions to this interesting group of non-conforming peas in the government pod.

The shape that this thesis will take is as follows. We are going to start by asking who the officers of Parliament are. Chapter One will look briefly at the reasons behind their existence, their individual mandates and history and why they can now be considered as a

⁹ U.K., H.C. Library, “Officers of Parliament: recent developments”, SN/PC/04720 (London: House of Commons Library, 2008) at 8; Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (Notre Dame, Indiana: University of Notre Dame Press, 2007) at 263.

unified group of actors at the federal level. Then we will turn to the question “why do we care?” Chapter Two will explore the potential impact these officers can have on governance at the federal level and on the individuals who become involved in their investigations. Given this role, we will then consider the issue of “on what basis do these officers wield power?” In Chapter Three we will begin to examine the legitimacy of officers of Parliament, seeking first to place them in the governing and accountability structures mandated by the Constitution. Chapter Four will continue this exploration, developing an alternative theory for the legitimacy of officers of Parliament. It will be considered whether their authority stems not from their accountability within the government but from their mandates and appointments, *per se* – i.e. from the virtues they are seen to embody and enforce. Finally, we will want to know “what next?” In Chapter Five we will set out the lessons that the preceding analysis yields about the unique nature of these offices and their legitimacy, the factors that should go into determining when the cadre of officers of Parliament should be further expanded and whether there are any issues that should be the subject of reform.

A Note about terminology:

Some of the officers of Parliament are also known as “agents” of Parliament, and some prefer the latter term. The question of whether the officers are, in law, agents of Parliament is addressed at the end of Chapter 3 as part of determining whether they are part of the legislative branch of government. Otherwise, for the purpose of my thesis, nothing turns on the choice between the two terms and for consistency I have used “officer” throughout.

One reason for the use of an alternate term is that there are many “officers” who serve Parliament within the legislative branch but who are not members of this group of eight office-holders. Examples include the Speakers and Clerks of the House of Commons and the Senate, the Parliamentary Librarian, and their deputies and other employees. The distinction between the two groups is reflected in the entry entitled “Officers and Officials of Parliament” on the parliamentary web site.¹⁰ In this thesis the term “officer of Parliament” will in all cases refer to the eight office-holders listed at the beginning of this Introduction, and never to these other officials.

As one of the central themes of this thesis is the relationship between the officers of Parliament and the three branches of government, it is important to define what I mean when reference is made to each branch. Although the enactment of federal legislation requires the participation of both Parliament and the Queen, the “legislative branch” for the purposes of this thesis refers only to the House of Commons, the Senate, and those under the authority of the Speakers of the two chambers. The “judiciary” at the federal level refers to courts established under section 101 of the *Constitution Act, 1867*.¹¹ The “executive” refers to both the formal executive, consisting of the Queen’s representative and the Cabinet, and to all government departments and entities, their officers and employees – basically to everyone who is paid out of the moneys appropriated to the Crown by Parliament.

One part of the executive which is closely implicated in what follows is the Treasury Board and its supporting department, the Treasury Board Secretariat. The Treasury Board, a committee of Queen’s Privy Council for Canada, consists of a group of Cabinet Ministers

¹⁰ Library of Parliament, “Officers and Officials of Parliament”, PARLINFO v.2.02.4 (26 May 2008), online: Parliament of Canada <<http://www2.parl.gc.ca/Parlinfo/compilations/OfficersAndOfficials/OfficersAndOfficialsOfParliament.aspx?Menu=Parl-Officers>>.

¹¹ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App.11, No.5, s. 101.

who have the right, pursuant to section 7 of the *Financial Administration Act*¹², to act for the Queen's Privy Council in all matters relating to administrative policy and financial management in the federal public administration. The President of the Treasury Board is responsible for tabling the executive's spending estimates in Parliament. All requests by government departments for funds must be approved by the Treasury Board.¹³

¹² R.S.C. 1985, c. F-11, s. 7(1).

¹³ Privy Council Office, *A Guide Book for Heads of Agencies: Operations, Structures and Responsibilities in the Federal Government* (August, 1999), online: Privy Council Office <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=guide2/table-eng.htm>>.

Chapter 1: Who are the officers of Parliament and why do we have them?

A Purposes behind the creation of officers of Parliament

As noted in the Introduction, officers of Parliament are the result of a belief that only non-partisan people of integrity, who are independent from all three branches of government, can be entrusted with the role of overseeing government. Specifically, in the course of the last few years, an heroic myth of sorts has been built up around eight offices in particular, which are together seen as a key instrument in restoring the public's lost trust in government.

At the time of the passage of the *Federal Accountability Act*, the group of officers of Parliament dealt with in that legislation was characterized by the government as one of the primary tools for holding the government to account, and enhancing accountability meant strengthening those offices and making them more independent.¹⁴ This is also, for the most part, the view of public administration commentators, the public and even the courts.

Writing in 2005, Peter Aucoin and Mark Jarvis described the “basic building blocks of the Canadian system of ministerial and government accountability” as including:

- “the audits of the Office of the Auditor General on the administration of public affairs generally and the management of the public purse in particular;
- the reviews of the administration of particular statutes by parliamentary agents, including the Information Commissioner, the Official Languages Commissioner and the Privacy Commissioner;”¹⁵

The same authors noted the “paradox” that “Canadians want greater accountability of ministers and public servants through parliamentary agencies such as the Auditor General but have little confidence that Parliament itself is able to secure that accountability.”¹⁶

¹⁴ *Supra* notes 6 and 8 and accompanying text.

¹⁵ Peter Aucoin and Mark D. Jarvis, *Modernizing Government Accountability: A Framework for Reform* (Ottawa: Canada School of Public Service, 2005) at 20-21. The two other accountability “building blocks” named by the authors were judicial review of administrative decisions and commissions of inquiry.

¹⁶ *Ibid.* at 77-78.

In the 2007 case of *Kreiner v. Auditor General (Man.)* the Manitoba Court of Queen's Bench shared the Aucoin and Jarvis view of the faith the public places in such officers, saying: "There is an argument to be made that the Auditor by virtue of the title, the Act and his job acquires an aura of impartiality and precision which from the public's point of view may lead to additional weight being given to conclusions by him that condemn an individual."¹⁷

The eight officers considered here also describe themselves in a way that links their independence and status as officers or agents of Parliament to their ability to perform their oversight functions. Examples include the statement on the web site of the Commissioner of Official Languages that, "[a]s an officer of Parliament and agent of change, the Commissioner has a mandate to promote the Official Languages Act and oversee its full implementation, protect the language rights of Canadians and promote linguistic duality and bilingualism in Canada".¹⁸ The Auditor General's web site states that her office is "an independent and reliable source of the objective, fact-based information that Parliament needs to fulfill one of its most important roles: holding the federal government accountable for its stewardship of public funds".¹⁹

Why are such offices considered necessary in order to hold the government to account? As noted in the Introduction, the size and complexity of government has made this task one that parliamentarians simply cannot do, unaided. But there are additional reasons or

¹⁷ 2007 MBQB 61, 213 Man.R. (2d) 252 at 270.

¹⁸ Office of the Commissioner of Official Languages, "About Us: Roles" (6 July 2007), online: Office of the Commissioner of Official Languages <http://www.ocol-clo.gc.ca/html/roles_e.php>.

¹⁹ Office of the Auditor General of Canada, "Welcome to the Office of the Auditor General" (9 June 2009) online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/admin_e_41.html>.

purposes, as well, that can be deduced from the mandate and powers of these bodies. They fall into four general categories.

First, some aspects of government administration and activity, and the context in which they are carried out, are so complex that an established, expert bureaucracy is required to study, understand and oversee them.

Second, with respect to some subjects, it is assumed that the Executive will not conform to standards of probity without being subject to a body with the means to coerce compliance.

Third, some issues are perceived as so important to the nation's identity or democratic culture that they require the visibility and prestige of an independent regime, positioned at the highest level of credibility.

Fourth, and perhaps most significantly, it is perceived that oversight of government on some issues cannot be left to the inherently partisan and conflict-driven parliamentary process.²⁰

These pressures have yielded a set of offices with a variety of mandates, status, powers, duties and functions. There was no conscious decision on the part of any particular federal government to create a body of accountability offices of this kind. As Nicholas d'Ombrain has pointed out: "When governments work up the mandates of new organizations and determine their governance arrangements, they do not think in terms of such classifications: they ask Parliament to approve legislation tailor-made to achieve the governments' objectives..."²¹ The eight officers of Parliament did not come about through

²⁰ See Paul G. Thomas, "The past, present and future of officers of Parliament" (2003) 46 Can. Pub. Admin. 287 at 293.

²¹ Nicholas d'Ombrain, "Ministerial responsibility and the machinery of government", (2007) 59 Can. Pub. Admin. 195 at 204.

an effort to identify the whole mandate of holding government to account and divide it up into eight pieces. The creation of each office responded to a perceived need, focused in a particular subject-area, which was assumed to require an officer with a particular set of functions and powers. However, the reduction in the public's confidence in government, and the priority given to accountability in recent years, have led to measures which had the effect of melding together this group of officers and attributing to them a common purpose and status based on the beliefs referred to above.

The degree to which these offices now form a unit of sorts will be considered in more detail at the end of this chapter. First, we need to go back and examine the eight offices separately. It is time to look more closely at the mandates of each of the officers of Parliament.

B The result – the current officers of Parliament

In this section the mandate of each officer will be briefly described, together with some sense of the history of the office and the reason it exists, in light of the four categories of purpose suggested above.

(a) The Auditor General (AG)²²

The AG is the auditor of the public accounts of Canada. Like a corporate auditor, she prepares a statement, which is included in the report called the Public Accounts when it is laid before the House of Commons. The Public Accounts is the statement of the government's financial transactions, expenditures and revenue for the year and the AG's

²² The abbreviations that appear in the headings in this Chapter will be used throughout the thesis for the eight officers of Parliament. A key to abbreviations can also be found in the Legend.

portion contains her opinion as to whether it fairly represents information in accordance with the stated accounting practices of the federal government.²³

In addition to this opinion, however, the AG prepares her own reports, up to four per year, on a variety of other matters, including whether accounts and essential records have been properly maintained with respect to public money and public property, whether money has been expended for the purposes for which it was appropriated by Parliament, whether it has been spent without due regard to economy or efficiency (also known as “value for money”) or effects on the environment, and whether satisfactory procedures have been put in place to measure the effectiveness of government programs.²⁴

The first AG was appointed in 1878 – a move that most consider to be a reaction to the “Pacific Scandal” (corruption and illegal government spending connected with the development of the national railway).²⁵ The office’s mandate has been expanded over time from purely financial auditing to include the current “value for money” reports that are made several times per year, and, most recently, the auditing of funding recipients. She has also had added to her jurisdiction the requirement to review government expenditure for its environmental effects in the context of sustainable development. For this purpose, she has the power to appoint an officer called the Commissioner of the Environment to assist her.²⁶

The AG’s mandate falls most clearly into the first and fourth categories of reasons behind the creation of officers of Parliament. The large, permanent bureaucracy that is currently housed in the Office of the AG is clearly considered necessary to study, understand

²³ *Financial Administration Act*, *supra* note 12, s.64 (hereafter FAA); *Auditor General Act*, R.S.C. 1985, c. A-17, s. 6 (hereafter AGA).

²⁴ AGA, *ibid.*, s. 7.

²⁵ Jeffrey Graham Bell, *Agents of Parliament: The Emergence of a New Branch and Constitutional Consequences for Canada* (Ottawa: The Institute On Governance, 2006) at 7; David E. Smith, *The People’s House of Commons: Theories of Democracy in Contention* (Toronto: University of Toronto Press, 2007) at 64.

²⁶ AGA, *supra* note 23, ss. 7.1, 7(2)(f) and 15.1.

and evaluate the myriad government programs whose records, measurements and “value for money” they are mandated to assess.²⁷ Further, placing this function in the hands of an independent officer of Parliament means that the choice of targets for audits, as well as audit results, are protected from inappropriate partisan or government intervention.

(b) The Chief Electoral Officer (CEO)

The CEO is responsible for the direction and supervision of federal elections, including maintaining the registry of eligible voters and ensuring the appropriate appointment and conduct of election officers, and for overseeing compliance with the provisions of the *Canada Elections Act*.²⁸ His duties include matters relating to nomination and leadership contests, political financing, political broadcasts and support for the independent boundaries commissions in charge of adjusting federal electoral districts. He appoints the Commissioner of Canada Elections, who investigates violations of the election laws and recommends prosecution where warranted. Following an election, it is the CEO who reports the results to the Speaker of the House of Commons. The CEO can adapt the provisions of the *Canada Elections Act* if necessary during elections, for example by extending voting hours.²⁹

The position of CEO was established in 1920, following allegations of franchise manipulation during the 1917 election. Originally only responsible for overseeing elections, the mandate of the office has grown steadily as election-related regulation has become more complicated.³⁰

²⁷ The Office of the AG currently employs about 650 employees: Office of the Auditor General of Canada, “Who We Are” (11 November 2007), online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/au_fs_e_370.html> .

²⁸ S.C. 2000, c. 9 (hereafter CEA).

²⁹ *Ibid.*, ss. 17, 44, 46, 318, 332, 366, and 509.

³⁰ Bell, *supra* note 25 at 8, Smith, *supra* note 25 at 64.

The CEO's mandate is an example of the third and fourth reasons for creating an officer of Parliament. Fair and free elections form the core of our democratic culture and it seems obvious that they should not be guaranteed either from within the executive, headed by the government of the day, nor by the elected Members of Parliament themselves. The CEO does not actually oversee government when he administers elections, but the recent addition of political financing and political broadcast responsibilities means that the people whose behaviour he supervises for those purposes will often be those who have been elected to office, some of whom will also serve in the Cabinet. In this his functions take on similarities to those of the other officers of Parliament.

(c) The Commissioner of Official Languages (COL)

The COL is responsible for ensuring the recognition and advancement of the status of English and French as the official languages of Canada. In particular, he oversees compliance with the *Official Languages Act*³¹ in "federal institutions", which include not only federal government departments and agencies, but Crown corporations, courts and Parliament itself. The Act is designed to protect the public's right to use either language in communication with federal institutions, in proceedings in Parliament and before the federal courts, and the right of employees of such institutions to use either language at work. The COL also sees that the activities of federal institutions are consistent with the advancement of English and French in official language minority communities and in Canadian society generally.³²

³¹ R.S.C. 1985 (4th Supp.), c. 31 (hereafter OLA).

³² *Ibid.*, ss. 2, 3 and 56 and Office of the Commissioner of Official Languages, *supra*, note 18.

The office dates back to 1969, and was established following the Royal Commission on Bilingualism and Biculturalism. Reporting in 1965, the Commission considered that the political, economic and social imbalance between English-speaking and French-speaking communities in Canada was one of its most serious crises. One obvious symptom of the lack of equality between the two official languages at the time was the prevalence of unilingual proceedings and documents in Parliament.³³

With that perspective, it can be seen that the motivation behind the creation of the COL falls into the second and third reasons for establishing officers of Parliament. Ensuring respect for English and French was seen as an essential step to preserve our national identity and a fair society. The structure of the office and its powers suggest a view that federal institutions require a compliance mechanism before they will go to the considerable trouble and expense of providing services, communications and a work environment in both languages.

(d) The Information Commissioner (IC)

The IC's statutory responsibilities are focussed on receiving and investigating complaints from people who have sought access to government information and have been refused or otherwise impeded. The IC may also, on his own initiative, formulate and investigate a complaint regarding obtaining access to records under the *Access to Information Act*³⁴. His enforcement functions go beyond his own investigations, and can include triggering court remedies and appearing in court himself to advance the interests of a person

³³ Office of the Commissioner of Official Languages, *Annual Report 2006-2007* (25 June 2007) at 4, online: Office of the Commissioner of Official Languages <http://www.ocol-clo.gc.ca/html/foreword_avantp2_e.php>; see also Keith Spicer, "Still bilingual after all these years" *The Ottawa Citizen* (7 September 2009) A9.

³⁴ R.S.C. 1985, c. A-1 (hereafter ATIA).

seeking access or as a party in his own right. He reports to Parliament on the activities of his office and on other matters within the scope of his powers, duties and functions.³⁵

The *Access to Information Act* and the IC's position were enacted in 1983, the year after the advent of the *Canadian Charter of Rights and Freedoms*. It was coordinated with the terms of the *Privacy Act* and the parallel office of Privacy Commissioner, created in the same year. In the case of the privacy legislation, the office was derived from one which had existed under the 1977 *Canadian Human Rights Act*, administered by an officer within the Canadian Human Rights Commission.³⁶

The IC is an example of the second reason for creating officers of Parliament. His extensive investigative powers³⁷ and ability to trigger court processes are designed to ensure that a reluctant government accedes to access to information requests.

(e) The Privacy Commissioner (PC)

This officer has a similar complaint investigation mandate to that of the IC. She receives and investigates complaints from people alleging that personal information about themselves has been illegally used or disclosed by the government or who have been refused access to their personal information by the government. In addition, the PC investigates the government's "exempt banks", files containing personal information that the government is not required to disclose, and, generally, examines compliance with the collection, retention and disclosure practices mandated by the *Privacy Act*.³⁸

³⁵ *Ibid.* at ss. 42, 38 and 39.

³⁶ Bell, *supra* note 25 at 9 and see *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] S.C.J. No. 55 at para. 24.

³⁷ ATIA, *supra* note 33, s. 36.

³⁸ R.S.C. 1985, c. P-21, ss. 29, 36 and 37 (hereafter PA).

The PC also has the responsibility to administer and oversee the *Personal Information Protection and Electronic Documents Act*, which deals with the use of electronic documents in place of paper in the federal government and with the treatment of personal information by industries that come under federal jurisdiction.³⁹ Under this statute, the PC receives complaints from those who feel their personal information has been mishandled by regulated private sector organizations and may conduct compliance audits of those organizations. This mandate was added in 2000. In the main, the treatment of the PC in this thesis will be limited to her *Privacy Act* responsibilities, but we will return to this other statute in the last chapter.

The history of the office of PC was touched on briefly above, in our discussion of the IC. Like the IC, it can be argued that the reasons behind the creation of the PC fall into the second category of motivation for the creation of officers of Parliament. The PC has the same investigative powers as the IC and the ability to trigger court processes to enforce her decisions. In addition, given the many ways in which government interacts with the personal information of its citizens and others, it is arguable that oversight of those activities falls into the first category, concerning the need for an experienced and permanent bureaucracy.

(f) The Conflict of Interest and Ethics Commissioner (COIEC)

The COIEC is responsible for the administration of a newly legislated conflict of interest code for “public office holders”. This term encompasses almost all Governor in Council appointees, ministers of the Crown and their staff, the RCMP and military judges, and some ministerial appointees.⁴⁰ Under the *Conflict of Interest Act*⁴¹, the COIEC oversees

³⁹ S.C. 2000, c. 5.

⁴⁰ Judges, lieutenant governors, most diplomats and officials who serve in Parliament (such as the Clerks of the Houses) are excluded. See *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2, s. 2 (hereafter COIA).

⁴¹ *Ibid.*

the measures taken by public office holders to eliminate or avoid conflicts of interest, such as financial measures, public declarations of financial interests, recusals from decision-making in certain cases and divestment of assets. She also provides advice with respect to public office holders after they have left the government. Such people are prohibited from taking improper advantage of their former offices.⁴²

The COIEC has a variety of powers connected with these responsibilities, including the provision of advice, investigative powers, authority to provide exemptions from the rules and an administrative monetary penalty scheme (limited to violations of the disclosure and divestment portions of the Act). Her chief remedies, if she uncovers real conflicts of interest among public office holders, are the ability to order a public office holder to take compliance measures and reports to the Prime Minister and the public.⁴³

This office had its origin in that of the Ethics Counsellor, originally established to provide informal advice to the Prime Minister and public office holders on the unlegislated conflict of interest code that each new Prime Minister put in place on taking office.⁴⁴ The Counsellor was first formalized into an Ethics Commissioner, under the *Parliament of Canada Act*⁴⁵, where the office acquired responsibility, as well, for administering the House of Commons' own conflict of interest and ethics code, provided for in the Standing Orders of the House. The COIEC retains this responsibility which may explain why, alone among the officers of Parliament, her office is actually situated within the legislative branch. She, her

⁴² *Ibid.* ss. 28-30, 33-36, and 43.

⁴³ *Ibid.* ss. 38, 43, 48 and 52-57.

⁴⁴ In 1996 the Ethics Counsellor also acquired responsibilities under the *Lobbyists Registration Act*, R.S.C. 1985 (4th Supp.), c. 44, as am. by *An Act to amend the Lobbyists Registration Act*, S.C. 2003, c. 10. See *Democracy Watch v. Canada (Attorney General)*, 2004 FC 969, [2004] 4 F.C.R. 83 at para. 3.

⁴⁵ *An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence*, S.C. 2004, c. 7, ss. 72.01, 72.05.

staff and expenses, are all paid directly out of Parliament's budget, and her work under the House's code is protected by parliamentary privilege.⁴⁶

What the COIEC does, overseeing the ethical behaviour of ministers and their senior appointees, could be seen as the core of what Parliament itself does when it holds government to account. It cannot, then, be said to be a function that must inherently be free of partisan influences. The most logical explanation for the office, therefore, is the third reason: the need to give a high profile to the issue of the ethical behaviour of powerful government office holders, through an office with credibility. This last feature is underlined by the fact that the COIEC is the only officer of Parliament with detailed qualification criteria for appointment.⁴⁷

(g) The Public Sector Integrity Commissioner (PSIC)

The duties of the PSIC are set out in the *Public Servants Disclosure Protection Act*⁴⁸. They include receiving and investigating disclosures of “wrongdoing” in government by public servants, developing methods for such disclosures to happen in confidence, advising chief executives of government departments about how to correct wrongdoing and receiving, investigating and potentially referring complaints about “reprisals” to adjudication. “Wrongdoing” includes illegal activity, misuse of public funds or assets, gross mismanagement, the creation of danger to life, health, safety or the environment and serious breaches of codes of conduct which the Act requires the Treasury Board and departments to establish. “Reprisals” are measures, such as discipline, taken against a public servant

⁴⁶ *Parliament of Canada Act*, R.S.C. 1985, c. P-1, ss. 84 and 86. The consideration of the COIEC in this thesis will not include the oversight of the House of Commons code, except for comparative purposes. We will focus instead on the administration of the *Conflict of Interest Act*.

⁴⁷ See *infra* note 149 and accompanying text.

⁴⁸ S.C. 2005, c. 46 (hereafter PSDPA).

because he or she made a disclosure under the Act. The PSIC has no order-making authority, but does possess extensive investigatory powers, and exercises its corrective mandate through reports to chief executives, the minister responsible for the department in question and Parliament. The bodies that come under her jurisdiction include most of the government departments and agencies covered by the *Financial Administration Act*⁴⁹, including Crown corporations, with certain exceptions and adjustments made in particular cases.⁵⁰

The office of the PSIC originated as an internal position in the Treasury Board Secretariat, which was created to administer the “Values and Ethics Code for the Public Service”, a policy approved by Treasury Board under the *Financial Administration Act*.⁵¹ When the *Public Service Disclosure Protection Act* was first introduced in 2004, the job of receiving disclosures of wrongdoing, including reprisals, was given to the President of the Public Service Commission.⁵² Extensive amendments were made to the Bill before it was passed in 2005 and again before it was brought into force. The 2006 *Federal Accountability Act* created the separate office of the PSIC as an officer of Parliament.⁵³ Another significant amendment was the creation of the Public Service Disclosure Protection Tribunal, an administrative tribunal consisting of judges, to which the PSIC may refer reprisal complaints for adjudication.⁵⁴

Like the COIEC, the PSIC carries out functions that were at the core of Parliament’s oversight of the executive – the detection and correction of wrongdoing in government. Her

⁴⁹ *Supra*, note 12.

⁵⁰ *Public Servants Disclosure Protection Act*, *supra* note 48, ss. 2, 8, 19.1, 22 and 37.

⁵¹ Treasury Board of Canada Secretariat, “Values and Ethics Code for the Public Service” (policy) online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve/1-eng.asp>; *supra*, note 12.

⁵² Bill C-11, *An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings*, 1st Sess., 38th Parl., 2004, cl. 22 (first reading, October 8, 2004).

⁵³ *Supra*, note 6, s. 39.

⁵⁴ *Ibid.*, s. 20.7.

Act provides an avenue for public servants to disclose wrongdoing, something they could have done through their members of Parliament, but that mechanism was considered insufficient. Consequently, the main motivating factor for the PSIC's office would appear to be providing a visible and credible method for wrongdoing to be disclosed, investigated and corrected.

(h) The Commissioner of Lobbying (LC)

This officer's jurisdiction, as set out in the *Lobbying Act*⁵⁵, has chiefly to do with the regulation of those who, for payment, communicate with office holders in the government for a variety of prescribed purposes, mainly having to do with access to programs, legislative development and government contracts. People engaged in this business must register themselves under the Act, which sets out an extensive list of information that they must include in returns to be included in the registry. The Act also contains a further list of restrictions on "designated public office holders" as concerns their employment as lobbyists during the five years after they leave office. The LC's responsibilities are to maintain the registry, provide exemptions from the Act's requirements where warranted, and develop and oversee the "Lobbyists' Code of Conduct". In the course of administering the Act or the code she may conduct investigations, reporting the results to Parliament or, where an offence under the Act is suspected, advise a peace officer.⁵⁶

The LC's responsibilities were originally assumed by the Ethics Counsellor, the precursor to the COIEC.⁵⁷ Later, they were carried out by the Registrar of Lobbyists, an official who served first in the Department of Industry and later in the Treasury Board

⁵⁵ R.S.C. 1985 (4th Supp.), c. 44 (hereafter LA).

⁵⁶ *Ibid.*, ss. 9, 10.1, 10.2, 10.4, 10.5.

⁵⁷ *Lobbyists Registration Act*, R.S.C. 1985 (4th Supp.), c. 44, s. 2(1), as enacted by S.C. 1995, c. 12, s. 1.

Secretariat.⁵⁸ The *Federal Accountability Act* made amendments to the *Lobbying Act* putting into place an officer of Parliament to perform this function.⁵⁹

The reasons behind the creation of this position as an officer of Parliament would seem to have to do mostly with the perception that partisan oversight is inappropriate for an activity as highly political as lobbying. As well, allegations of inappropriate lobbying may have led to the desire to have a high profile office charged with the task. However, it should be noted that this officer's oversight of government is mostly indirect. The people who are subject to her authority are all outside the public service, including former public office holders. Her official interaction with people currently serving within government is limited to the collection of information.

C Do the officers of Parliament form a unit?

This description of mandates and purposes reveals that the eight officers of Parliament perform very different tasks for reasons which also, to some extent, diverge. Later we will see that the functions of several of them are actually more similar to other government bodies, which do not share their status and title. It should also be noted that no statute actually uses the term "officers of Parliament" to describe either this group of officials or any one of them individually.

Writing in 2003, Paul Thomas noted that the term "officer of Parliament" was "ambiguous".⁶⁰ Part of the confusion stemmed from the fact that the term also connoted someone who worked within the legislative branch, such as the Speakers and Clerks and of

⁵⁸ *Democracy Watch v. Campbell*, 2008 F.C. 214, 324 F.T.R. 44 at para. 11 (CanLII).

⁵⁹ *Supra*, note 6, s. 68.

⁶⁰ *Supra* note 20 at 292.

the House of Commons and the Senate and the Parliamentary Librarian.⁶¹ The officers who are the subject of this paper perform very different tasks from those employed to provide procedural and administrative services to the two Houses.

Why then does this thesis treat these office-holders as a unit, and as together constituting a phenomenon whose advent marks an interesting development in the governing structures of this country? The answer is two-fold. First, while the purposes behind their creation fall into more than one category, they do share an underlying theme – the protection and promotion of integrity and transparency in government. Second, while it is true that other bodies exist who have a similar purpose, this group of officers has been singled out and treated differently by legislation, parliamentary rules and procedures, and government policy. Furthermore, the specific differences that distinguish the officers are not uniform, no one or two officers is different from the others in every respect. This section will explore the legislative and other measures which have enhanced the cohesion of the officers of Parliament.

(a) *Federal Accountability Act*

The *Federal Accountability Act* itself does not use the term “officer of Parliament”.⁶² But the background materials prepared by the sponsoring department and the Library of Parliament’s legislative summary both indicate that various of its measures were aimed at “officers of Parliament”⁶³ or “Agents and Officers of Parliament”⁶⁴ as a group. One set of

⁶¹ See “Note about Terminology” above.

⁶² *Supra*, note 6.

⁶³ Library of Parliament, “Legislative Summary, Bill C-2: The Federal Accountability Act” LS-522E (18 December 2006), online: Parliament of Canada, LEGISinfo, <<http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&query=4649&Session=14&List=ls#part2>>.

⁶⁴ Government of Canada, Fact Sheets re *Federal Accountability Act*, “Making qualified government appointments” (17 April 2007), on-line: Government of Canada, <www.faa-lfi.gc.ca/fs-fi/16/06fs-fi-eng.asp>.

provisions standardized the appointment procedures for the five existing officers of Parliament and extended those same provisions to the three new officers created by the Act (the COIEC, PSIC and LC). Removal provisions were also standardized, as was tenure for all but the AG and CEO. These provisions were included in a Part of the Bill entitled “Supporting Parliament”.⁶⁵

They were also made subject to each other. Another set of *Accountability Act* provisions added all the officers of Parliament, except the COIEC, to the definition of “government institution” for purposes of the *Access to Information Act*. Any of the officers that were missing from the same definition under the *Privacy Act* were also added to that statute, except, again, the COIEC. A series of sections were inserted as a block in the “Exemptions” portion of the *Access to Information Act* to protect material created or obtained by the officers in the course of their investigations from being disclosed pursuant to an access request until the investigation and all related proceedings are complete.⁶⁶

The new officers of Parliament were added to a list in the *Official Languages Act* that now contains all of the officers except the COIEC. This provision, s.24(2), gives all these bodies the duty to ensure that any member of the public can communicate with and obtain services from all of its offices in either official language.⁶⁷

Another *Accountability Act* standardization was the addition of an immunity clause for the AG. As considered in more detail in Chapter 3, the legislation of seven of the officers of Parliament now protects them from criminal or civil liability for anything done or said in

⁶⁵ *Supra*, note 6, Pt. 2, ss. 109-120.

⁶⁶ *Ibid.*, ss. 141-172.01 and 181-193. There is no time limit on the exemption in the case of the CEO.

⁶⁷ *Ibid.*, ss. 96, 222. Most government institutions have such an obligation only with respect to their head offices, offices located in the National Capital Region, or in places where there is significant demand for communications in both languages.

the course of their duties and from being competent or compellable witnesses in any court proceeding other than a prosecution for perjury.⁶⁸

(b) Standing Order 111.1(1)

One of the Standing Orders of the House of Commons now actually uses the term “Officer of Parliament”. Where such an official is to be appointed, Standing Order 111.1(1) sets out a single mechanism for Parliament’s involvement to be obtained, including a referral to the appropriate standing committee. No list of the positions that qualify for this process is included, although it is of interest that the COIEC is actually listed separately in the Standing Order, as are the Clerk of the House and the Parliamentary Librarian.⁶⁹

(c) Officers of Parliament Working Group

The officers themselves have taken up their communal cause and have banded together into a working group. Both the IC and the AG included comments on the progress of this group in their 2008 reports. They describe work undertaken in cooperation with the Treasury Board Secretariat to address the perceived problem that the government policies promulgated by the Treasury Board and other central agencies apply to the officers of Parliament in the same way that they do to other government institutions. This is seen by the officers as undermining their independence. The officers have apparently provided the Treasury Board with a set of “working principles” that outlines how and when such policies should apply to their offices. Consultations are on-going.⁷⁰

⁶⁸ *Ibid.*, s. 305. Neither the CEO nor the LC are provided with such immunities.

⁶⁹ Canada, House of Commons, *Standing Orders of the House of Commons* (June, 2009), c. 13, S.O. 111.1(1).

⁷⁰ Canada, Office of the Information Commissioner, *Annual Report 2007-2008* (14 May 2008), online: Office of the Information Commissioner <<http://www.infocom.gc.ca/reports/2008-2009-e.asp>>; Treasury Board of

This unity of effort has yielded fruit, in the form of some cooperative substantive undertakings, such as the joint AG/PC report on managing identity information, issued on February 12, 2009.⁷¹ It has also resulted (and been part of) some substantial administrative changes, such as the introduction of the ad hoc parliamentary panel to oversee the budgets and estimates procedure of officers of Parliament. The panel's work is described in more detail in Chapter 3.⁷²

(d) Key similarities

Different as the functions and roles of the officers may be, there are certain identifying characteristics which they possess and other government bodies do not. Not all of these factors are standard across all eight offices but the pattern of similarities and differences does not exclude any one officer in particular from claiming kinship with the rest.

The statutes creating officers of Parliament contemplate that they will report directly to Parliament, not through a Minister of the Crown. As we will see, this is a very unusual reporting relationship for a government institution. Further, the officers do not just report annually, but also when they feel special reports are urgently needed and, in most cases, on the results of each of their investigations. In some cases all investigations are automatically the subject of reports to Parliament, in others, only where the relevant government body has not taken sufficient steps, in the view of the officer, to comply with the recommendations coming out of the investigation.

Canada Secretariat, *Estimates, Reports on Plans and Priorities, 2008*, "Office of the Auditor General of Canada" (12 February, 2008), online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca/rpp/2008-2009/inst/aud/aud02-eng.asp#sec2p2>>.

⁷¹ Office of the Auditor General of Canada, *2009 February Report of the Auditor General of Canada*, "Managing Identity Information" (12 February 2009), online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/oth_200902_e_32154.html#hd3a>.

⁷² See *infra* note 170 and accompanying text.

Of the bodies that are similar in function to the officers of Parliament, only these officers have legislation that requires that their reports be referred to a committee of the House of Commons or the Senate that has been designated for the purpose of reviewing those reports.⁷³

And the officers of Parliament are the only officials who are appointed using the quite unusual formula which the *Federal Accountability Act* has introduced, a formula which requires all of executive, parliamentary and political input in the selection of the incumbent.⁷⁴

D Conclusion

Clearly there is a wide variety in the subject-matter that has been entrusted to officers of Parliament. However, both in the substance of the mandates, and in the reasons they were created or expanded, it is possible to discern some themes. Four of these are probity, transparency, justice and integrity. Probity, or the value of respect for rules, is represented by the AG's mandate, the conflict of interest mission of the COIEC, and by the assumption that some rules, like the workplace recognition of official languages, require additional incentives and oversight. Transparency is enhanced by the work of the IC, and by the disclosure of government practices generally, such as its use of personal information and the interaction between public office holders and lobbyists. Justice is promoted by officers of Parliament, as well, but generally in a community-based way, rather than through the protection of the rights of the individual. Examples are the work of the COL and the CEO in protecting the language rights of English and French-speaking minorities and the fairness of electoral boundaries and party politics. However, ethical rules and the correction of "wrongdoing",

⁷³ Although this is not true of all the officers of Parliament. See discussion at *infra* note 211 and accompanying text.

⁷⁴ *Supra*, note 65.

even in the absence of enforceable legal rights, are very much the subject of interactions between these officers and individuals, as illustrated by the work of the PSIC, the LC and the COIEC. In fact, the promotion of ethical integrity is a thread that runs through the mandates of all of the officers of Parliament, from the work of the AG to ensure value is achieved when public money is spent, to the capacity of the PC and the IC to go to court on behalf of people who have been wrongfully denied access to personal or government information. For this reason people with similar functions in other jurisdictions have been called “ethical regulators”.⁷⁵

Creating and empowering officers of Parliament with these responsibilities is a sign that these themes are intended to be more than pious hopes or goals to be enforced haphazardly, through questions to ministers in Parliament, committee reviews of departmental performance reports or individual complaints to MPs or departments. As explored in the next chapter, the specific functions through which the officers accomplish their mandates have the potential to touch many aspects of governing and relationships between the public and government. The fact that these themes, in particular, were chosen to be made operational in this way represents a legislative judgment that ordinary government institutions were insufficient to protect these values, there was an objective need to protect them and it was both acceptable and appropriate to give this responsibility to people who are largely independent from the other branches of government. This last point will be discussed in more detail in Chapter 3.

Further, recent developments have welded the officers into a unit which shares both a unique status and some key characteristics. The result is an institution that is assumed to be

⁷⁵ U.K., H.C. Library, *supra* note 9.

both trust-worthy and trust-restoring. The implications of this assumption will be considered further in Chapter 4. We turn next to an examination of the impact of officers of Parliament.

Chapter 2: Why are officers of Parliament important?

The politicians and public administration experts who advocated strengthening the role of officers of Parliament clearly had a reason to care about their mandates and legitimacy. They were seen as the means to restore something considered precious in our society and essential to our system of government – public trust. But are there other reasons that justify the examination undertaken in this thesis? Do officers of Parliament have any real importance as regards the lives of Canadians or the ordering of their government?

In this chapter we are going to examine some of the ways in which officers of Parliament affect government accountability and the interests of individuals. The work of officers of Parliament is intended to have a significant impact on the activities of parliamentarians and, in particular, parliamentary committees. However, their functions are not limited to supporting the traditional responsibilities of Parliament. Both by statutory design, and because of the roles that the officers have taken on in the implementation of their legislation, their efforts extend well beyond the passive provision of information to the legislature.

The functions of officers of Parliament consist of: audits and investigations of government activity; investigating complaints about government activity (also known as the “ombudsman” function⁷⁶); the promotion of best practices, often through direct interaction with government departments and agencies; and information for and advice to Parliament, including with respect to legislation. To accomplish these functions, the officers have been given a variety of tools and powers, some quite extensive. The nature of these mechanisms, and the use the officers have made of them, illustrates the effect they can have on the redress

⁷⁶ Smith, *supra* note 25 at 65. See also Office of the Commissioner of Official Languages, *Annual Report 2007-2008* (29 May 2008), online: Office of the Commissioner of Official Languages <http://www.ocolclo.gc.ca/html/ar_ra_2007_08_e.php>.

of citizen complaints, the careers of persons whose activities are examined, the conduct of government business, the work of parliamentarians and the interests and perceptions of members of the public. We will be examining each of these areas of impact in turn, for the purpose of tracing the influence of officers of Parliament. (For the abbreviations used in this chapter and those that follow, see the Legend.)

A Impact on individuals

(a) Complainants

For most of the officers, their relationship with complainants is very important. At times it can be more important than their relationship with Parliament. For example, the IC's annual report to Parliament did not attract a single hearing by the committee designated to receive it over a period of 16 years. However, during that time, the IC's office received and investigated hundreds of individual complaints per year.⁷⁷

The interaction with complainants takes a different form depending on the officer, but in most cases, there is a significant portion of the mandate that is focussed on responding to the concerns of individuals. It is interesting to examine these relationships through the lens of the theory that the officers' main role is to support Parliament. In only one case are the relevant statutory provisions drafted in a way that would suggest that the relationship is three-way: officer-parliamentarian-complainant. In all other cases the officer's relationship with the individual complainant is direct.

The traditional model is reflected in the mandate of the COIEC. She receives formal complaints, whether they originate with members of the public or not, only from members of

⁷⁷ Canada, Office of the Information Commissioner, *Annual Report: 1998-1999* (29 May 2007), online: Office of the Information Commissioner <<http://www.infocom.gc.ca/reports/1998-1999-e.asp>>.

the House of Commons and Senators. The member of Parliament may only pass on the complaint when the member has reason to believe a public office holder or former public office holder has contravened the *Conflict of Interest Act*. The COIEC then investigates and reports her findings and conclusion to the member of Parliament who requested the examination, the person who is the subject of the report and the Prime Minister. Reports on individual cases involving public office holders do not go to Parliament itself but are made available to the public. The statute does not require her to report directly to the member of the public who raised the complaint in the first place.⁷⁸

Other officers have a formally recognized relationship with complainants, one that extends from the acceptance and investigation of complaints, to the monitoring of compliance with recommendations, advice about legal remedies, and representation in court. In this category are the IC, PC, COL and PSIC.

The IC, PC and COL are required to receive and investigate complaints filed by any member of the public who believes their rights and interests under the relevant legislation are not being respected. All three report the results of their investigations to the complainant directly. They all have the further duty to report to the complainant where, in their opinion, their recommendations are not adequately implemented by the government institution. If, in the end, the complainant is still not satisfied with the response of the government institution,

⁷⁸ COIA, *supra* note 40, s. 44. This mechanism is similar to the means by which the jurisdiction of the U.K. Parliamentary Commissioner for Administration (more commonly called “the Ombudsman”) is triggered. This officer, who has powers and duties very similar to those of the Canadian officers of Parliament, investigates complaints from citizens about maladministration on the part of the British bureaucracy, but only after the complaint is relayed by a member of Parliament. Interestingly, the referral mechanism has come to be seen as a hindrance by the Ombudsman herself and those who comment on the development of her office, including members of Parliament themselves. Unlike the COIEC, the U.K. Ombudsman has no capacity to conduct examinations on her own initiative. See *Parliamentary Commissioner Act 1967* (U.K.), 1967, c.13; Oonagh Gay and Barry K Winetrobe, *Officers of Parliament: Transforming the Role* (London: The Constitution Unit, School of Public Policy, UCL, 2003) at 16-17.

under all three statutes there is a right to pursue the matter in court. The IC and PC have a duty to inform the complainant of their rights in this respect, where the government institution continues to refuse access to the requested information. And all three of these officers may then take the additional step of either going to court themselves to seek a remedy against the institution, or appearing before the court on behalf of the complainant.⁷⁹

The PSIC receives disclosures about wrongdoing within the meaning provided in her Act not from the public at large but from public servants. Public servants and former public servants also file with her complaints of reprisals taken against them as a result of their having made such disclosures. The relationship that exists between a discloser or complainant and the PSIC includes the possibility of obtaining legal advice about the operation of the statute, either provided directly by the PSIC's office itself, or through the provision of money to cover advice by private sector lawyers. In the case of reprisal complaints, if the PSIC decides to refer the matter to the Public Servants Disclosure Protection Tribunal, she will also appear as a party before the tribunal, although not on behalf of the complainant.⁸⁰

The CEO may receive complaints about an election from any candidate, candidate's agent, leader or chief agent of party, as well as suggestions about changes to the legislation. The CEO does not respond directly to the complainant, but may include any document or summary of a document that relates to a complaint in the reports he files with the Speaker after an election. As noted in the last chapter, the CEO has the power to adjust the application of his statute. He may also trigger an investigation by the Commissioner of Elections if he believes that an offence under the Act has been committed or that the

⁷⁹ ATIA, *supra* note 34, ss. 30, 37, 42; PA, *supra* note 38, ss. 29, 35, 36; OLA, *supra* note 31, ss. 58, 65, 78.

⁸⁰ PSDPA, *supra* note 48, ss. 13, 19.1, 25.1, 20.4, 21.4(2).

Commissioner should seek another kind of remedy, such as a decision by the Federal Court to de-register a party.⁸¹

The AG has no statutory duty or authority to receive complaints or disclosures about her main audit function. Her statute does allow for petitions to be filed with her office by any resident of Canada about an environmental matter that is the responsibility of a government department.⁸²

Formal complaints are not, however, the only way in which investigations by the officers can be triggered. Almost all of them have the authority to conduct investigations on their own initiative, either by filing their own “complaint” or as part of their general duties to investigate or examine government activities within their mandates. Information received from members of the public, whether or not there is a formal process for such disclosures, can go into forming an officer’s reason to believe that an investigation is warranted. For example, in her November, 2006 report the AG indicated that one of her investigations was undertaken as the result of an anonymous complaint about activities in the Office of the Correctional Investigator.⁸³

It is also clear that those officers whose complaint-receiving authority is limited to a particular class of persons, may nonetheless accept, consider and act upon information received from anyone. In the case of the PSIC, this is made clear in the statute, which refers to information provided to the PSIC by a person who is not a public servant, upon which the PSIC may base a belief that wrongdoing has been committed, and commence an

⁸¹ CEA, *supra* note 28, ss. 537, 510, 521.1.

⁸² AGA, *supra* note 23, ss. 22-23. The petition is sent to the minister responsible for the department, who must respond to the petitioner. The Commissioner of the Environment, an officer who serves in the Office of the AG, may conduct examinations and inquiries to monitor ministers’ replies. The results of those examinations are reported to Parliament.

⁸³ Office of the Auditor General of Canada, *2006 November Report of the Auditor General of Canada* (28 November 2006) at para. 11.1, online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/parl_oag_200611_11_e_14979.html>.

investigation.⁸⁴ The COIEC also has the authority to initiate investigations if she has reasonable grounds to believe there has been a violation of her Act. In her 2007-2008 Annual Report the COIEC reported that four times during that year members of the public wrote to request that the COIEC exercise that authority.⁸⁵ Should the COIEC decide to initiate her own investigation, her reports would go not to Parliament but to the public office holder whose activities are the subject of the investigation, the Prime Minister and the public.⁸⁶

The result of a complaint investigation varies. Only rarely will the outcome be a remedy with legal consequences for the complainant (as opposed to the person complained of). One example is that a decision by the PSIC to pursue the investigation of a reprisal complaint results in the immediate cessation or reversal of any disciplinary measures that have been taken against the complainant, pending the outcome of the investigation.⁸⁷

Another is the power of the COIEC to order a public office holder to eliminate a conflict of interest situation.⁸⁸ In the case of the IC and PC, a legally enforceable remedy can only be achieved by the complainant or the relevant Commissioner seeking and obtaining that remedy in court.

⁸⁴ PSDPA, *supra* note 48, s. 33.

⁸⁵ Conflict of Interest and Ethics Commissioner, *The 2007-2008 Annual Report in respect of the Conflict of Interest Act*, (Ottawa, Office of the Conflict of Interest and Ethics Commissioner, Parliament of Canada, 2008) at 15. Only one of these requests provided enough information to merit a response, that of the organization Democracy Watch. However, the COIEC did not feel the request provided “sufficient credible evidence to believe that a contravention” had occurred. Democracy Watch sought judicial review of this ruling, but was unsuccessful. See *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 (CanLII), leave to appeal to S.C.C. refused, 33086 (11 June 2009).

⁸⁶ COIA, *supra* note 40, s. 45.

⁸⁷ If the investigation yields a belief that there has been a reprisal, the PSIC has the power to trigger the appointment of a panel of the Public Servants Disclosure Protection Tribunal to determine whether a complainant has suffered a reprisal, possibly triggering further legal remedies. PSDPA, *supra* note 48, ss. 19.6, 20.4.

⁸⁸ COIA, *supra* note 40, s. 30.

For the most part no legal consequences flow from the investigation. Instead, the officers have the authority to make findings and recommendations stemming from the initial complaint or disclosure. The recommendations are addressed to the government institution, which in most cases has some duty to respond to the recommendations.

In sum, the relationship between the officers of Parliament and those who seek to trigger their investigative jurisdictions is a key element of the mandate in most cases. Their functions combine an investigative mechanism with, in some cases, a decision-making or advocacy role, in others, a means of directly engaging public opinion. The availability of these avenues for seeking redress may have an important impact on the relationship between government departments and the public. A dispute that might otherwise have been dealt with by internal complaint mechanisms can become the subject of a publicized report and, potentially, a court process.

The officers' jurisdiction also has a direct effect on complainants because it is a gate-keeping function. If an officer investigates a complaint and finds that it is ill-founded, it is unlikely the person in question is going to obtain relief from any other source, including the courts. In most of these cases, therefore, their work has a significant impact on individuals – both those who seek to trigger their jurisdiction and those who are the subject of their investigations. We will consider the case of the latter group next.

(b) Individuals who are the subject of reports

Each of the officers of Parliament has a relationship, which involves a complicated series of roles, with parties who may be adversely affected by their investigations, rulings and reports. Several of the officers are expressly authorized to investigate the activities of

individuals. The COIEC determines whether public office holders and former public office holders are acting in accordance with the conflict of interest rules which govern them. The LC determines if lobbyists are practicing without being registered or if they have failed to disclose required information. People accused of wrongdoing and reprisals are the subjects of the PSIC's investigations. The COL may look into whether anyone has obstructed the work of his office or committed a reprisal against people who cooperate with him.⁸⁹ The AG determines whether a recipient of government funding has failed to meet its obligations under a funding agreement and whether any person has improperly retained public money.⁹⁰ The CEO makes decisions about whether a candidate's nomination campaign expenses may be reimbursed.⁹¹

The results of these investigations run from simple findings, with recommendations about how similar problems can be avoided in future, to tangible punishment. The COIEC may impose an administrative monetary penalty if she finds that a public office holder has violated the disclosure and divestment portions of the *Conflict of Interest Act*. She may also order an office holder to take the measures necessary to avoid a conflict of interest under the Act and current public office holders to refuse to do business with former public office holders who infringe the post-employment lobbying rules.⁹² The PSIC, if she has reason to believe a reprisal has taken place, can trigger the appointment of a panel of the Public Servants Disclosure Protection Tribunal who may, among other remedies, order disciplinary measures against a person found to have taken a reprisal.⁹³ And the LC can order public

⁸⁹ OLA, *supra* note 31, s. 62(2).

⁹⁰ AGA, *supra* note 23, ss. 7.1, 10.

⁹¹ CEA, *supra* note 28, s. 478.19.

⁹² *Supra* note 40, ss. 53, 30, 41.

⁹³ PSDPA, *supra* note 48, ss. 20.4, 21.5(4).

office holders not to have business dealings with a person who has been convicted of an offence under the *Lobbying Act*.⁹⁴

Where the statute is silent about direct consequences for those who breach its provisions, less formal means have been developed to bring home the error of their ways. The IC's 2007-2008 annual report notes his desire to tie his "report card process" – the annual audit which his office performs concerning government institutions' compliance with his Act – to "the government's performance management framework" in order to "hold heads of institutions accountable for their organizations' access to information performance".⁹⁵ This provides a mechanism for those heads of institutions whose performance is measured every year, with salary and promotion consequences, to personally feel the impact of the IC's evaluation.

In most cases the impact of the officers' work is not direct, in the sense of a tangible punishment or legal effect. Nonetheless, most of the officers are empowered to make findings which have the potential to adversely affect the reputations and careers of individuals, whether because it deals with their own "wrongdoing" or conflicts of interest, or because the institution or program for which they are responsible attracts negative attention. Those who were in charge of the sponsorship program in the Department of Public Works and Government Services, for example, came under intense criticism as a result of the AG's examination of that program in 2003 (which was followed by a full-scale public inquiry).⁹⁶ The effect of some officers' decisions extends outside the government, for example when the

⁹⁴ LA, *supra* note 55, s. 14.01.

⁹⁵ Canada, Office of the Information Commissioner, *Annual Report: 2007-2008* (14 May 2008), online: Office of the Information Commissioner <<http://www.infocom.gc.ca/reports/2007-2008-e.asp>>.

⁹⁶ Office of the Auditor General of Canada, *2003 November Report of the Auditor General of Canada* (10 February 2004), online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/parl_oag_200311_03_e_12925.html>; Commission of Inquiry into the Sponsorship Program & Advertising Activities, *Who is Responsible?* (Ottawa, Public Works and Government Services Canada, 2005).

LC determines whether lobbyists have infringed the code of conduct enacted under his statute.

In addition, the powers wielded by the officers have the potential to affect the interests of those who become involved in the investigation. Five of the officers, the COL, IC, PC, COIEC and LC have the same powers to summon witnesses and compel oral testimony and the production of document as those belonging to a court.⁹⁷ Two more officers, the AG and the PSIC have the powers of commissioners appointed under the *Inquiries Act*.⁹⁸ Some of the officers also have the more unusual authority to enter the premises of any government organization under their jurisdiction and receive free access to all information found there. This includes the right to interview any person on the premises, in some cases without the usual evidentiary privileges applying. In this category are the AG, the COL, the IC, the PC and the PSIC.⁹⁹ The LC has the more limited ability to send information received from registered lobbyists to public office holders for confirmation of its accuracy and completeness.¹⁰⁰

Because of this potential for directly affecting the interests of individuals, all of the officers but two (the AG and the CEO) are instructed by their legislation to conduct their investigations according to the principles of natural justice. The COL, IC, PC, COIEC, PSIC and LC all have provisions that require them, if they are going to make adverse findings about a person or organization, to give the subject an opportunity to answer allegations or

⁹⁷ OLA, *supra* note 31, s. 62(1); ATIA, *supra* note 34, s. 36(1); PA, *supra* note 38, s. 34(1); COIA, *supra* note 40, s. 48; LA, *supra* note 55, s. 10.4(2).

⁹⁸ AGA, *supra* note 23, s. 13(4); PSDPA, *supra* note 48, s. 29(1).

⁹⁹ AGA, *supra* note 23, s. 13(1); OLA, *supra* note 31, s. 62 (1)(d); ATIA, *supra* note 34, s. 36(1)(d)-(f); PC, *supra* note 38, s. 34(1) (d)-(f); PSDPA, *supra* note 48, ss. 19.9(1), 29(3).

¹⁰⁰ LA, *supra* note 55, s. 9.1(1).

make representations.¹⁰¹ However, one of the COIEC's duties, that of providing confidential advice to the Prime Minister about the compliance of individual public office holders with the *Conflict of Interest Act*, does not require her to give the person in question notice or any opportunity to be heard¹⁰².

Four of the officers, the COL, COIEC, PSIC and IC, have an obligation to report their findings to persons who may be adversely affected by their reports, usually persons whose conduct is criticized.¹⁰³ The AG, CEO and LC have no obligation to report to individuals about their investigations, although the AG sends drafts of her reports to the head of the government department in question for comment, prior to their publication.¹⁰⁴

The extent of the impact on persons who are the subject of investigations, or key witnesses, will of course vary from case to case and from mandate to mandate. However, it is clear that there is potential for officers to affect the reputations, careers, and in some cases the pocket books, of individuals about whom complaints are made or who become the subject of investigations.¹⁰⁵

¹⁰¹ OLA, *supra* note 31, s. 60(2); ATIA, *supra* note 34, s. 35(2); PA, *supra* note 38, s. 33(2); COIA, *supra* note 40, s. 46; PSDPA, *supra* note 48, s. 27(3); LA, *supra* note 55, s. 10.4(5).

¹⁰² COIA, *supra* note 40, s. 43(a).

¹⁰³ OLA, *supra* note 31, s. 64(1); COIA, *supra* note 40, ss. 44(8), 45 (4). The PSIC must inform persons who have been identified as alleged reprisors but there is no similar requirement for persons whose conduct is the subject of a disclosure of wrongdoing: PSDPA, *supra* note 48, s. 20.6. In some cases, the IC is required to notify third parties whose information, under the control of a government institution, is determined to be accessible to the complainant: ATIA, *supra* note 34, s. 37(2).

¹⁰⁴ Office of the Auditor General of Canada, *What to Expect—An Auditee's Guide to the Performance Audit Process* (6 June 2008), online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/meth_gde_e_30869.html>.

¹⁰⁵ See the comments in *Kreiner v. Auditor General (Man.)*, *supra*, note 17 and accompanying text. See also the Australian Federal Court's decision in *Chairperson, Aboriginal and Torres Strait Islander Commission v. Commonwealth Ombudsman*, (1995) 63 F.C.R. 163 at para. 31 (Q.L.): "Insinuations of personal culpability by a major public investigative body carry great stigma and have the potential to do serious harm to reputations."

B Impact on management of departments

All of the officers except the CEO have relationships with the government institutions in their jurisdiction which go beyond simply investigations and reports of findings. Some of these interactions are mandated by the statutes. Others have been developed by the officers as ways of ensuring compliance and preventing violations of the legislation before a problem arises that would result in a complaint or negative audit report. Whether formal or informal, these interactions are intended to have an impact on the department's practices, either in a specific case or generally with respect to the issue of concern to each officer.

The AG is specifically empowered to advise appropriate officers and employees of matters discovered in her examinations. In practice, as part of her power to seek "explanations", she also sends audited departments drafts of her audit reports for comment.¹⁰⁶ Often the responses are included in the final report. The Office of the AG also works with the government on initiatives to improve financial reporting and management capacity, for example the work done with Treasury Board in 1997 on the development of a "Financial Management Capability Model".¹⁰⁷

Other officers have an even more express mandate to intervene in departmental affairs where they suspect non-compliance. The COL is empowered to take all actions and measures necessary to ensure the recognition of the official languages and compliance with the Act in the administration of the affairs of federal institutions. As a result, in 2006-2007, increased media monitoring lead the COL to intervene in situations in which compliance was doubtful and, in cooperation with the institution, to resolve the problem. If, following an

¹⁰⁶ AGA, *supra* note 23, s. 12 and see, *supra*, note 104.

¹⁰⁷ Office of the Auditor General of Canada, *1997 April Report of the Auditor General of Canada* (1 April 1997), at para. 3.16, online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/parl_oag_199704_e_19737.html>.

investigation, the COL is of the opinion that any practice of the department in question is likely to lead to a contravention of the Act, taking into account any applicable government policies or Treasury Board directives, he must include that opinion in his report.¹⁰⁸

The *Access to Information Act* contains no such broad intervention power. However, informally the IC produces “report cards” detailing how well federal institutions meet their obligations under the Act, a move designed to reduce the causes of requesters’ complaints. The 2007-2008 Annual Report indicates that these report cards are to be incorporated in the performance management framework for heads of government institutions.¹⁰⁹

The PC has authority to investigate and report, with recommendations, not only as to the outcome of complaints, but on the maintenance of exempt banks and the handling of personal information generally.¹¹⁰

The COIEC provides confidential advice to public office holders about how to conduct their private affairs, and their government duties, without running the risk of a conflict of interest. She also designs compliance measures to reduce the conflicts of interest to which public office holders may be subject, including requiring office holders to recuse themselves from certain duties within their jurisdiction, where the decision would provide them with an opportunity to further an interest described in the *Conflict of Interest Act*. She can, if necessary, issue orders that those measures be complied with.¹¹¹

The PSIC is empowered to advise chief executives on how to correct workplace wrongdoing and to assess action taken in response to her recommendations. She must also make evaluations such as whether an alleged wrongdoing results from a balanced and

¹⁰⁸ OLA, *supra* note 31, s. 56 and see Office of the Commissioner of Official Languages, *supra* note 33.

¹⁰⁹ *Supra* note 95 and accompanying text.

¹¹⁰ PA, *supra* note 38, ss. 36(3), 37(3).

¹¹¹ COIA, *supra* note 40, ss. 29, 30.

informed decision-making process on a public policy issue. When the PSIC decides to deal with a reprisal complaint, the effect is that no disciplinary measures may be taken against the person who makes the complaint and any that have been taken must be suspended.¹¹²

All of the officers except the LC and CEO report their findings to the head, chief executive, or other appropriate officers and employees of the government institution in question or to central agencies – the Treasury Board in the case of the AG and COL and the Prime Minister in the case of the COIEC. Often this report triggers an obligation on the institution to respond, by making representations about the findings or by outlining action plans to implement the findings and recommendations of the officer. Sometimes the need for a response is recognized in the statute, for example as regards the reports of the COL.¹¹³ In other cases, an informal system of comments on draft reports has developed - this is the practice followed by the office of the AG. These responses may be published together with the findings in the officer's report, in which case they represent a public commitment to the promised course of action.

Closely related to the effect of the findings and decisions of officers of Parliament is the question of their enforcement. In addition to the measures referred to above, several of the officers have enforcement mechanisms at their disposal, should government institutions or individuals not comply with their reports. In some cases, this involves reporting to Parliament where their powers and recommendations have not been respected. The AG and LC can include in their report, for example, a statement of whether they received all the information they required from government departments and public office holders.¹¹⁴ Where no action is taken in respect of the COL's investigation reports he can report first to the

¹¹² PSDPA, *supra* note 48, ss. 22(h), 24(1)(e), 19.5, 19.6.

¹¹³ OLA, *supra* note 31, ss. 63(3).

¹¹⁴ AGA, *supra* note 23, s. 7(1)(b); LA, *supra* note 55, s. 9.1(2).

Governor in Council and then, if necessary, to Parliament.¹¹⁵ The PC and IC monitor the results of their investigations to see if their findings are complied with and, if not, will advise the complainant of his or her right to go to court, or will appear before the courts themselves to seek a remedy against the department in question. And the PSIC may include in her reports to Parliament her comments on any action taken by government institutions to implement her recommendations, or on their inaction in that respect.¹¹⁶

The intention behind these provisions is that the work of the officers of Parliament should have an impact on the management and operation of government institutions. The nature of the investigations undertaken by these officers, as noted by Donald Savoie, can affect both administrative matters and policy development.¹¹⁷ The latter point is especially true when the officers make suggestions about legislative proposals or the need for legislative reform, as will be explored further below.

Each officer has the mandate to comment on how his or her Act is administered by government departments and public office holders. This means that an officer's report represents a published set of advice concerning any subject that touches on that officer's mandate. Those reports can then provide a standard to which both parliamentarians and the public can hold institutions when it comes to their use of personal information, their respect for the two official languages, or the wisdom of their program expenditures. While the recommendations they make are not mandatory, in the sense of being legally enforceable, their public nature is intended to provide an incentive for government entities to comply.¹¹⁸

¹¹⁵ OLA, *supra* note 31, s. 65.

¹¹⁶ PSDPA, *supra* note 48, s. 38(3.1).

¹¹⁷ Savoie, *supra* note 1 at 167-168. Savoie comments that the "value for money" audits of the Auditor General, which he terms "'qualitative' or 'soft reviews'" "enable the office to contribute to policy debates and in some ways to participate in the making of public policy."

¹¹⁸ This point was explored by the U.K. Supreme Court of Judicature in the case of *Bradley v. Secretary of State for Work and Pensions* [2008] EWCA Civ 36 in which it was held that the Parliamentary Ombudsman's

C Impact on Parliament and parliamentarians

All of the officers report to Parliament at least annually except the CEO (who reports only if there have been elections or by-elections). The COL, IC, PC, PSIC and LC also submit case reports of their investigations to Parliament. All except the CEO may also make reports that are not case reports more often than once a year. The AG may now make regular reports up to four times per year. And, like the COL, IC, PC, PSIC and LC, the AG may make special reports where the matter is of pressing important or urgency.¹¹⁹

As will be explored in the next chapter, having the officers report to parliamentarians is not the same thing as parliamentarians doing their own study or investigation of an issue. This is true because of the more detached perspective and heightened expertise that the officers bring to the task, but it is also true because of the confidentiality requirements that apply to much of the material gathered during the officers' investigations.¹²⁰ This restriction on access to the raw material behind each report means that, unless they decide to hold their own hearings into the same matter, parliamentarians are largely dependent on the officer's assessment of the facts on which the report is based. The holding of parallel hearings is not a practice that is encouraged by some of the officers. For example, in her annual report for 2007-2008, the COIEC points to the "confusion" that can be caused by a parliamentary

findings can be rejected by the minister responsible for the department in question but only if the minister has a rational reason for the rejection. The mandate of the Parliamentary Ombudsman is described at *supra* note 78. In the U.K., the various other Ombudsmen who report to the legislature have seen their recommendations implemented in almost every case. See Richard Kirkham, Brian Thompson and Trevor Buck, "When Putting Things Right Goes Wrong: Enforcing the Recommendations of the Ombudsman", [2008] P.L. 511 at 525-526.

¹¹⁹ AGA, *supra* note 23, s. 7(1); OLA, *supra* note 31, ss. 65(3), 66, 67; ATIA, *supra* note 34, ss. 38, 39; PA, *supra* note 38, ss. 338, 39; PSDPA, *supra* note 48, s. 38; LA, *supra* note 55, ss. 10.5, 11, 11.1.

¹²⁰ See discussion *infra* at notes 187-188 and accompanying text.

committee carrying out its own study of matters about which she may receive requests to conduct an examination.¹²¹

In a few cases, the officers' statutes contain an express duty on Parliament (acting through a designated committee) to keep the administration of these Acts under review. This is true of the *Official Languages Act*, the *Access to Information Act* and the *Privacy Act*.¹²² When parliamentarians carry out this duty, the content of the relevant officer's report will likely provide the agenda for their deliberations. Parliament's study of the legislation, and the various reports of each officer, is the responsibility of committees designated for that purpose. The designation of committees is discussed in more detail in Chapter 3.

The reports provided by officers of Parliament can certainly be seen as vital to inform and support the activities of these parliamentary committees. However, that support function works both ways. Reporting to Parliament is also one of the tools used by the officers to enforce the recommendations in their reports. Examples include the COL and PSIC, both of whom may report to Parliament specifically on the question of whether sufficient action has been taken by government institutions to implement their recommendations.¹²³

But the reports of individual cases are not the only subjects on which the officers advise parliamentarians. They also comment on legislation, including both their own constituent statutes and proposed measures that touch on their areas of responsibility. Only two of the officers have an express statutory mandate to comment on legislation. All of the CEO's reports following an election may potentially contain his recommendations for changes to the *Canada Elections Act*.¹²⁴ The COL is called upon not only to propose changes

¹²¹ Office of the Conflict of Interest and Ethics Commissioner, *supra* note 85 at 14.

¹²² OLA, *supra* note 31, s. 88; ATIA, *supra* note 34, s. 75(1); PA, *supra* note 38, s. 75(1).

¹²³ OLA, *supra* note 31, s. 65(3), PSDPA, *supra* note 48, s. 38(3.1).

¹²⁴ CEA, *supra* note 28, s. 535.

to the *Official Languages Act* which will better give effect to its spirit and intent, but also to initiate reviews of federal regulations for conformity with the Act's standards.¹²⁵

However, even without the formal mandate other officers do, regularly, comment on legislation, whether as part of considering how their own mandates might be altered or in an effort to ensure that new legislation will be consistent with the Acts that empower them.

Two examples are the AG, who was one of the strongest voices for the amendments that expanded her mandate to include "value for money" audits,¹²⁶ and the PC, whose goal is to interact with government departments in their legislative development processes in order to comment earlier on Bills before they are introduced in Parliament.¹²⁷

Finally, the officers of Parliament provide a service which parallels, in some ways, the advocacy function that members of the House of Commons perform for their constituents in their interactions with the government. That this activity is inherent in the role of elected representatives is recognized in a couple of places in federal legislation, which confers the right for members of Parliament to access certain information when acting on behalf of a constituent. One example is paragraph 8(2)(g) of the *Privacy Act*, which allows the disclosure of personal information about an individual "to a member of Parliament for the purpose of assisting the individual to whom the information relates in resolving a problem."¹²⁸ These "ombudsman" activities of members of Parliament have been increasing in recent years, according to a Library of Parliament publication, and are seen by some

¹²⁵ OLA, *supra* note 31, ss. 57, 66.

¹²⁶ S.L. Sutherland, "The Office of the Auditor General of Canada: Government in Exile?", Working Paper 31 (Kingston: School of Policy Studies, Queen's University, 2002) at 10-12.

¹²⁷ Canada, Office of the Privacy Commissioner, *Annual Report to Parliament, 2004-2005: Report on the Privacy Act*, online: Office of the Privacy Commissioner, <http://www.priv.gc.ca/information/ar/200405/200405_pa_e.cfm>.

¹²⁸ *Supra* note 38, s. 8(2)(g). Another example can be found in s.104.01(3) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, which provides that information relating to pension matters may be made available "a member of Parliament inquiring on behalf of the individual".

members as among their most important functions.¹²⁹ They can involve contacting Ministers or public servants to communicate and resolve problems constituents are experiencing, and the seeking and receipt of various kinds of government information related to the constituent. In this respect there is an overlap between the advocacy, citizen redress, and information disclosure role of members of Parliament and the activities of several of the officers of Parliament.

Only one of the officers, the COIEC, is actually mandated to assist members of the House of Commons and Senators, as described above. It is interesting to note, however, that the intention is for the COIEC to really take over dealing with a complaint that is referred to her office by a member of Parliament. This is reflected in the fact that, while the COIEC is considering the matter, the member must not disclose the information he or she provided to the COIEC to anyone else.¹³⁰ The other officers of Parliament do not have this connection to parliamentarians – in most cases members of the public can contact them directly. They therefore do not really support the functions of members in helping their constituents deal with government departments, but instead replace it with their own processes.¹³¹

To conclude on this point, the information and advice provided by officers of Parliament are valuable resources for the work of members of the House of Commons and the Senate in holding the government to account. Their reports are intended to have a significant impact on the agendas and deliberations of the parliamentary committees who are designated to receive them (although this expectation has not always been fulfilled in

¹²⁹ Library of Parliament, “The Roles of the Member of Parliament in Canada: Are they Changing?” PRB 02-04E, (31 May 2002), online: Parliament of Canada <<http://www.parl.gc.ca/information/library/PRBpubs/prb0204-e.htm>> (Prepared by: Jack Stilborn, Political and Social Affairs Division).

¹³⁰ COIA, *supra* note 40, ss. 44(1), 44(5).

¹³¹ In Australia, this overlap in function has led some parliamentarians to resent the Commonwealth Ombudsman as a competitor. See John McMillan, “Parliament and Administrative Law” in G. Lindell and R. Bennett, eds., *Parliament: The Vision in Hindsight* (Sydney: The Federation Press, 2001) 333 at 366.

practice, as the example of the IC's history illustrates.) However, it is also clear that one of the purposes for officers reporting to Parliament is as an enforcement mechanism to ensure that their recommendations are carried out by government institutions. In short, the relationship works both ways, with the "servants" of Parliament often taking the lead, or in fact replacing the role traditionally played by parliamentarians.

D Impact on the public

Officers of Parliament also have an impact on the public generally, beyond the people who actually complain or disclose information to them. The officers make findings and rulings that affect the exercise of certain rights held by citizens generally or by particular communities. They interact with the nation at large through the public release of their reports and media briefings and interviews. These activities can affect the public's perception of government in a very direct way, which in turn can have ripple effects on the issues to which politicians are called to give priority. A good example is the focus that was placed on accountability in government during the 2006 election campaign following the AG's report on the management and financial probity of the sponsorship program.¹³²

One instance of their capacity to affect the rights and interests of members of the public is the power of the CEO to alter the application of the *Canada Elections Act*, and even to amend the schedules to the Act. That officer makes decisions and recommendations about the way in which democratic rights are to be exercised, for example when he suggests that an alternate polling day be chosen to the one prescribed by statute. He also determines which political parties are eligible to be registered.¹³³

¹³² Office of the Auditor General of Canada, *supra* note 96.

¹³³ CEA, *supra* note 28, ss. 17(3), 369.

The LC can prohibit people who have been convicted of an offence under the *Lobbying Act* from lobbying the government, thereby severely limiting the chosen livelihood of the lobbyist in question.¹³⁴ And the COL is expected to ensure that federal institutions carry out their duty to enhance the vitality of the English and French linguistic minority communities in Canada.¹³⁵

The more general impact that the officers have is through the publication of their reports. Although most of the officers' reports eventually become public, all but one of the statutes are silent on this point. The exception is the COIEC, who is required by the *Conflict of Interest Act* to make her examination reports available to the public (though not, of course, her "confidential advice" to the Prime Minister and public office holders).¹³⁶

Even where the legislation does not require that a report be made public, the officers ensure that there is public access, at minimum by posting their reports on their publicly available web sites. However, some of the officers go further, engaging the media directly when their reports are issued. The best example is the AG, whose web site notes: "The Auditor General of Canada and the Commissioner of the Environment and Sustainable Development typically deliver opening statements at news conferences organized for the tabling of the Office's reports."¹³⁷ All of the opening statements, as well as the reports and other press releases, are then made available on the Office's web site. To ensure the media are prepared to examine the report and attend the press conferences and other briefings, the AG issues a news release, containing information as to the studies that will be in the next report, as soon as she has advised the Speaker of the House of Commons of the date she will

¹³⁴ LA, *supra* note 55, s. 4.01.

¹³⁵ OLA, *supra* note 31, ss. 41, 56.

¹³⁶ COIA, *supra* note 40, ss. 44(8), 45(4).

¹³⁷ Office of the Auditor General of Canada, "Media Statements" 12 June 2008), "Reporting to Parliament", (11 November 2007), online: Office of the Auditor General of Canada <<http://www.oag-bvg.gc.ca>>.

be tabling it. On the day the report is tabled there is a media “lock-up” during which embargoed copies of the report are given to journalists, in advance of the tabling in the House, and a news conference is held. Journalists are allowed to leave the lock-up fifteen minutes before the report is tabled. These procedures give a glimpse into the weight the media gives the AG’s reports and how essential her information is thought to be to those journalists who comment on the probity of government spending and programs.

The other officers’ media procedures are not quite as elaborate, but most issue press releases, and some engage the public directly. For example, the IC issued notice last year of a public consultation on modernizing access to information. Discussion papers were posted on the Office’s web site, together with the responses received from interested groups.¹³⁸

The officers of Parliament clearly see themselves as sources of information not only for parliamentarians, but for the public at large. And their interaction with the public goes beyond simply making their reports accessible to include information that is specially designed for media and public distribution, and even invitations for a two-way dialogue. In short, a direct relationship with the public has developed in most cases, making it unnecessary for news reports or individuals to wait for parliamentarians to pursue or comment on the work of the officers of Parliament before their reports are given public attention.

E Conclusion

The functions described above give an idea of the intended impact of officers of Parliament. Taken as a group, they have the potential to influence many aspects of the

¹³⁸ Canada, Office of the Information Commissioner, “Public Comments” (June 6, 2008), online: Office of the Information Commissioner <http://www.infocom.gc.ca/media/public_comments-e.asp>.

administration of government programs and government departments, as well as having an impact on the relationship between the executive and Parliament and the public perception of government.

We have seen that these officers investigate, adjudicate and advocate the rights and interests of individuals. They also evaluate and, if necessary, castigate the behaviour of those about whom complaints are made. Clearly they support, guide and sometimes supplant the work of parliamentarians, bringing perspectives on government activity that members of Parliament would not have the opportunity to form, but also providing investigatory and advocacy roles. Finally, they inform and sometimes determine the interests and perceptions of the public vis-à-vis their government.

It can safely be concluded, therefore, that officers of Parliament are important instruments of government accountability. It becomes important, as a result, to consider their legitimacy. What gives these officers the right to affect individual rights and interests and the course of elected and responsible government in the way that they do? The next two chapters will consider this question from several perspectives: legal, constitutional and theoretical.

Chapter 3: The Constitution and the legitimacy of officers of Parliament

Having seen the potential impact of officers of Parliament on government accountability and on individuals, in this chapter and the next we will be asking: what is the source of their legitimacy? What do we mean when we ask this question? From a constitutional perspective, there are two ways in which the legitimacy of the exercise of power can be understood. The first concerns the source of the authority in question: From where do these officers derive their powers to affect the operations of government and the lives of individuals? The second is institutional: To which of the constitutional centres of power do they, as government actors, belong?

The answer to the first question is relatively straightforward. Officers of Parliament derive their powers from Acts of Parliament. They exercise authority on the basis of a mandate obtained from Parliament acting in its sovereign legislative capacity.

The answer to the second question is more complicated, as we will see. Unlike most bodies possessing governmental authority, officers of Parliament do not seem to come unequivocally within any of the institutions through which power is usually wielded under our Constitution. In Canada, those are generally thought to be three: Parliament, the executive (or the Crown) and the judiciary¹³⁹. As to the first two, Adam Tomkins describes them as “the only two powers the constitution has ever recognized as enjoying any degree of sovereign authority”. Under the United Kingdom’s Constitution, “constitutional authority – power – is divided between the Crown and Parliament” and “[e]very constitutional actor falls

¹³⁹ Although Chief Justice MacLachlin, in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, [1993] S.C.J. No. 2 at para. 141 (Q.L.), seems to give us four: “I add this. Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.”

on one side or the other of this great divide”.¹⁴⁰ In Canada, because it is provided for in the written portion of our Constitution, the third centre of constitutional authority is the judiciary.¹⁴¹

Why do we have to ask both of these questions? Because there are two great themes that apply to the exercise of power by governments in a parliamentary democracy: the first is that “the use of public power must be justified by law”.¹⁴² The second is that those who wield such power must be held “to some form of constitutional or parliamentary account”.¹⁴³ When contemplating the constitutional legitimacy of any holder of authority it is therefore important to ascertain both the legal source of his or her powers and the means by which he or she can be held to account for the exercise of those powers.

The issue of accountability turns, in part, on the institutional questions posed above. This is because, under the Constitution, the accountability that legitimizes government and the exercise of government powers is that which is found in the text of the Constitution itself and in the principles which underlie it. The text recognizes three branches of government, each with unique but overlapping authority: the executive, the legislature and the judiciary.¹⁴⁴ Among the underlying principles identified by the Supreme Court of Canada is that of “democracy”:

Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters ... and as candidates ...

...

¹⁴⁰ Adam Tomkins, *Public Law* (Oxford: Oxford University Press, 2003) at 46.

¹⁴¹ See *Constitution Act, 1867*, *supra* note 11, ss. 92(14), 96 and 101.

¹⁴² Colin Turpin, *British Government and the Constitution*, 3rd ed. (London: Butterworths, 1995) at 48, citing *Entick v. Carrington* (1765) 19 State Tr 1030 (Court of Common Pleas).

¹⁴³ Tomkins, *supra* note 140.

¹⁴⁴ See *Constitution Act, 1867*, *supra* note 11, Parts III, IV and VII.

To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution.¹⁴⁵

Consequently, part of determining whether a government actor has legitimacy requires asking whether the institutional structure in which that actor operates conforms to these requirements for democratic institutions, or is otherwise provided for in the Constitution.

The rest of this chapter will consequently seek the institutional “home” of officers of Parliament, attempting both to determine in which branch of government they serve and to trace the lines of their accountability from a constitutional perspective. In order to make this determination, it will be necessary to work from a set of criteria for associating these actors with a particular branch of government. The criteria employed here will include:

- Which branch of government appoints and removes the officers?
- Where are the officers employed? Who pays their salaries, provides their facilities, staff and budgets?
- Which branch of government do they work for? Whose functions do they perform or support?
- Who directs them?
- Which branch do they most closely resemble in functions, attributes and purpose?
- Who oversees their work and their budgets and administration?
- Who is accountable for them, and to whom do they account?
- On whose behalf do they act?

¹⁴⁵ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paras. 65 & 67 (CanLII).

With these criteria in mind, we now turn to a consideration of the relationship of officers of Parliament with each of the legislative, executive and judicial branches of government.

A Which branch of government appoints and removes the officers?

One of the parts of the *Federal Accountability Act* had as its purpose to standardize the appointment procedure for officers of Parliament, in a way that emphasizes their independence from the executive.¹⁴⁶ With two exceptions, the officers are now appointed by the Governor in Council after consultation with the leader of every recognized party in the House of Commons and approval by both the Senate and the House of Commons.¹⁴⁷ This formula is not exactly duplicated in the case of any other federal appointee, including judges. It has the effect of spreading responsibility for the appointment over a number of actors, with the Governor in Council, the formal signatory to the appointment, being only one participant. In an effort to ensure that the appointment is free from government control, either through a Cabinet decision, or by control of a majority in the Senate or House of Commons, the leaders of parties who won as few as twelve seats in the House must be consulted on the nominee.¹⁴⁸

This raises the issue of which branch of government is accountable for making these appointments. If the government ignores the consultations and produces a nominee of its

¹⁴⁶ *Supra* note 65.

¹⁴⁷ This does not apply, however to the CEO, who is still appointed, “by resolution of the House of Commons”: CEA, *supra* note 28, s. 13(1); or to the COIEC: PCA, *supra* note 46, s. 81(1). Presumably because of her duties with regard to the House of Commons code of conduct, appointment of the latter need only be approved by that House. A Standing Order of the House of Commons now provides for a process that comes into play when the government intends to appoint an “Officer of Parliament” (or the Conflict of Interest and Ethics Commissioner, who is named separately in the Order). The name of the proposed appointee is deemed referred to the appropriate standing committee for consideration and thirty days after the referral a notice of motion to ratify the appointment is to be put under Routine Proceedings of the House: S.O. 111.1, *supra* note 69.

¹⁴⁸ See PCA, *supra* note 46, s. 50(2) and Robert Marleau and Camille Montpetit, eds. *House of Commons Procedure and Practice*, 2000 ed., “Parliamentary Institutions”, online: Parliament of Canada <<http://www2.parl.gc.ca/MarleauMontpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch01&Seq=3&Lang=E#nB174>>.

own, there will presumably be political consequences. However, if the Governor in Council bows to the consensus of the party leaders, and there is a question later about the quality of the appointment, blame can be shared with legislators in a way that would not be available in the case of most appointment decisions. The appointment process thus does not provide a clear indication of whether the officers are executive or legislative bodies.

A few of the officers resemble judges in their appointment, by reason of their qualifications for appointment or their tenure. For example, the COIEC is required to be a former judge or member of a federal board, commission or other tribunal with (in the opinion of the Governor in Council) expertise in conflict of interest, professional regulation and discipline, ethics or related matters.¹⁴⁹ The method of appointment outlined in the legislation governing each of the officers above implies another qualification. To be acceptable to the leaders of all political parties, presumably the nominees for each of these positions must be essentially non-partisan and neutral on political issues. In this, it can be argued that their situation is to some degree similar to that of judges. Judges hold their positions until they reach the age of 75.¹⁵⁰ This is also true of the CEO, who holds office until age 65 as does the AG, although she also has a fixed term of 10 years.¹⁵¹ The other officers have fixed terms of seven years.¹⁵² To compare the appointment processes themselves, judges are appointed by the Governor General, acting on the advice of the Cabinet, following a recommendation by the Minister of Justice for puisne judges and a recommendation by the Prime Minister for

¹⁴⁹ COIA, *supra* note 40, s. 81(2). Also eligible are former Senate Ethics Officers or the former Ethics Commissioner.

¹⁵⁰ *Constitution Act, 1867*, *supra* note 11, s. 99(2).

¹⁵¹ CEA, *supra* note 28, s. 13; AGA, *supra* note 23, s. 3.

¹⁵² OLA, *supra* note 31, s. 49(2); ATIA, *supra* note 34, s. 54(2); PA, *supra* note 38, s. 53(2); PCA, *supra* note 46, s. 58(1); PSDPA, *supra* note 48, s. 39(2); LA, *supra* note 55, s. 4.1(2).

Chief Justices and Associate Chief Justices.¹⁵³ The law does not require any parliamentary involvement in judicial appointments.¹⁵⁴

The removal provisions for officers of Parliament are simpler and resemble those that apply to some other office-holders, including judges.¹⁵⁵ They provide that the officers may all be removed for cause by the Governor in Council on address of the Senate and House of Commons.¹⁵⁶ The term “for cause” indicates that the officers do not serve “at pleasure” and that there has to be a substantive reason for their removal. What is interesting about this formula is that it raises the question of whether the Governor in Council needs to have a “cause” of its own to dismiss the officer that goes beyond the address of the Senate and the House of Commons, or whether that address is, by itself, sufficient to trigger a removal.¹⁵⁷ Other appointees, including judges and the heads of a few executive bodies, require the same procedure for their removal. However, this too is a formula that diffuses responsibility for sanctioning a non-performing officer between the legislative and executive branches.

¹⁵³ Office of the Commissioner for Federal Judicial Affairs, “Process for an Application for Appointment” at 4, online: Office of the Commissioner for Federal Judicial Affairs, <<http://www.fja.gc.ca/appointments-nominations/process-regime-eng.html>>.

¹⁵⁴ Recently, however, informal mechanisms have been explored to increase scrutiny of these appointments by parliamentarians, including once occasion on which a nominee for appointment to the Supreme Court of Canada was called before parliamentarians to answer questions. See Forcese and Freeman, *supra* note 5 at 283-284 and “Harper nominates Rothstein for Supreme Court”, *CBC News* (23 February 2006), online: CBCNews.ca, <<http://www.cbc.ca/canada/story/2006/02/23/scoc-060223.html>>.

¹⁵⁵ Judges may be removed by the Governor General on address of the Senate and House of Commons: *Constitution Act, 1867*, *supra* note 11, s. 99. An inquiry by the Canadian Judicial Council which would usually take place prior to any such removal: *Judges Act*, R.S.C. 1985, c. J-1, ss.59-71.

¹⁵⁶ Again, except for the COIEC, whose removal only requires an address of the House. See AGA, *supra* note 23, s. 3(1.1); CEA, *supra* note 28, s. 13(1); OLA, *supra* note 31, s. 49(2); ATIA, *supra* note 34, s. 54(2); PA, *supra* note 38, s. 53(2); PCA, *supra* note 46, s. 82(1); PSDPA, *supra* note 48, s. 39(2); LA, *supra* note 55, s. 4.1(2).

¹⁵⁷ See discussion in Forcese and Freeman, *supra* note 5 at 249-251.

B Where are the officers employed?

The answer to this question requires a consideration of the legislative structure which underlies the administrative rules applying to each branch. Officers and employees of the legislative branch are dealt with, as concerns their employment status and financial administration, in the *Parliament of Canada Act*¹⁵⁸ and the *Parliamentary Employees Staff Relations Act*.¹⁵⁹ There are five recognized “employers” under those statutes: the Senate (as represented by the appropriate Senate committee), the House of Commons (as represented by the Board of Internal Economy, the Library of Parliament, the office of the Senate Ethics Officer and the office of the COIEC).¹⁶⁰ The employment relationships within those organizations are not dealt with under the same legislation that governs the staff relations of public servants in the executive branch. The parliamentary employees, their facilities and expenses, are also paid for out of moneys appropriated directly to the two Houses, not the executive’s budget.¹⁶¹

The bodies whose administration takes place inside the legislative branch include the COIEC, whose offices, personnel, salary and expenditures are all paid for out of “moneys appropriated by Parliament for that purpose”.¹⁶² Financially and from the employment perspective, therefore, the COIEC is an officer located within the legislative branch, with minimal opportunity for any control over her budgets or expenditures by the executive, including the Treasury Board.¹⁶³ This is not the case for the rest of the officers of Parliament.

¹⁵⁸ *Supra* note 46.

¹⁵⁹ R.S.C. 1985 (2nd Supp.), c. 33.

¹⁶⁰ *Ibid.*, s. 3.

¹⁶¹ PCA, *supra* note 46, ss. 19.4, 52.4.

¹⁶² *Ibid.* s. 84(6).

¹⁶³ This is true despite the fact that, technically, the “staff” of the COIEC is defined as a “department” under the FAA and therefore as falling under some of the administrative authority of the Treasury Board: *supra*, note 12, ss. 2(c), 7. However, this is also true of the “staffs” of all the other bodies listed above. Nonetheless, for the

They are not listed in either of the parliamentary statutes and their budgets and staff relations are not governed by the same rules.

Except for the COIEC, each of the other officers of Parliament have offices that bear the technical designation of “divisions or branches of the federal public administration”.

This means that the offices are named in Schedule I.1 of the *Financial Administration Act*.¹⁶⁴

They therefore satisfy paragraph 2(a.1) of the definition of “department” in that Act.

Opposite the name of each office in the Schedule is that of its “appropriate minister”. As a government department, each office is dependent for its budget and spending authority on its appropriate minister. The appropriate minister must approve budget estimate prepared by the officer before it is forwarded to the Treasury Board for inclusion with the Estimates presented to Parliament.¹⁶⁵

Only one officer is given a statutory remedy if the estimates for her office, as submitted to Parliament by the government, are considered inadequate. The AG is empowered in such a case to report her dissatisfaction to Parliament.¹⁶⁶

This is the situation as it is set out in legislation. However, the case has been made by the officers that they should not be subject to administrative and budget control by the very

House of Commons and the Senate, the PCA gives responsibility for financial and administrative matters to the Board of Internal Economy (made up of members of the House) and the equivalent Senate Committee: *ibid.*, ss. 19.3 and 52.3. The COIEC is not part of either House, however, so there is an interesting question about exactly who can set financial and administrative policy for that office.

¹⁶⁴ *Supra* note 12, s. 2, Sched. I.1.

¹⁶⁵ Privy Council Office, *supra* note 13. Besides the COIEC, the other partial exception is the CEO, most of whose budget, including election-related expenses, are a statutory charge on the Consolidated Revenue Fund, without the need for a further appropriation by Parliament: CEA, *supra* note 28, s. 553. The Office of the CEO is still subject to the annual estimates process for its staff's salaries.

¹⁶⁶ AGA, *supra* note 23, s. 19(2).

government institutions they were appointed to oversee. Their preference is to be supervised, even for administrative purposes, by Parliament.¹⁶⁷

Some adjustments are being made that are designed to increase the officers' independence from the executive in the matter of financial resources. The Officers of Parliament Working Group (described in Chapter 1), together with committees in both the Senate and the House of Commons, have expressed concerns with the way budgets are obtained for the offices of officers of Parliament.¹⁶⁸ As a result, an ad hoc panel of parliamentarians from every recognized party was struck in the Fall of 2005 as part of a pilot project to test a new funding mechanism. The panel was given responsibility to oversee the annual funding requests of all the officers of Parliament and then report their recommendations to the Treasury Board.¹⁶⁹ The panel's consideration of the budget proposals takes place after employees of the Treasury Board Secretariat have reviewed them, but before the responsible minister has signed off on the Main Estimates submission to Treasury Board. According to the framework agreement on which the project is based any of the parties concerned can bring questions regarding the administration of the offices to the panel's attention.¹⁷⁰

Arguably, this mechanism further insulates the funding of these offices from executive control. By the time the panel has reviewed the budget proposals and made their

¹⁶⁷ See, for example, Office of the Auditor General of Canada, *supra* note 96, "Matters of Special Importance" at paras. 18-19.

¹⁶⁸ *Supra*, note 70 and accompanying text.

¹⁶⁹ See "Note on Terminology" in the Introduction.

¹⁷⁰ See Thomas, *supra* note 2; RDM Consulting, *Work plan for the Implementation of a Pilot project for a revised funding and oversight mechanism for the Agents of Parliament: Draft 4* (11 October 2006) [unpublished]; William C. Corbett, *Assessment Report of the Pilot Project Mechanism for the Funding and Oversight of Officers of Parliament* (Manotick, Ontario: William C. Corbett, 2008) [unpublished]. The panel process was applied to the 2006-2007, 2007-2008 and 2008-2009 Estimates process for the officers. It was assessed in the Spring of 2008 and found to have been successful. A recommendation was made that the panel be given formal recognition in the Standing Orders.

recommendations to Treasury Board, the appropriate minister will have little choice but to sign off on the estimates.

In some ways, the financial administration of the offices of officers of Parliament is now more independent from executive control than the administration of the courts. The Courts Administration Service was created by legislation and is a separate department under the *Financial Administration Act*, providing the courts with administrative services, which its Act specifies are “at arm’s length from the Government of Canada”.¹⁷¹ However, the Service is subject to the financial and administrative procedures of the federal government and its budget is not determined by an external process analogous to the parliamentary panel’s role with respect to officers of Parliament.

When it comes to spending the moneys obtained in the estimates process, all the officers of Parliament except the COIEC are subject, as departments under the *Financial Administration Act*, to sections 33 and 34 of that Act. These sections provide that charges against the each department’s appropriation must be approved by the appropriate minister or by a person authorized by that minister in writing. Each of the officers will have been the subject of such a written delegation. The legislation thus makes a minister of the Crown ultimately responsible for the financial transactions of each of these offices.¹⁷²

The fact that all eight offices come within the scope of the *Financial Administration Act* means that they are all, to some degree, under the authority of the Treasury Board and subject to a variety of Treasury Board policies concerning administrative matters.¹⁷³ This too has been a matter of controversy, with the officers seeking freedom from the controls to

¹⁷¹ *Courts Administration Service Act*, S.C. 2002, c. 8, s. 2(b).

¹⁷² *Supra* note 12, ss. 33, 34.

¹⁷³ *Supra* note 12 and accompanying text.

which other government departments are subject.¹⁷⁴ The COL is the only officer with a statutory way out of the Treasury Board's control. The Governor in Council may make an order exempting that officer from directives issued under the *Financial Administration Act*.¹⁷⁵ The parliamentary panel referred to above is also intended to provide input into the question of how Treasury Board policies should apply to these offices.

As concerns personnel matters in the offices of the officers of Parliament, only the AG and the COIEC have the authority to hire their own staff. The employees of all the other offices are engaged pursuant to the *Public Service Employment Act*, which means that staffing authority comes to the officer of Parliament by means of a delegation from the Public Service Commission. It also means that the Public Service Commission has the authority to audit the hiring and promotion practices within the offices.¹⁷⁶ Further, as portions of the "federal public administration" it means that the other six offices are subject to the Treasury Board's human resources jurisdiction.¹⁷⁷ The AG alone is expressly empowered to exercise all these powers of the Public Service Commission and the Treasury Board.¹⁷⁸

Most of the officers' own salaries are provided for in the legislation itself. Five are fixed with reference to the salaries of judges: the CEO, COL, IC and PC are paid the salaries of a judge of the Federal Court, and the AG that of a puisne judge of the Supreme Court of

¹⁷⁴ *Supra* notes 70 and 167 and accompanying text.

¹⁷⁵ OLA, *supra* note 31, s. 54.

¹⁷⁶ *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13, ss. 15, 17, hereafter PSEA.

¹⁷⁷ FAA, *supra* note 12, ss. 7(e), 11.1.

¹⁷⁸ AGA, *supra* note 23, ss. 15, 16. No such exception is made for the COIEC, but as a body inside Parliament, that office's employees are not within the same human resources regime as the executive bureaucracy. See *supra* note 160 and accompanying text.

Canada.¹⁷⁹ Three, the COIEC, PSIC and LC, all have their salaries fixed by the Governor in Council.¹⁸⁰

Administratively as well, therefore, it is difficult to clearly place the officers of Parliament within either the legislative or executive branch. Their offices bear some resemblance to the separate administration that has been established for judges, but arguably are moving toward an even greater degree of independence in financial matters.

C Which branch of government do they work for?

The generally accepted theory behind the creation of officer of Parliament positions is that their work is intended to support Parliament's function of holding the government to account.¹⁸¹ And indeed, many of the officers' activities contribute to that end, in particular their audit work and their reports to Parliament. One of the most immediate examples of the support role is that the officers' reports assist Parliament to meet its duty of keeping the administration of these Acts under review. This is expressly required by three of the statutes: the *Official Languages Act*, the *Access to Information Act* and the *Privacy Act*.¹⁸² Even where such a provision does not appear in the legislation, these officers carry out Parliament's work of examining the probity of expenditure, the freedom of office holders from conflicts of interest, and the identification and correction of wrongdoing generally.

The officers of Parliament report to Parliament directly. This means that their reports are not tabled by a minister of the Crown, which is the case for almost all other government

¹⁷⁹ AGA, *supra* note 23, s. 4(1); CEA, *supra* note 28, s. 15(2); OLA, *supra* note 31, s. 50(2); ATIA, *supra* note 34, s. 55(2); PA, *supra* note 38, s. 54(2).

¹⁸⁰ PCA, *supra* note 46, s. 83(1); PSDPA, *supra* note 48, s. 39.2(1); LA *supra* note 55, s. 4.2(3). For her own salary, the COIEC is thus beholden to the executive, not the legislature, despite being the officer most closely associated, for administrative matters, with Parliament.

¹⁸¹ Thomas, *supra* note 20 at 293; Smith, *supra* note 25 at 64; *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources*, [1982] 2 S.C.R. 49 at paras. 26 and 47 (QL).

¹⁸² *Supra*, note 31, s. 88; *supra* note 34, s. 75(1); *supra* note 38, s. 75(1).

entities, but instead are transmitted to the Speaker of one or both Houses for tabling – usually immediately.¹⁸³ This underscores the intention that they have a direct relationship with the legislative branch.

However, even as regards their reporting function, there are aspects of the officers' *modus operandi* that indicate that they are not just the tools of Parliament. For example, if their investigative function was intended simply as an extension of that exercised by parliamentary committees, we would expect that the reports of their investigations would come to Parliament, but that is not always the case. Investigation reports are different, in most cases, from annual and special reports.¹⁸⁴ Some of the officers, the AG, the CEO and the LC, submit their final reports only to Parliament. The PSIC also sends all her case reports for tabling in the Houses of Parliament. Other officers submit individual case reports to Parliament only where adequate and appropriate action is not taken after their interaction with the executive – notably the COL – or after the government institution has had an opportunity to respond – this applies to the PC and IC.¹⁸⁵ The COIEC does not send her investigative reports concerning public office holders to Parliament at all.

Clearly, the officers' reports to Parliament are the principal means by which they render support to Parliament. In that context, it is interesting to examine the confidentiality rules that govern the officers, including in their relationship with Parliament. The AG and CEO have no express confidentiality provisions in their statutes. Presumably, therefore, everything they collect and produce in the way of information may be shared with Parliament

¹⁸³ AGA, *supra* note 23, ss. 7(3), 8(2), 23(5); CEA, *supra* note 28, ss. 534, 535, 535.2, 536; OLA, *supra* note 31, s. 69; ATIA, *supra* note 34, s. 40(1); PA, *supra* note 40(1); PCA, *supra* note 46, s. 90(1)(b); PSDPA, *supra* note 48, s. 38; LA, *supra* note 55, ss. 10.5(2), 11, 11.1. The AG and CEO send their reports only to the House of Commons. The rest report to the Senate as well. The frequency of reports was discussed above: see *supra* note 119 and accompanying text.

¹⁸⁴ The exceptions are the CEO and AG, who issue only one kind of report containing both general material and the results of examinations.

¹⁸⁵ See *supra* notes 119 and 123 and accompanying text.

unless it is governed by applicable confidentiality rules in other statutes (such as the *Privacy Act*¹⁸⁶).

The other five officers are required to observe the security measures that would normally apply to the information they obtain. Four of them, the COL, IC, PC and LC must conduct their investigations in private. They are allowed to disclose confidential information in their reports, but only to the extent necessary to establish the grounds for their conclusions and recommendations. The LC has a further list of specific information from the Registry that she is permitted to disclose in her reports.¹⁸⁷

The COIEC and PSIC have even more restrictions on what they can disclose. The COIEC and her staff have a general duty not to disclose any information that comes to their knowledge in the course of examining summoned witnesses, except as needed for the investigation. And any information that she is required to keep confidential may not be revealed in any of her reports to Parliament. Similarly, any information that comes to the PSIC's knowledge in the course of her duties may not be disclosed. When it comes to reports to Parliament, information necessary to support her findings and recommendations may be disclosed but only if the public interest in making the disclosure outweighs its potential harm.¹⁸⁸

These restrictions make it clear that the officers' duties do indeed go beyond simply replacing the work of parliamentary committees, who would otherwise call their own witnesses and examine their testimony themselves.¹⁸⁹ Working through the officers means

¹⁸⁶ *Supra* note 38.

¹⁸⁷ OLA, *supra* note 31, ss. 60(1), 65, 71, 72; ATIA, *supra* note 34, ss. 35(1), 61, 62, 63(1); PA, *supra* note 38, ss. 33(1), 62, 63, 64(1); PSDPA, *supra* note 48, s. 43; LA, *supra* note 55, ss. 10.4(3), 10.4(6), 10.5(2).

¹⁸⁸ COIA, *supra* note 40, ss. 43, 44(a), 48(3), 48(5); PCA, *supra* note 46, s. 90(2); PSDPA, *supra* note 48, ss. 43, 44, 49(1), 49(3).

¹⁸⁹ See discussion in Marleau and Montpetit, *supra* note 148, "3. Privileges and Immunities" and "20. Committees" and in The Senate of Canada, "Fundamentals of Senate Committees" (October 2004), online:

that parliamentarians may have only minimal access, in some cases, to the raw information that goes into the officers' findings.

Another ambiguity about the notion of officers of Parliament as extensions of Parliament is raised by the question of parliamentary privilege. Parliamentary privilege has been defined by the Supreme Court of Canada as “the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions”.¹⁹⁰ In particular, Parliament has the ability to conduct its own proceedings, and to carry out the functions that are necessary to those proceedings, free of supervision by the courts. Parliamentary privilege confers immunity on those functions which are necessary “to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly’s work in holding the government to account for the conduct of the country’s business.”¹⁹¹ It extends to the activities of employees of the House of Commons “whose work is connected with the legislative and deliberative functions of the House.”¹⁹²

It would appear to follow that, if the officers’ functions were considered to be necessary to Parliament’s work of holding government to account, and if they were considered to be under the control of or answerable to Parliament, privilege would protect their activities from judicial scrutiny. However, Parliament itself does not seem sufficiently

Parliament of Canada <<http://www.parl.gc.ca/38/1/parlbus/commbus/senate/com-E/pub-e/fundamental-e.htm#THE%20MANDATE%20AND%20POWERS%20OF%20COMMITTEES>>, of the power of committees to send for persons and papers. See also discussion below.

¹⁹⁰ *Canada (House of Commons) v. Vaid*, *supra* note 4 at para. 29.2.

¹⁹¹ *Ibid.* at para. 41.

¹⁹² *Ibid.* at para. 47. It has been extended, as well, to the activities of an officer such as the “Clerk of the Crown in Chancery for the Province of Ontario” where the function for which mandamus was sought was considered to have been imposed on the Clerk “in his character of an officer under the control of the Legislative Assembly and answerable to the Legislative Assembly.” See *Temple v. Bulmer* [1943] S.C.R. 265 at 267.

confident of this point to leave the officers unprotected from suits and prosecution before the courts.

Most of the officers are expressly excluded, like other investigative bodies, from criminal or civil liability for anything done or said in the course of their duties. In five cases, the AG, COL, IC, PC, and PSIC, a specific protection is included declaring both the officer's report, and accurate media accounts of it, to be privileged with respect to the law of defamation or libel and slander. Most of the officers are also declared, along with their staff, not to be competent or compellable witnesses in any court proceeding other than a prosecution for perjury.¹⁹³

The implication of these immunity provisions is that they are necessary to protect the work of the officers from being questioned or challenged in a court of law. However, if their work was considered to be necessary to the proceedings of Parliament, such protections would not be needed, as parliamentary privilege would apply. Where the officers report the results of their investigations to a number of people outside of Parliament, the additional immunity is perhaps understandable. But the AG's statute indicates that she reports only to Parliament, and yet contains a similar immunity clause to that of most of the others.¹⁹⁴

As regards supervision by the courts generally, half of the officers are expressly made subject to judicial review in the Federal Court. Four of the statutes, those of the COL, IC, PC

¹⁹³ AGA, *supra* note 23, ss. 18.1, 18.2; OLA, *supra* note 31, ss. 74, 75; ATIA, *supra* note 34, ss. 65, 66; PA, *supra* note 38, ss. 66, 67; COIA, *supra* note 40, s. 86.1; PSDPA, *supra* note 48, ss. 45, 46, 47. Only the CEO and the LC are not given these protections by their statute. It should be noted that the AG went unprotected by such a provision for the first 128 years of the office. Her immunity was added in 2006: *supra* note 68.

¹⁹⁴ This confusion about the application of parliamentary privilege to officers of Parliament is illustrated by its treatment in connection with the COIEC. In respect of the duties and functions she carries out concerning the conduct of members of the House of Commons, the PCA specifies that the COIEC enjoys the privileges and immunities of the House. No similar mention is made of parliamentary privilege in relation to her duties under the COIA. However, at the end of the provision that confers immunity from suit or from being compelled as a witness, a subsection declares that this protection does not limit any privileges or immunities the COIEC otherwise enjoys. See PCA, *supra* note 46, ss. 86(2), 86.1(3).

and COIEC make provision for review of the officers' decisions by the Federal Court or the Federal Court of Appeal. Persons who have made complaints to the COL, IC or PC, and who are not satisfied with the outcome, are given a right to apply to the Federal Court for a remedy.¹⁹⁵ However, even the officers whose statutes are silent on this point are potentially subject to judicial review by the Federal Court.¹⁹⁶ If so, then this is another way in which they are distinct from parliamentary bodies and persons performing truly legislative functions.

As we saw in Chapter 2, much of the officers' work is intended to have an impact on how government departments operate in areas which touch the officers' mandates. Several of them are empowered to provide advice to departments and agencies of the executive government or to public office holders. These include the AG, who advises departments of matters discovered in her investigations and the COIEC, who provides confidential advice to both public office holders, including Cabinet ministers, and to the Prime Minister.¹⁹⁷ All except the LC and the CEO report the findings of their investigations first to the head of the government institution in question.

¹⁹⁵ OLA, *supra* note 31, s.77; ATIA, *supra* note 34, s. 41; PC, *supra* note 38, s.41; COIA, *supra* note 40, s.66.

¹⁹⁶ There is inconsistency in the jurisprudence about whether, absent legislation, the results of the officers' work are subject to judicial review. An Ontario Divisional Court decision determined that complaint dismissals by province's Privacy Commissioner were covered by legislative privilege and therefore not reviewable by the courts: *Reynolds v. Ontario (Information and Privacy Commissioner)*, 2006 CanLII 36624, 217 O.A.C. 146. On the other hand, the English Divisional Court soundly rejected the argument that the U.K. Parliamentary Ombudsman was outside the scope of judicial review: *R. v. Parliamentary Commissioner for Administration ex p. Dyer*, [1994] All E.R. 375 (QB DC). Recently, a refusal by the COIEC to investigate a complaint was held by the Federal Court of Appeal not to be subject to judicial review as it carried no legal consequences: *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, *supra* note 85. It is not certain which view would prevail if an officer of Parliament's determinations were challenged in the courts otherwise than in accordance with the statutory provisions cited above. However, the *Federal Courts Act*, R.S.C. 1985, c. F-7, s.2 contemplates review by the Federal Court of "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament...". All of the officers considered here fall into that category.

¹⁹⁷ At least one commentator considers it clear that "[r]egulating the ethical conduct of ministers is an executive matter", and that providing advice to the Prime Minister reinforces the executive nature of the function. See Denis Saint-Martin, "Should the Federal Ethics Counsellor Become an Independent Officer of Parliament?" (2003) 29 Can. Pub. Pol'y 197 at 210.

We also saw that the officers have taken on mandates that expand their opportunities to influence executive behaviour, such as the report cards the IC issues on access to information practices in each department. Many of the officers also make comments intended to influence legislative policy development by the executive.

Finally, the investigative and adjudicative functions performed by, for example, the COL, IC and PC are in reality one form of conflict resolution between government departments and persons who feel the actions of a department have undermined their rights. In this, as well, their work can be seen to support the good functioning of public administration, and the correction of errors in departments and agencies.

It is reasonably clear that officers of Parliament do not provide direct support to the work of judges although some of their functions are similar, as will be considered below. However, as concerns the legislative and executive branches, we can see from the above that the ambiguity about the institutional home of the officers of Parliament continues through a consideration of which branch their work supports.

D Who directs them?

Parliamentarians are not given any legislative avenue to direct the work of officers of Parliament, although it is always open to the committees before whom they appear to make suggestions as to investigations that should be pursued.¹⁹⁸

By way of contrast, fully half of the officers may be directed or requested to carry out inquiries or studies at the request of ministers. These include the AG, who may inquire into matters as requested by the Governor in Council (if she does not feel it would interfere with

¹⁹⁸ The COIEC may be directed by parliamentarians with respect to her work administering the House of Commons code of conduct, but not as relates to her work under the COIA: PCA, *supra* note 46, ss. 86(1), (3).

her primary responsibilities); the COL, who may engage in other related activities as authorized by the Governor in Council; the PC, who must conduct studies when they are referred to her by the Minister of Justice; and the COIEC, who will provide the Prime Minister with confidential advice about conflicts of interest of public office holders, including at the request of the Prime Minister. In the main, however, such directions seem to be issued very rarely.¹⁹⁹

Aside from these specific authorities, however, there is no mechanism for the officers of Parliament to be directed in their work by anyone in the executive branch.

Clearly, officers of Parliament are not directly subordinate to anyone within the judicial branch. A successful judicial review application could result in a judicial order to an officer to withdraw a report or repeat an investigation using appropriate procedures. However, this kind of direction is not different from that which judges can give to executive bodies on judicial review.

E Which branch do they most closely resemble?

Another basis for associating the officers with a particular branch of government might be the nature of their functions and duties. Is their work legislative, executive or judicial in character?

First, are the officers' activities basically an extension of those of Parliament? In some respects, this is the case. Officers of Parliament conduct investigations of matters that are relevant to the legislative task of holding government to account. In so doing, they

¹⁹⁹ AGA, *supra* note 23, s. 11; OLA, *supra* note 31, s. 55; PA, *supra* note 38, s. 60; COIA, *supra* note 40, s. 43(a). In 1990, for example, requests from the Governor in Council were recommended by the AG to provide the office with authority "for a number of its long-standing activities": See Office of the Auditor General of Canada, *1990- Report of the Auditor General of Canada*, (1 November 1990) at para. 31.15, online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/parl_oag_199011_e_1160.html>.

employ statutory powers that are similar to the inherent constitutional powers of the two Houses of Parliament. The House of Commons and the Senate, and their committees, have the power call for anyone to appear before them to testify and bring documents. Such summonses can be enforced by being reported to the relevant House, which may then take such enforcement action as it sees fit, including contempt proceedings.²⁰⁰

This authority has been recreated in some of the legislation governing officers of Parliament, although using different language and a different reference point for the powers conferred. Seven of the officers have the same powers to summon witnesses and compel oral testimony and the production of document as those belonging to a superior court of record.²⁰¹

However, in some respects the investigation powers of the officers differ from those of Parliament itself. In addition to their court-like endowments, some of them also have the authority to enter the premises of any government organization under their jurisdiction and there receive free access to all information, including interviews with any person on the premises. In this category are the AG, the COL, the IC, the PC and the PSIC.²⁰² This authority to scour government departments for information is a power which Parliament itself has never had. No parliamentarian has the right to enter government premises, review its files and interview personnel.²⁰³

²⁰⁰ See *supra* note 189.

²⁰¹ AGA, *supra* note 23, s. 13(4); OLA, *supra* note 31, ss. 62(1)(a), (b); ATIA, *supra* note 34, ss. 36(1)(a), (b); PA, *supra* note 38, ss. 34(1)(a), (b); COIA, *supra* note 40, s. 48; PSDPA, *supra* note 48, s. 29(1); LA, *supra* note 55, s. 10.4(2). In the case of the COIEC, AG and PSIC the powers are limited to those a court enjoys in civil cases. (The AG's and the PSIC's statutes refer to the powers of commissioners appointed under the *Inquiries Act*, R.S.C. 1985, c. I-11, s. 5, which in turn makes reference to those of a court in civil cases.) Only the CEO has no compulsion powers, just the authority to request documentary information where he considers it necessary. See, for example, CEA, *supra* note 28, s. 478.23(4).

²⁰² *Supra* note 99. The LC has the more limited ability to send information received from registered lobbyists to public office holders for confirmation of its accuracy and completeness: *supra* note 100.

²⁰³ There is a statutory exception for prisons, which must grant members of Parliament access, pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 72.

The officers of Parliament have other powers which Parliament has never given itself or assumed. These include the capacity of the COL, IC and PC to go to court to enforce the rights they establish during the investigation of a complaint. Various officers can make orders that would be different from any measures parliamentarians could take. The CEO may adapt provisions of the *Elections Act* as an election proceeds; the COIEC can impose administrative monetary penalties on public office holders who fail to report conflicts of interest and can order them to take measures to correct conflicts of interest; a decision by the PSIC that an allegation of reprisal should proceed to the Public Service Disclosure Protection Tribunal has the effect of suspending or reversing any discipline imposed on the person who made the allegations.²⁰⁴ These are all matters that a parliamentary committee could issue recommendations about, but not orders with legal effect.

Some of the officers' less invasive functions are also distinct from those of members or employees of the legislature. Among these are the responsibility of the COIEC to give confidential advice about ethics and conflicts of interest to the Prime Minister; the LC's obligation to maintain a registry of lobbyists and the fact that several of the officers are actually subject to being directed by a minister or the Governor in Council to undertake certain studies and other duties.²⁰⁵

Several bodies in the executive branch share some of the attributes and functions of officers of Parliament. It is useful to compare three of these bodies, the Security Intelligence Review Committee (SIRC), the Public Service Commission (PSC) and the Canadian Human Rights Commission (CHRC), to the officers of Parliament in order to consider the extent to which the latter are really unique. The points of similarity between these entities and the

²⁰⁴ See above.

²⁰⁵ See above.

officers include their appointment, removal and remuneration procedures, aspects of their mandates and their reporting functions. There remain, however, some important attributes of the officers of Parliament, taken as a group, that make them distinct.

A detailed comparison of the officers of Parliament with the CHRC, PSC and SIRC, together with the relevant statutory references, appears in the Appendix to this thesis. In general, each of these bodies has both less connection to Parliament and less formal and informal separation from the executive branch. Aspects of the mandate of the CHRC, PSC and SIRC are close to those of the officers of Parliament, although their reporting relationship with Parliament is somewhat less immediate. While two of the three report directly, not through a minister, their legislation does not indicate that they are to report the results of individual investigations, although they can of course choose to do so in annual or special reports. Nor does the legislation require that a parliamentary committee be designated to receive their reports.

In terms of their appointment, there is less parliamentary involvement for these entities, although the procedures for appointing the President of the PSC and the members of SIRC feature some of the same requirements that apply to officers of Parliament. Yet both these agencies have other reasons for being considered fundamentally executive in nature – the first because it has responsibility for staffing in the public service and the second because its membership is drawn from the Queen’s Privy Council for Canada and reports primarily to a minister of the Crown. The CHRC and PSC share the same removal process as the officers of Parliament.

Financially and administratively these bodies are for the most part within the normal legislative structure for executive departments and agencies. One exception is the by-law

making authority of the CHRC, by which remuneration and expenses can be established, but even that authority is made subject to the approval of the Treasury Board.

However, the truth remains that these bodies perform functions that are quite similar to those carried out by officers of Parliament. Why then, are they in a different category? One reason is simply that they have been treated differently. They are not part of the group whose appointment and removal provisions were standardized in the *Federal Accountability Act*²⁰⁶ or Standing Orders or whose budgets were made the subject of an ad hoc parliamentary committee. They therefore have not been accorded the same separation from executive control of their appointment or budgeting processes that the officers of Parliament now enjoy. But, more fundamentally, these other bodies are not part of the accountability myth that surrounds officers of Parliament and was referred to in Chapter 1. The subject-matter for which they are responsible was not considered key to restoring trust in government and therefore was not given to one of the officers in this specialized group of eight. Why that, in turn, is the case is another question, and one to which we will return in the last chapter of this paper.

Several aspects of the work of some of the officers also resemble the functions of judges. As noted above, all of the CEO, COL, IC, PC, COIEC, and PSIC are formally tasked with receiving complaints or disclosures of wrongdoing about the matters within their jurisdiction. When such complaints are received, the officers' job is to investigate them to see if they are substantiated. As explained in Chapter 2, this often involves the officers reaching conclusions, and sometimes imposing obligations, on persons within the government who are accused of the action to which the complaint or disclosure is addressed.

²⁰⁶ *Supra* note 6.

Thus, the officers find themselves hearing both sides of an issue and reaching a “verdict” as to whose version of the facts is the correct one.

Most of the officers have powers similar to those of judges.²⁰⁷ However, the uses to which these powers are put by officers of Parliament are investigative, rather than adjudicative, which is a significant difference from the function of a court. Judges compel evidence as part of testing a case that has been assembled and presented by opposing parties for decision. The officers of Parliament are tasked with doing the investigation themselves and use their powers to elicit information as part of their own collection and consideration of the evidence. Officers of Parliament, even those required to give particular parties “an opportunity to be heard”, are not required to hold a hearing, similar to a court process. All of their investigations can proceed behind closed doors – indeed, in some cases the legislation requires this.²⁰⁸ There is no obligation to permit the complainant to confront or cross-examine the person complained of, or *vice versa*.

There are certainly similarities here with the adjudicative role of judges. But an important difference is that it is very rare that the results of the officers’ process have any legally binding effect. Their impact is usually reputational only.

A further distinction that marks officers off from judges is that the officers can, themselves, appear before the courts to defend or enforce their decisions. This is recognized in the legislation establishing the COL, IC and PC, while the PSIC may appear before the Public Servants Disclosure Protection Tribunal. Other officers of Parliament have also

²⁰⁷ See above.

²⁰⁸ See provisions related to the COL, IC, PC and LC, considered above, in Chapter 2.

appeared before the courts when their decisions were challenged.²⁰⁹ Judges do not appear before the higher court when their decisions are appealed.

F Who is accountable for them and to whom do they account?

Another aspect of the theory that the officers are part of the legislative branch is that they consider themselves responsible and accountable to Parliament (rather than to anyone in the executive branch). To test this assumption, it is necessary to review the mechanisms by which parliamentarians oversee the work of the officers.

As regards the administration of their offices, until recently parliamentarians really had no role in determining the budgets of the officers or in supervising their expenditures. This has been altered, in part, by the advent of the special panel and pilot project referred to earlier, whereby all of the officers' budgets are now the subject of a recommendation from a panel of members of the House of Commons. The panel does not yet have a specific mandate to supervise how those budgets are spent.²¹⁰

With respect to their substantive functions, oversight is mainly by way of designated parliamentary committees, which are all distinct from the budget panel. The statutes of four of the officers, the COL, IC, PC and PSIC require there to be a designated committee of the

²⁰⁹ For example, the COIEC and the Registrar of Lobbyists appeared to defend challenges to their actions by Democracy Watch. See *supra* notes 58 and 85.

²¹⁰ Each of the officers of Parliament is also required to answer to an appropriate parliamentary committee for the administration of their offices. This is because they have been identified, under new provisions of the FAA, *supra* note 12, as "accounting officers" for their respective departments. This concept, introduced by the *Federal Accountability Act*, *supra* note 6, requires the designated officer in charge of government institutions to appear before appropriate parliamentary committees and answer questions on a variety of administrative matters, including compliance with government policies and procedures. The relationship between this process and that of the ad hoc panel overseeing their budget process is not yet clear.

House of Commons or Senate (or both) to review the reports and work of the relevant officer of Parliament.²¹¹

In only two cases is the designated committee responsible solely for the subject matter of concern to the officer. The AG reports to the Public Accounts Committee, whose mandate is to oversee the government's finances and the COL reports to the Standing Committee on Official Languages. The other officers with designated committees all report to the Standing Committee on Access to Information, Privacy and Ethics. This large mandate, and the requirement to review so many officers' reports, may make it difficult for the work of each officer to be given in-depth consideration.²¹²

Another oversight mechanism to which some of the officers are subject is the statutory requirement that the terms and administration of their legislation be reviewed by Parliament – either once or on an on-going basis.²¹³

How effective is Parliament's oversight of the officers of Parliament? Well, on the one hand, parliamentarians have not always been assiduous in their review of the reports of officers of Parliament. In 1999 the IC, for example, noted that “[n]ot once, in 16 years, has the designated committee held a hearing to consider the annual report of the Information Commissioner”.²¹⁴

On the other hand, a serious breach of administrative propriety a former PC was the subject of an investigation by the parliamentary committee who, at that time, was responsible

²¹¹ OLA, *supra* note 31, s. 88; ATIA, *supra* note 34, s. 75(1); PA, *supra* note 38, s. 75(1); PSDPA, *supra* note 48, s. 58(4). There is a similar statutory requirement regarding the COIEC, but it is limited to her role in administering the code of conduct for the House of Commons: PCA, *supra* note 46, s. 41.5(1). Even where the statutes are silent, committees have been designated for most of the officers: Canada, House of Commons, *Standing Orders of the House of Commons* (June, 2009), c. 13, S.O. 108(3).

²¹² See *infra* note 214 and accompanying text.

²¹³ See *supra* notes 122 and 124-127 and accompanying text. See also CEA, *supra* note 28, s. 536.1; ATIA, *supra* note 34, s. 75(2); PA, *supra* note 38, s. 75(2); COIA, *supra* note 40, s. 67(1); PSDPA *supra* note 48, s. 54 and LA *supra* note 55, s. 14.1(1).

²¹⁴ *Supra* note, 77. Cited in Thomas, *supra* note 20 at 303.

for reviewing his reports, the Standing Committee on Government Operations and Estimates. While examining the annual report of the PC, and having asked for and received information concerning the expenses of his Office, the Committee learned, from an employee of the OPC, that some of the information provided by the Office had been falsified. The Committee held hearings at which the PC and his officers and employees were examined, and concluded that they had been deliberately misled. Further, they determined that the financial and administrative practices of the Commissioner and his Office were sufficient irregular, and inconsistent with his role, that the Committee had come to “lack confidence in the Privacy Commissioner and his capacity to perform his duties to Parliament and the people of Canada”.²¹⁵ The misdeeds they uncovered were referred by the Committee to the AG and the Public Service Commission, respectively. The Committee would have recommended that the House of Commons adopt a motion asking the Governor General to remove the PC, had the incumbent not resigned by the time the Committee issued its final report. Its report also recommended a study of institutional arrangements relating to the oversight of officers of Parliament.²¹⁶

Clearly, in the four years between the IC’s complaint of a lack of attention, and the examination of the PC’s 2003 Annual Report, parliamentarians had found reasons to scrutinize the activities of at least one officer of Parliament more closely. An interesting portion of the Committee’s report is the reference to having “lost confidence” in the incumbent of the office.²¹⁷ This phrasing assumes a relationship between the House of Commons and an officer of Parliament that is analogous to the relationship between ministers

²¹⁵ Parliament, Standing Committee on Government Operations and Estimates, “Fifth Report: Matters Relating to the Office of the Privacy Commissioner”, in *Sessional Papers*, No. 8510-372-121 (June 2003) at 17.

²¹⁶ *Ibid.* at 17-19.

²¹⁷ *Ibid.* at 16.

of the Crown and Parliament. Ministers are, in theory, required to resign where they lose the confidence of the parliamentary chamber to which they are responsible.²¹⁸ Certainly executive governments are required to maintain such confidence, or face dissolution of parliament and an election. But this is not true of any other government actors. Public servants and public office holders do not need to have the confidence of Parliament to continue in their jobs. Their responsibility to Parliament is by way of that of their appropriate minister – the minister designated as responsible for the department or agency in which they work.

A relationship of confidence between an individual public office holder and the Houses of Parliament, would therefore be a constitutional innovation. However, there was no suggestion that the Committee sought to invoke the responsibility of the appropriate minister of the Crown, which in the case of the PC is the Minister of Justice. No mention was made of that minister or his department in the list of agencies the Committee recommended be asked to follow up on their report. A more direct relationship between Parliament and the officers is therefore implied, although with the recognition that the “institutional arrangements” surrounding the officers may not, in reality, support such a relationship.²¹⁹

As revealed by the nature of the address the Committee would have recommended, the defaulting PC could not have been removed or disciplined by the House of Commons or the Senate directly. Only the Governor in Council can dismiss an officer of Parliament. Parliament itself does not have the same authority over such officers that each of the parliamentary bodies has over its own officers and employees. If an officer of Parliament is

²¹⁸ Tomkins, *supra* note 140 at 155-156.

²¹⁹ Parliament, Standing Committee on Government Operations and Estimates, *supra* note 215 at 18.

suspected of being untrustworthy by the parliamentarians to whom the officer reports, that assessment can provoke an address by the Senate and House of Commons and provide a “cause” for which the Governor in Council may remove the officer. But our question is whether the officers are part of the legislative branch. The 2003 incident reveals that, while parliamentarians can have a significant role in holding officers of Parliament to account, they do not have the institutional tools to impose sanctions on such officers themselves (though often, as in this case, such technical sanctions will become unnecessary due to the individual’s decision to resign rather than be dismissed). Other than recommending a reduction in their budgets, Parliamentarians are without any direct means of sanctioning the officers for their performance.²²⁰

Are the officers, instead, accountable as bodies within the executive branch? As noted above, executive bodies are responsible to Parliament indirectly, through a Minister of the Crown. Adam Tomkins explains that ministers are “the vehicles through which Parliament holds the Crown to constitutional account, keeping the exercise of the Crown’s administrative and executive authority within parliamentary terms.”²²¹ This connection between the people’s elected representatives and all of the persons who exercise power in the executive branch of the government is what makes our system a democracy.

This three-part relationship between Parliament, a minister and the public servants within that minister’s responsibility is easiest to see in the case of departments and agencies

²²⁰ A sanction that parliamentarians can apply to anyone is that of a finding of contempt. However, contempt will be an option if any witness is found to have misled the House of Commons or the Senate or one of its committees. There is no requirement that a relationship of “confidence” exist between the witness and either Chamber for contempt to be found. A finding of contempt is not, therefore, a sanction that stems from a special relationship between Parliament and the officers of Parliament, although the Committee noted that such officers would be held to “an even higher level of duty and foreknowledge for honest during testimony”: *ibid.* at 9. Also, contempt will only apply to activities that take place vis-à-vis Parliament itself – it would not be available as a sanction for the PC’s misdeeds in his handling of the office’s finances and administration. See Marleau and Montpetit, *supra* note 189.

²²¹ Tomkins, *supra* note 140 at 50.

that are directly under a minister's control, like the Department of Foreign Affairs and International Trade or the Canadian International Development Agency. However, even arm's length bodies, like administrative tribunals, have assigned ministers through whom parliament exercises its function of holding all parts of the executive to account. Each such body tables its reports to Parliament through its responsible minister. This applies to both substantive annual reports and the "departmental performance reports" that form part of the Estimates process.²²²

The fact that all executive bodies have an appropriate minister through whom they are responsible to Parliament is reflected in the *Financial Administration Act*.²²³ All of the entities considered in this paper, except the COIEC, are listed in Part III of Schedule VI of that Act. Section 16.4 (2) describes the administrative accountability of these organizations to Parliament. It begins "[w]ithin the framework of the appropriate minister's responsibilities under the Act or order constituting the department and his or her accountability to Parliament..."²²⁴

The appropriate minister for each of the offices of the officers of Parliament is identified in Schedule I.1 of the *Financial Administration Act*. In the case of these bodies, as reflected in the wording of s.16.4(2), the appropriate minister has a limited number of responsibilities. As only ministers of the Crown communicate directly with Parliament in financial matters, the appropriate minister still has to sign the estimates reflecting the budgets of each of the offices and make the formal request for funds, first to the Treasury Board and then to Parliament itself. Also, sections 33 and 34 of the *Financial Administration Act* place the ultimate responsibility for expenditures out of those budgets in the hands of the

²²² *Supra* note 13.

²²³ *Supra* note 12.

²²⁴ *Ibid.*, s. 16.4(2).

appropriate minister.²²⁵ Each of the officers of Parliament (except the COIEC) therefore spends his or her budget on the basis of an authorization from their appropriate minister.

Can it be said, therefore, that the officers of Parliament are accountable to their appropriate ministers, and through them to Parliament? It is clear that when it comes to the substantive activities of the officers of Parliament, no member of the Cabinet is responsible to answer to Parliament on their behalf. No minister is given responsibility for the activities of the offices under any of their constituting legislation. However, does the language in the *Financial Administration Act* indicate that, for all the officers' independence, ministers' "accountability framework" for their institutions remains? If so, this raises questions about the position of these ministers when a mechanism like the ad hoc parliamentary panel is introduced, attenuating the appropriate ministers' capacity to have any influence over the officers' budgets. We will return to this question in the last chapter.

As concerns the spending authority, if Parliament had any real sense that a minister remained responsible for having issued the spending authorization in an office like that of the PC, it is hard to explain why, during the 2003 investigation of the mismanagement of funds in that office, the appropriate minister was never examined by the parliamentary committee.

Another aspect of executive oversight that most government bodies are subject to is the Treasury Board's authority to set and enforce administrative and financial policies. However, another purpose of the ad hoc parliamentary panel discussed above is to comment on the degree to which Treasury Board policies should be applied to officers of Parliament. The officers themselves have commented that the application of such policies to their operations undercuts their independence. If they make that case successfully to the panel, conceivably Treasury Board control over their administration will also become attenuated.

²²⁵ *Ibid.*, ss. 33, 34.

With these developments in mind, it is hard to see officers of Parliament as fully subject to oversight by the executive branch. That does not mean that they are not subject to a variety of specific controls. Those offices of officers of Parliament which are staffed under the *Public Service Employment Act* are subject to audit by the PSC.²²⁶ The *Federal Accountability Act* has also made almost all of the officers of Parliament subject to each other's oversight, within their various areas of substantive mandate.²²⁷ However, as we are seeing, oversight by an officer of Parliament is not the same thing, necessarily, as oversight by the executive branch of government.

By way of comparison, judges' oversight and discipline is handled within various courts by the chief justice of that court and, for serious allegations leading to potential removal of the judge, by the Canadian Judicial Council. This is a body of all of the senior judges in the country who are responsible, at the request of the Minister of Justice or the attorney general of a province, to commence an inquiry as to whether a judge should be removed from office. The report of an inquiry is made to the Minister of Justice who then advises the Governor in Council (who may then elect to engage the removal procedure with Parliament).²²⁸

Interestingly, the *Judges Act* also provides that the Canadian Judicial Council's investigative process can be engaged with respect to the removal from office of any person appointed to hold office during good behaviour under an Act of Parliament. In such a case, at the request of the Minister of Justice, the Council can commence an inquiry and make a report as to whether the person should be removed on the same grounds of incapacity that

²²⁶ *Supra* note 176, s. 17. This includes all of the offices except those of the COIEC and the AG.

²²⁷ *Supra* note 66.

²²⁸ *Supra* note 155.

apply to judges.²²⁹ Conceivably, in a situation in which an officer of Parliament is suspected of misconduct or incapacity, this process could be triggered as a means of obtaining an independent assessment of the officer's capacity to continue in office. However, as the Privacy Commissioner example demonstrates, it is assumed that in such cases the relationship between the officers and Parliament is such that it is parliamentarians, not an outside body such as the Canadian Judicial Council, who must test the fitness of the individual to continue as an officer of Parliament.

G On whose behalf do they act?

Officers of Parliament are often known as “agents of Parliament”. Some of the officers prefer this title themselves.²³⁰ Black's Law Dictionary indicates that an “agent” is “a person authorized by another to act for him, one intrusted (sic.) with another's business.”²³¹ By some interpretations, that is what it could be said that the officers do. They have been empowered by Parliament to act for Parliament in carrying out part of Parliament's business of holding government to account.

However, on closer examination, this analogy tends to break down. First, has Parliament really acted as a principal in entrusting its business to the officers? The officers' mandates are not based on any direct legal relationship, direction or instruction from either

²²⁹ These include age or infirmity, misconduct, failure in the execution of the office and being in a position incompatible with the execution of the office. See *Judges Act*, *supra* note 155, ss. 69(1), 65(2).

²³⁰ See, for example: Canada, Office of the Commissioner of Lobbying, “Roles, Office of the Commissioner of Lobbying” (2 July 2009), online: Office of the Commissioner of Lobbying <http://www.ocl-cal.gc.ca/eic/site/lobbyist-lobbyiste1.nsf/eng/h_nx00264.html>; Public Sector Integrity Canada, “About Us” (2 December 2008), online: Public Sector Integrity Canada, <<http://www.psic-ispc.gc.ca/doc.php?sid=7&lang=eng>>; Canada, Office of the Information Commissioner, “Notice of Vacancy” (24 June 2009), online: Office of the Information Commissioner, <http://www.infocom.gc.ca/notice_vacancy-note_vacant-e.asp>. It is to be assumed that the use of this term by the officers on their websites does not refer to the quite old notion of “parliamentary agent”, meaning a non-member (usually a lawyer) who appears on behalf of the promoter of a private bill before the House of Commons or its committees. See Marleau and Montpetit, *supra* note 148, “23. Private Bills Practice”.

²³¹ *Black's Law Dictionary*, 5th ed., s.v. “agent”.

the House of Commons or the Senate. They are based in statute. But when “Parliament” acts through legislation, it in fact has three branches. Laws require the approval of both Houses of Parliament and royal assent to be passed, thus the Crown has a role in the making of legislation. If the officers can be said to be acting as agents simply because they are exercising a mandate under legislation, then they are acting as agents of the Crown, as well as the House of Commons and Senate. Put this way, it is easy to see that the flaw here is not just theoretical. If it is enough to establish an agency relationship with Parliament that a law is passed by Parliament empowering the actor then everyone who acts under powers conferred by federal statutes would be an agent of Parliament.

Further, are the officers really carrying out Parliament’s business? It is true that they perform jobs which have to do with holding government to account and that their work assists Parliament. But similarity of function, and the fact that the actor’s activities assist the supposed principal, are not enough to establish an agency relationship. Reading further in the Black’s definition, we see that an agent is:

One who represents and acts for another under the contract or relation of agency ... One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it. One who acts for or in place of another by authority from him; a substitute, a deputy, appointed by the principal with power to do the things which principal may do. One who deals not only with things, as does a servant, but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons.²³²

In short, an agent acts on behalf of, and in the name of, the principal. The affairs in which he or she engages are not the agent’s, but the principal’s. The agent exercises his or her own discretion, but only as to “means”. The substance and content of the agent’s

²³² *Ibid.*

activities are determined by the principal. And the agent is liable to account to the principal for all that the agent does.

With respect to one officer of Parliament, the AG, the Supreme Court of Canada has described her relationship to Parliament in exactly these terms. In *Canada (Auditor General v. Canada (Minister of Energy, Mines & Resources))* the Court said: “The Auditor General is the political servant of Parliament who carries out Parliament’s function on its behalf.”²³³ However, there are reasons why this characterization of the relationship should not be taken as the final word on the matter.

In several respects the relationship of the officers of Parliament to either House of Parliament does not meet the legal test for agency. The officers act in their own names, exercising their powers according to their own judgment as to which matters to pursue, as well as when and how. They are not formally substitutes for or deputies of either House or its members. They render account to Parliament of what they do, but not with respect to all their activities, and some information they are required to keep confidential, even from parliamentarians. And their powers are not necessarily confined to the things that parliamentarians themselves could do.

When we move from the general or private law description of agency to the tests that have been applied in the governmental context, another difficulty arises, that of control. In the area of Crown liability, for example, courts have increasingly made the issue of control the determining one for a finding that a person was acting as an agent of the Crown. For example, in *Westeel-Rosco Ltd. v. Board of Governors of South Saskatchewan Hospital Centre*, the Supreme Court of Canada stated that “Whether or not a particular body is an

²³³ *Supra* note 181 at para. 47. See, however, paragraph 26 of the judgment, where the Court characterizes the AG’s function as limited to “an evaluation of the economic cost” of a particular decision, and says that members of Parliament have a different job, that of passing “their own political judgments on the wisdom of the venture.”

agent of the Crown depends upon the nature and degree of control which the Crown exercises over it.”²³⁴ In that case, the Court distinguished the Hospital Board in question, which they found was not a Crown agent, from the Halifax Harbour Commissioners, which had been declared to be an agent in an earlier decision.²³⁵ The Commissioners were “a body which is subject at every turn in executing its powers to the control of the Crown”, which was a condition to be distinguished from that of the Hospital Board, who had “complete discretion to conduct its own affairs within the limits of its statutory powers”.²³⁶

If a similar test were to be applied to the question of whether the officers of Parliament are Parliament’s agents, it seems likely that it would not be satisfied, with respect to most of the current group of officers. The officers are not appointed, directly, by Parliament and do not require the approval of parliamentarians for their actions, let alone being subject to their control “at every turn”. Like the Hospital Board they have wide powers which they exercise at their own discretion, without the need to consult parliamentarians or anyone else. By either a private or public law approach to agency, therefore, it seems unlikely that officers of Parliament are legally the agents of Parliament (although a less technical application of the term will no doubt continue to be applied).

Are they, then, the Crown’s agents? In the *Westeel* case, agency was rejected because the Act in question “confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown.”²³⁷ This is an accurate description of the relationship between the executive and the

²³⁴ [1977] 2 S.C.R. 238 at 250-251.

²³⁵ *Halifax City v. Halifax Harbour Commissioners* [1935] S.C.R. 215.

²³⁶ *Supra* note 234 at 251, 253.

²³⁷ *Ibid.* at 254, quoting *Meat Industry Board v. Sheedy* [1927] A.C. 899.

officers of Parliament, as regards the exercise of the latter's discretionary powers. There would not seem to be any basis for concluding that they act as agents of the Crown.

Nor do they act on behalf of the judiciary (although the U.K. Ombudsman has recommended that she be given a more formal role as an alternate dispute resolution mechanism to which judges could refer cases between individuals and the government).²³⁸ In short, officers of Parliament would not seem to be agents of any external authority, but instead act on their own behalf in the discharge of their functions.

H Conclusion

“An officer of Parliament is a peculiar sort of official, one who straddles the executive and legislative branches of government.”²³⁹ They are “essentially executive arms of the legislative branch.”²⁴⁰ “In the eyes of the public, the most recognisable role of the Parliamentary Ombudsman ... is that of performing functions similar to those of the courts and tribunals...”²⁴¹

Paradox seems to be inevitable whenever a description of the officers of Parliament is attempted. Executive bodies doing Parliament's work, investigative bodies performing adjudicative functions, government-staffed and -financed offices responsible directly to Parliament. Do the paradoxes even matter? Are we not quibbling about meaningless structural questions when what is important is what the officers can achieve in the way of government accountability?

²³⁸ Ann Abraham, “The ombudsman and “paths to justice”: a just alternative or just an alternative” [2008] P.L.

1. See discussion of U.K. Parliamentary Ombudsman at *supra* note 78.

²³⁹ Forcese and Freeman, *supra* note 5 at 246.

²⁴⁰ *Ibid.* at 405.

²⁴¹ Ann Abraham, “The Ombudsman as Part of the UK Constitution: A Contested Role” (2008) 61 Parliamentary Affairs 206 at 208. See *supra* note 78 for discussion of U.K. Ombudsman.

It was argued at the beginning of this chapter that legitimacy under the Constitution takes two forms. One is that a person wielding the power to affect the lives of individuals or the affairs of government must be authorized by law. The other is that there must be some mechanism for holding that person to account for the exercise of their authority and for their expenditure of public funds. It matters, therefore, if a body with these attributes is placed in a sort of penumbra of accountability, where in “straddling” the various branches of government, it escapes the accountability mechanisms that apply to each of them. To some extent, this appears to be true of the officers of Parliament.²⁴²

While the officers share a similarity of function and status with actors in all three branches of government, there are significant dissimilarities with each branch, particularly in the area of accountability. Despite being essential to one of the most important functions of Parliament, they are not, for the most part, members of the legislative branch. They are outside its administrative structure and some of their functions and attributes are distinct from those of parliamentary bodies.

They (again for the most part) spend moneys appropriated to the executive government, use facilities paid for by the executive, run programs and implement laws as do other executive bodies, but have made the case, with some degree of success, that they ought not to be within the executive branch. The officers are increasingly removed from administrative and financial oversight by the executive and from accountability to or through the ministers of the Crown. They have a closer relationship to Parliament than other

²⁴² Some seem to be aware of this gap and have turned their minds to engaging other methods of accountability for their offices. The AG, for example, is audited by an outside firm of auditors, as required by s. 21 of the AGA, *supra* note 23, but also participates in an “international external review” of her audit practices. In 2003-04 this review was led by the National Audit Office of the U.K., with participation from the national auditors of France, Norway and the Netherlands. See Office of the Auditor General of Canada, *supra* note 96, “Matters of Special Importance”, at paras. 24-25. Such steps are clearly important quality control mechanisms, although they do not address the issue of democratic accountability which has been the subject of this Chapter.

executive bodies, but without becoming subject to the administrative hierarchy of the legislative branch. Thus the officers occupy a place between the effective control of the executive and that of Parliament. It can be argued that, in this space, the officers' overall accountability is minimized and their autonomy of action maximized.

Many of the officers adjudicate interests as between aggrieved members of the public and public servants accused of wrongdoing or maladministration and for that purpose wield court-like powers. Their findings are not binding, but can have an important impact on reputations and careers. But they do not follow all of the rules or practices of adjudicative bodies such as courts or tribunals. They are not judges and are subject to only minimal judicial oversight.

Arguably, therefore, the affiliation of officers of Parliament with any of the three branches of government, and with the accountability structures that pertain to them, is attenuated. Their legitimacy, from a constitutional perspective, is arguably attenuated to the same degree.

There are two further questions to ask about this state of affairs. The first is "Why do officers of Parliament occupy this shadow land of accountability?" The second, which is closely related, is "Why are parliamentarians, executive governments, public administration experts, the media and the public comfortable with giving officers of Parliament this special status and freeing them from close scrutiny?"

The answer would appear to be that their legitimacy derives not just from their legal mandate or the accountability mechanisms that are applied to them, but from something additional, something that is unique to this small group of office holders. In the next chapter of this thesis we will explore what that source of legitimacy might be.

Chapter 4 : The legitimacy of officers of Parliament – an alternative approach

We saw in the last chapter that officers of Parliament share characteristics of institutions in each of the three branches of government: legislature, executive and judiciary. We also saw that they are nonetheless distinguishable from all three branches of government – both structurally and from an accountability perspective. Indeed, independence from each of the other branches is considered one of their most valuable characteristics, fitting them to “address problems the courts, the legislature and the executive cannot effectively resolve”.²⁴³

However this independence from the structures and accountability mechanisms that apply to the rest of government has implications for the legitimacy of the officers as people entrusted to exercise governmental powers. To repeat what was said in Chapter 3, officers of Parliament have legal authority, in the sense that they are empowered by an Act of Parliament. But an inquiry about the constitutional appropriateness of granting power to a particular body goes beyond the issue of legal empowerment and has to do with whether they are part of an institution recognized by the Constitution or responsible to the public through such an institution. Bodies which are outside the framework contemplated by the text of the written Constitution, and removed from conventional accountability mechanisms, are difficult to locate within a constitutional vision of legitimate holders of power.

A Perceived legitimacy

And yet, the perception is that officers of Parliament have not less but more entitlement to trust and respect than those whose activities they oversee. They are variously

²⁴³ *B.C. Development Corp. v. B.C. (Ombudsman)* [1984] 2 S.C.R. 447 at 461. See also Megan Furi, *Officers of Parliament: A Study in Government Adaptation* (M.A. Thesis, University of Saskatchewan, 2002), online: University of Saskatchewan Library Electronic Theses & Dissertations <<http://library2.usask.ca/theses/available/etd-11062008-130840/>>.

described as being a “critical mechanism” of accountability,²⁴⁴ as possessing “a legitimacy ... that is not available to regular departments of government”²⁴⁵ and a vital “credibility as ombudsmen”.²⁴⁶ David Smith cites an Ipsos-Reid poll that found the current AG “is ‘immensely trusted by Canadians because “she has no vested interest and is viewed by Canadians as being above politics”’”.²⁴⁷ Indeed, the Office of one of the longest-established officers, the CEO, recently defined “trust” as a strategic priority.²⁴⁸

Even critics of the phenomenon recognize the faith that is placed in the officers by the media and the public. Their complaints have to do with the power they see these people as having, under conditions which they characterize as being outside accountability or guidance by the other branches of government. Donald Savoie notes that “[t]here is an inherent belief that [officers of Parliament] will be better because they are above the political fray” and Sharon Sutherland comments that they “connect very directly with the media, creating storms left, right and centre without any political mediation.”²⁴⁹

In the UK, one of the officers of Parliament is the Parliamentary Commissioner for Administration, commonly referred to as the Parliamentary Ombudsman.²⁵⁰ She is responsible for investigating complaints of injustice brought about by maladministration on the part of the British bureaucracy and has been described by the Court of Appeal as that of

²⁴⁴ Aucoin and Jarvis, *supra* note 15 at 61.

²⁴⁵ Thomas, *supra* note 20 at 298.

²⁴⁶ Georges Tsai, *Relations Between Parliamentary Agencies and the Public Service: New Perspectives*, (Ottawa: Canadian Centre for Management Development, 2002) at 6.

²⁴⁷ *Supra* note 25 at 68, quoting “Straight-Talking Fraser Strikes Fear on the Hill” *The Globe and Mail* (12 February 2004) 4.

²⁴⁸ “In-and-out affair sparks Elections overhaul” *The Ottawa Citizen* (8 May, 2009) A3.

²⁴⁹ Savoie, *supra* note 1 at 169-170; Sharon Sutherland quoted in Simon Doyle, “Let government, Parliament review Environment Commissioner’s Office, says Parliamentary expert” *The Hill Times* (5 February, 2007) 24; and see Sharon L. Sutherland and G. Bruce Doern, *Bureaucracy in Canada: Control and Reform* (Toronto: University of Toronto Press, 1985) 50-55.

²⁵⁰ See *supra* note 78.

an “authoritative investigator” whose work is “both highly valued and entitled to respect”.²⁵¹ Indeed, that Court held, in *Bradley v. Secretary of State for Work and Pensions* that the Ombudsman’s findings cannot be rejected by a Minister unless cogent reasons are presented on the Minister’s behalf.²⁵² Similar judicial remarks have been made about ombudsmen in Canadian jurisdictions, some of whom share similar functions and characteristics to those of officers of Parliament.²⁵³ The Supreme Court of Canada, speaking of the B.C. Ombudsman, noted the “persuasive force” of that officer’s conclusions, which “allow the Ombudsman to marshal public opinion behind appropriate causes”.²⁵⁴

B Beyond the perception

In short, the perceived legitimacy of officers of Parliament is significant. The question of whether there is a “real” legitimacy that validates that perception has been dealt

²⁵¹ *Bradley v. Secretary of State for Work and Pensions*, *supra* note 118 at paras. 40, 146.

²⁵² *Ibid.* at para. 51. For Canadian judges’ comments on the officers of Parliament and similar officials, see *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, *supra* note 181 at para. 75: “[t]he Auditor General fulfils a crucial function in the sphere of public accountability and thereby enhances our democratic system...”; *Democracy Watch v. Canada (Attorney General)*, *supra* note 44 at para. 39, referring to “the critical role of the Ethics Counsellor in enhancing “public confidence in the integrity of public office holders and the decision-making process in government”” and see *Kreiner v. Auditor General (Man.)*, *supra* note 17 and accompanying text.

²⁵³ Ombudsmen share with officers of Parliament the role of reporting to the legislature. They receive and investigate complaints, the results of which form the basis of their reports. See David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 525-531. It is true that in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, *ibid.*, the Supreme Court of Canada distinguished the case of *B.C. Development Corp. v. B.C. (Ombudsman)*, *supra* note 118, when it declined to decide a dispute between the government and the AG over the extent of the latter’s investigative powers. However, in my view the distinction made in the *Auditor General* case should not be taken as rendering the ombudsman jurisprudence inapplicable to this consideration of the eight officers of Parliament at the federal level. Many of the officers investigate individual complaints (even the AG now informally accepts and acts on information from members of the public) and ombudsmen share with officers of Parliament the essential role of overseeing government activity. In the *B.C. Ombudsman* case Chief Justice Dickson specifically referred to the Ombudsman as a mechanism of bureaucratic control and supervision and as “an officer of the Legislature”, *supra* note 118 at 461.

²⁵⁴ *B.C. Development Corp. v. B.C. (Ombudsman)*, *supra* note 243 at 463. This language is reminiscent of that used in a decision of the New South Wales Supreme Court: “When intervention by an Ombudsman is successful, remedial steps are taken not because orders are made that they be taken but because the weight of its findings and the prestige of the office demand that they be taken.” *Ainsworth v. The Ombudsman* (1988), 17 N.S.W.L.R. 276 at 283-284 (S.C.).

with in only a very limited way in the sparse literature that relates to officers of Parliament. Paul Thomas sees their authority as legitimate because they “are created by and meant to serve Parliament”.²⁵⁵ Arguments such as these concerning the authority of the officers of Parliament hold little weight with their critics, who see their direct connection with the public and the media as, in fact, undermining the role of the legislature and therefore as harmful to self-government.²⁵⁶

As explained in chapter 3, creation by Parliament provides a legal source for the powers given to officers, but does not answer the question of where accountability for that power resides. Private corporations are created pursuant to a statute, yet would have insufficient connection to democratic accountability mechanisms to be the recipients of governmental authority. As for “serving Parliament”, we have seen that the functions, capacity and roles of the officers go well beyond providing support to parliamentarians.

If this thesis is not going to simply add a voice to those who hold that officers of Parliament operate outside the legitimate scope of government power, we are therefore going to have to look beyond the law and the structures and accountability mechanisms which are currently in place under our Constitution. In so doing, we head out into waters that remain, for the most part, uncharted. Commentators have opined that an attempt should be made to bring clarity to the place of officers of Parliament in the existing constitutional framework.²⁵⁷ Paradoxically, in order to do so we may need to step outside of that framework for a time, in order to explore whether legitimacy of officers of Parliament can be established in ways that are to some degree alien from traditional constitutional theory. In the rest of this chapter we

²⁵⁵ *Supra* note 20 at 298. See also Bell, *supra* note 25 at 16: “[Agents of Parliament] do not undermine the constitution. Parliament has delegated to them the authority to promote certain values, and Parliament can take this authority back.”

²⁵⁶ See Savoie, Sutherland and Sutherland and Doern, *supra* note 249. See also Smith, *supra* note 25 at 69-70.

²⁵⁷ See Savoie, *supra* note 1 at 170; Thomas, *supra* note 20 at 311.

will be asking whether there is a different way of looking at the validity of conferring powers on officers of Parliament, and whether that perspective is supported by theories underlying our constitutional democracy.

C Alternate sources of legitimacy

What do we mean by legitimacy? Lawyers tend to focus specifically on the legal pedigree of a power or authority, or on its status under the Constitution, as determinative of its legitimacy. As was stated by the Court of Common Pleas in the case of *Entick v. Carrington*,²⁵⁸ “This power, so claimed by the secretary of state, is not supported by one single citation from any law book extant... If it is law, it will be found in our books. If it is not to be found there, it is not law.”

Increasingly, however, even lawyers are prepared to look behind the “law on the books” to ask about its consistency with certain basic principles. In a speech entitled “Unwritten Constitutional Principles: What is Going On?”, Chief Justice McLachlin of the Supreme Court of Canada commented on the “belief, widely accepted in developed modern democracies since World War II, that legal systems must adhere to certain norms.”²⁵⁹ One of the principles she considered must underlie the legitimate exercise of power is that of “democracy”. Others were the “rule of law”, “human rights” and “good governance”. In the Chief Justice’s view, the legitimacy of the state “depends on its adhesion to fundamental norms that transcend the law and executive action”.²⁶⁰

²⁵⁸ *Supra* note 142.

²⁵⁹ Beverley McLachlin, “Unwritten Constitutional Principles: What is Going On?”, (Paper given at the 2005 Lord Cooke Lecture, Wellington, New Zealand, 1 December 2005) [unpublished] at 7.

²⁶⁰ *Ibid.* at 9.

The Chief Justice was speaking of norms that could be applied by those working within the legal system. However, questions of the validity of the exercise of power are not only of concern to lawyers and judges. The comments quoted above show the continuing interest of political scientists and others in issues of the legitimacy when it comes to unusual emanations of the state like officers of Parliament. Originally, of course, the basic principles concerning the validity of the exercise of power were developed by those who wanted to make sense of the question in the context of the entire polity – the society as a whole and its interests, values and aspirations. Questions of sovereignty – of the locus of legitimate power in the state - continue to be of interest to theorists, who note that such a concept “takes in issues related not only to law, but to politics, economics, culture and morality.”²⁶¹

The question of legitimacy, in this broader perspective, asks whether governing institutions stem from and reflect deeper sources of validity, beyond the existing Constitution and the ballot box. Such sources could include democracy in a less mechanical sense – the act of representing the “general will” of the populace, rather than a majority vote. Even more fundamentally, we can explore the institution’s connection to the moral or ethical principles inherent in our society, including whether it contributes to the “rule of reason”. Finally, it makes sense to ask whether the particular institution, given its own characteristics, “works” effectively to allow our Constitution, democracy and the rule of reason to function. In what follows, the authority of officers of Parliament will be examined from each of these perspectives.

²⁶¹ Peter C. Oliver, “Sovereignty in the Twenty-First Century” (2003) 14 K.C.L.J. 137 at 137.

(a) Democratic – but not through the ballot box

Chief Justice McLachlin cited “democracy” as one of the underlying principles of our society. She characterized this notion as referring to the right of citizens “to vote their governments into and out of office”.²⁶² However, the Supreme Court itself, in a case cited in the last chapter, recognizes that the purposes of democracy go beyond the straightforward imperative that governments should be elected and that those who exercise power should be responsible to the elected. Democratic institutions, they have said, “must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution.”²⁶³ This is necessary so that our government will be one “resting ultimately on public opinion reached by discussion and the interplay of ideas”²⁶⁴

These statements imply that democracy has a deeper meaning than “one citizen, one vote”. The purpose of representative government is not just that each person be represented in Parliament, in a numeric sense, or even that their interests be championed by elected members. The intention is that somehow the “opinion” of the public as a whole will have a place to develop, through the exploration of the ideas and values that motivate society. For that to happen, those ideas must be represented somehow in government.

Some of the commentary on officers of Parliament makes reference to the idea of “representation” that goes beyond a mandate from the ballot box. David Smith notes that, in their reports and comments, officers of Parliament speak to Parliament, “but they also speak for, if not on behalf of, public opinion.” He continues on this point:

In their commentaries and in the attention their commentaries elicit, officers of Parliament assume some of the features of representation... Conscience, principle and character describe this type of ‘unaccountable representative, since there is no direct

²⁶² *Supra* note 259 at 9.

²⁶³ *Secession Reference*, *supra* note 145 at para. 67.

²⁶⁴ *Ibid.* at para. 68, citing *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, 1953 CanLII 3 S.C.C. at 330.

linkage between elector and elected. ... officers of Parliament inhabit a world of representation and articulate concerns some of the represented believe to be inadequately expressed by elected members.²⁶⁵

Commentary from other jurisdictions, where officers performing the same kinds of functions are referred to as “ombudsmen”²⁶⁶, also raise the question of whether this kind of officer represents the public in a more direct sense, through their accountability role. In *Botany Council v. The Ombudsman*²⁶⁷, the New South Wales Court of Appeal considered the powers of the New South Wales Ombudsman to investigate and report on administrative action to be “beneficial provisions, designed in the public interest for the important object of improving public administration and increasing its accountability, including to ordinary citizens ...”.²⁶⁸ The U.K. Parliamentary Ombudsman has raised a similar question, asking whether her role is as “an adjunct of representative democracy or an agent of more direct accountability of government to the people”.²⁶⁹

But if officers of Parliament are representative, they cannot be direct representatives of the people themselves – that role is filled by elected members of Parliament. Instead, the task of these officers is to articulate what Smith refers to as widely-held concerns about government. It follows that the accountability they achieve is not of the same nature as that provided by elected representatives. Activities of government are measured not against party platforms or political agendas but with reference to the standards reflected in the concerns of the public.

²⁶⁵ Smith, *supra* note 25 at 69.

²⁶⁶ See note 253, above.

²⁶⁷ (1995) 1195 N.S.W. Lexis 10757 (C.A.).

²⁶⁸ *Ibid.* at 8.

²⁶⁹ Abraham, *supra* note 241 at 207.

The fact that officers of Parliament are so highly thought of by the populace raises the possibility that their legitimacy is derived from their representation of the “general will” of the country. This is a concept referred to by democratic theorists, among them Jean-Jacques Rousseau. For Rousseau, power in any state had to trace its origins to the body politic, based on a social pact between members of that society for mutual preservation. That power, directed by the “general will”, was what constituted sovereignty – the capacity to make and enforce laws to which all members of society would be subject.²⁷⁰ Government was a body established between individual citizens and the sovereignty derived from the whole people, whose business was to make operative those laws which the general will desired and to maintain the freedom of the country.²⁷¹

Despite his close association with the link between authority and democracy²⁷², Rousseau stated that “[s]overeignty cannot be represented ... its essence is the general will, and will cannot be represented...”²⁷³ What he meant was that the “general will” was not just the sum or majority of desires of individuals in the society, which they could instruct representatives to state on their behalf. The general will was the “public interest” – what the country felt was right for the country, not a compromise reached to balance various private interests.²⁷⁴ In Rousseau’s view, to the extent that persons who exercise governmental power do so on behalf of the sovereign – i.e. the whole of the body politic – and in accordance with the “general will”, they act in a representative capacity. The fact that they are not elected nor

²⁷⁰ Jean-Jacques Rousseau, *The Social Contract*, trans. by Maurice Cranston (London : Penguin Books, 2004) at 32.

²⁷¹ *Ibid.* at 65.

²⁷² See Fred D'Agostino & Gerald Gaus, “Contemporary Approaches to the Social Contract” (5 September 2008), online: Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/contractarianism-contemporary/>> and Tom Christiano, “Democracy” (27 July 2006), online: Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/democracy/>>.

²⁷³ Rousseau, *supra* note 270 at 112.

²⁷⁴ *Ibid.* at 30.

responsible directly to those who are, would not diminish their legitimacy as a governing body.²⁷⁵

The idea that a society may have a “general will” that goes beyond the compromise achieved between the private interests of each of its members or regions is one that persists. Also of relevance is the idea that democratic representation is not limited to the straightforward equation of “elector plus elected equals represented”.²⁷⁶ Indeed, in parliamentary democracies like Canada, not all of the organs of the state are based strictly on that model. Senators are not elected, for example, and yet the constitutional provisions that apply to Senators refer to them as “representing” the various regions from which they are selected.²⁷⁷

One possibility, therefore, is that officers of Parliament derive their legitimacy from being mouthpieces for the general will of the country, as concerns the standards of behaviour expected of government actors. Before proceeding further with this idea, we need to consider what the content of that will consists of in this respect. What is it that the public considers is missing or “inadequately expressed”, to use Smith’s phrase, by scrutiny and accountability through elected members?

People seem to be impressed by both the mandates and the status of the officers.²⁷⁸

What do those mandates convey? “Accountability” is one answer, but that concept is really

²⁷⁵ *Ibid.* at 66-67 and 112-113.

²⁷⁶ As Peter Oliver notes, “... the closely related concept of legitimacy is not just about popular ratification. ... however, an appreciation of the relationship between law and fact, or law and the “popular political”, may be essential to understanding how law achieves real (as opposed to theoretical) normativity... The legitimacy of constitutions, laws and legal systems is clearly more complicated than simply counting votes from time to time.” Oliver, *supra* note 261 at 174-175.

²⁷⁷ *Constitution Act, 1867*, *supra* note 11, s. 22.

²⁷⁸ See *supra* notes 244-247 and 251-254 and accompanying text. See also *R. v. Local Commissioner for Administration, ex parte Eastleigh Borough Council*, [1988] 1 QB 855 at 876 A-D, quoted in *Bradley, supra* note 118 at para. 57, referring to the unlikelihood of a successful judicial review application for the Local Commissioner for Administration, given “the nature of his office and duties and the qualifications of those who hold that office”.

just a means to an end. Officers of Parliament do hold government actors to account, but they do so in order that the world at large can determine whether they are meeting the goals set for them by the people they serve. What are the goals that the general will considers are not being met at this time? Four purposes, derived from the mandates and history of the current officers of Parliament, were outlined in chapter 1. They were probity, transparency, justice and integrity. Like accountability, transparency is also not really a substantive goal, but a means to the end of ensuring appropriate behaviour is taking place within government. Probity is about following rules, but also about applying rules in a rational way which is faithful to the spirit of the rule, and not just its language. Justice and integrity or honesty are virtues in their own right.

What does the status of officers of Parliament convey? A key feature, in terms of public confidence, seems to be their separation, both substantively and administratively, from the regular government bureaucracy and from any comprehensive oversight of their activities by politicians. It is this that leads people to consider them to be “above the fray” and free from any vested interests or political or bureaucratic interference.

It is also arguable that their means of appointment, as recently established, is one in which the “general will” of the populace can be reflected to a unique extent. Requiring not just selection by the Government of the day, or the agreement of a majority of elected and appointed parliamentarians, but consultation with all parties who obtained at least twelve seats, allows for a larger variety of views to be considered in the selection of officers of Parliament than is the case for other government appointees.

In sum, the judgment of the populace, derived from the faith placed in officers of Parliament, would seem to be that probity, justice and integrity are missing from government

and that current levels of transparency and accountability are inadequate to correct that situation. The general desire would seem to be that these values be reinstated. And the general opinion is that this cannot be accomplished by the efforts of either bureaucrats or politicians, or anyone they oversee. Hence, it is possible that officers with mandates like these, selected following broad consultation and enjoying a unique degree of separation from other government institutions, can be seen as supported by the general will and as deriving their legitimacy from it.

However, there is a need for caution here. The “general will” is different from the opinion of a numeric majority. According to Rousseau, “the people is never corrupted, but it is often misled; and only then does it seem to will what is bad.” He says that the “general will” is always imbued with a sense of the public interest – he contrasts this with the “will of all” or majority opinion, which is often simply the sum of individual prejudices or interests.²⁷⁹ In other words, the general will must be one that is informed and driven by a sense of what is best for the state or body politic as a whole.²⁸⁰ How can we judge if that is what is happening when the general opinion supports the status, mandates and work of officers of Parliament? That question may force us to go further and explore whether these institutions can also be said to reflect the fundamental principles underlying our society. Are there core tenets of our polity and form of government that provide the impetus for the public to desire probity, integrity and justice in the matters which have been confided to officers of Parliament? If so, are those beliefs reflected in the mandates and status of the officers we currently have?

²⁷⁹ Rousseau, *supra* note 270 at 30.

²⁸⁰ *Ibid.* at 31. Rousseau specifies that: “As soon as someone says of the business of the state – ‘What does it matter to me?’ – then the state must be reckoned lost.” *Ibid.* at 112.

(b) Preserving the ethical structure and the rule of reason

Under this heading we are going to be looking at sources of legitimacy that go beyond (or lie below) either sense of democratic representation: the popular vote or the general will. The idea here is to see if there is an underlying value structure that is implied in our government institutions and tradition which provides legitimacy for government actors, even when they go beyond what is supported by the public. This could be referred to as the moral or ethical self-expression of the polity itself, rather than its members. It may have some affinity with the concepts of “national character” or “moral tradition”.²⁸¹

The connection between an institution like officers of Parliament and this notion of fundamental or underlying values is the fact that their mandates are all values-based. In that they are distinct from most other government entities, whose *raison d'être* has more to do with administration, or making policy, or enforcing the law. There is an important difference between the “rules” which are enforced by officers of Parliament (some of which are in the form of laws) and the idea of “law enforcement” as it is carried out by police, prosecutors or regulatory enforcement agencies, and judges.

The values implied by the mandates and status of the officers of Parliament are administered in a way that goes beyond the usual requirements of the law. Probity, in the hands of the AG, includes “value for money”. Justice includes, not just the right of individuals to communicate with the government in the language of their choice, but the protection of their linguistic community where it is a minority. Integrity includes not

²⁸¹ Although the latter term is often limited to a particular set of mores championed by a sub-set of the population, rather than an attempt to capture the ethical aspirations of the country as a whole.

just freedom from the illegal aspects of corruption, but the avoidance of “wrongdoing” and conflicts of interest.

Referring to the statutes under which some of the officers of Parliament act, judges have found that their effect is to go beyond the rules set out on the face of the legislation to express purposes such as the “facilitation of democracy”.²⁸² Official language rules are said to be “the result of a delicate social and political compromise” and to reflect “certain basic goals of our society”.²⁸³ The protection of privacy is considered “necessary to the preservation of a free and democratic society”.²⁸⁴ The *Access to Information, Official Languages and Privacy Acts* have all been declared “quasi-constitutional”.²⁸⁵ In the case of the latter two statutes, the Supreme Court of Canada has linked this status specifically to their connection with constitutional values: “The *Official Languages Act* and the *Privacy Act* are closely linked to the values and rights set out in the Constitution, and this explains the quasi-constitutional status that this Court has recognized them as having.”²⁸⁶

The status, attributes and powers of officers of Parliament fit them to advance these values in ways that are not available to actors in any of the legislature, the executive or the judiciary. For the most part, the work of officers of Parliament takes the form of persuasion, not legal judgment. This reflects the fact that the standards they apply, such as the avoidance of “wrongdoing” and the promotion of linguistic duality, go beyond legal rules. It also

²⁸² For example, in the case of the *Access to Information Act: Canada (Attorney General) v. Canada (Information Commissioner)*, 2004 FC 431, [2004] 4 F.C.R. 181 at para. 194.

²⁸³ *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373 (C.A.) at para. 16, cited in Canadian Heritage and Department of Justice Canada, *New Canadian Perspectives: Annotated Language Laws of Canada* (Ottawa: Department of Public Works and Government Services Canada, 1998) at 125. See also Spicer, *supra* note 33, where he describes adopting, as COL, an approach of “non-political humanism” which “downplayed legalities”.

²⁸⁴ Lavigne, *supra* note 36 at para. 25, cited in Michel W. Drapeau and Marc-Aurèle Racicot, *Federal Access to Information and Privacy Legislation Annotated 2007* (Toronto: Thomson Carswell, 2007) at 6-13.

²⁸⁵ *Canada (Attorney General) v. Canada (Information Commissioner)*, 2002 FCT 128, [2002] 3 F.C. 630 at para. 20 cited in *Federal Access to Information and Privacy Legislation Annotated*, *ibid.* at 1-16. In the case of the ATIA this characterization has to do, in part, with its use of the phrase “notwithstanding any other Act of Parliament”: ATIA, *supra* note 34, s. 4(1).

²⁸⁶ Lavigne, *supra* note 36 at para. 25.

means that, not being part of a formal judicial decision-making structure, they are free to approach their work from the orientation of promoting the values or virtues their mandates espouse, rather than the strict neutrality required of an arbiter of legal rights and interests.

As David Smith observes, not just objectivity, but “conscience, principle, and character” are the hallmarks of the popular vision of officers of Parliament.²⁸⁷ It is the nature of the office itself, including its title, the purpose of the statute that establishes it, and the duties it requires, that provide its authority. They convey that the person who fills the office possesses the conscience and character that Smith refers to, and is thereby able to protect the principles it stands for.

Is this credibility derived from their mandate and status a valid basis for legitimacy? The notion that the character of those who exercise power is as vital, for achieving perfection in the state, as the law itself is an old one. In his work on *Politics*, Aristotle contrasted two basic models of government. One was a state framed simply on the basis of “equality and likeness”, in which each person would expect to be able to take his turn as ruler. Government would be a question of the ruler protecting his own interests, but also those of his successors, so that when the successor was in power, he would return the favour. The difficulty with this model was that the turn-taking could not be assumed: “men want to be always in office”. Consequently, any state whose government was based on the interests of the rulers was “defective”. A state which enjoyed a “true form” of government would always be based on “the common interest” and constituted in accordance with strict principles of justice”.²⁸⁸

²⁸⁷ *Supra* note 25 at 69.

²⁸⁸ James H. Ford ed., *Aristotle: Ethics and Politics*, trans. by William Ross and Benjamin Jowett (El Paso, Texas: El Paso Norte Press, 2006) at 174.

If private interests cannot be the motivating factors for a true form of government, then it follows that persons motivated solely by self-interest cannot be entrusted with authority. Thus, regardless of the model of government, whether it be rule by the one (kingship), the many (democracy or “constitutional rule”) or the few (aristocracy), a just society could only be achieved when the “rulers are the best men” or “have at heart the best interests of the state and the citizens”.²⁸⁹ In his summary on this point, Aristotle makes reference to the virtues he hopes for in both the rulers and the ruled.

We maintain that the true forms of government are three, and that the best must be that which is administered by the best, and in which there is one man, or a whole family, or many persons, excelling all the others together in virtue, and both rulers and subjects are fitted, the one to rule, the others to be ruled, in such a manner as to attain the most eligible life.²⁹⁰

This formula for how to obtain “the most eligible life” or, more simply, “the good life”, has been taken up and expanded upon by modern-day virtue ethicists. These theorists harken back to Aristotle in maintaining the centrality of three ancient Greek concepts: *arête*, or virtue itself, *phronesis*, the practical wisdom or judgment required to apply the virtues to the real world, and *eudaimonia*, a good, full and “morally meritorious life” that is nonetheless “responsive to the demands of the world”.²⁹¹ The first and second concepts are required in order to achieve the third.

The idea of government achieved through the reasoned application of character or virtue to situations that raise legal or ethical problems is central to Aristotle’s view of one of the underlying principles of our society outlined by Chief Justice McLachlin, that of the rule of law. As Judith Shklar explains it, Aristotle’s view of the rule of law was that it required,

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.* at 189.

²⁹¹ Rosalind Hursthouse, “Virtue Ethics” (18 July 2007), online: Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/ethics-virtue/>>.

not only just laws and impartial judges, but “the rule of reason”. It was the character of those who judge which would ensure justice, specifically “a settled ethical character”, which was as important as knowledge or intelligence.²⁹² Decisions about matters of public importance made by such people would have an impact on society as a whole: “The rule of reason depends decidedly on the capacity of the same to persuade others to practise some degree of self restraint and to maintain the legal order that best fits the ethical structure of a polity.”²⁹³ It is to people with this kind of ethical character that falls “the responsibility for preserving the basic standards of the polity in their daily application, and for maintaining reasonable modes of discourse in the political arena.”²⁹⁴

Obvious parallels exist between this description and the work of officers of Parliament. The goal is not just that laws are passed and obeyed, or even that order is achieved, but that the ethical structure of the polity is maintained. This coincides with some of the Chief Justice’s remarks on attaining fulfillment of the underlying principles of the Constitution. Referring to the Henry VIII’s Lord Chancellor, who discovered first-hand the cost of attempting to preserve what he saw as the basic standards of the polity, she notes: “Thomas More viewed conscience as the foundation of law precisely because he did not see it as an expression of personal feeling or passion. Instead, what he termed “conscience” was what allowed all individuals, even traitors and tyrants to access justice if they applied their reason.”²⁹⁵ The Chief Justice comments that a similar conscience, together with legal and

²⁹² Judith N. Shklar, “Political Theory and The Rule of Law” in Allan C. Hutchinson and Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 1 at 3.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.* at 5.

²⁹⁵ *Supra* note 259 at 29, citing Gerard B. Wegemer, *Thomas More on Statesmanship* (Washington: Catholic University of America Press, 1996) at 73.

cultural knowledge “is the surest guide to upholding the fundamental principles upon which justice and democracy rest.”²⁹⁶

The kind of conscience Chief Justice McLachlin attributes to More is much more than a guilty feeling that one should act in a particular way. For a person’s conscience to amount to the kind of virtue on which the rule of reason rests, it must amount to a settled orientation. As Shklar says of Aristotle’s view on this: “Justice is the constant disposition to act fairly and lawfully, not merely the occasional performance of such actions.”²⁹⁷ The virtue ethicists elaborate that a person who acts from this perspective does so because they accept only a particular set of considerations as motivations. Generous people act generously because it is generous to do so. Lovers of justice act fairly because they see it as the only way to act.²⁹⁸

However, it is also essential that such people possess the “practical wisdom” or *phronesis* to apply their virtues to particular, complex situations, in such a way that justice or the generous purpose will actually be achieved. “Common sense” would be another term for this gift – it is the ability to identify when generosity would be misplaced as humiliating charity or justice as equality would cause inequality due to unequal circumstances. Both virtue or *arête* and wisdom or *phronesis* are required for individuals or a society to achieve *eudaimonia* (the good life).²⁹⁹

²⁹⁶ *Ibid.*

²⁹⁷ *Supra* note 292.

²⁹⁸ Hursthouse, *supra* note 291.

²⁹⁹ Without putting it in these terms legal theorists have long advocated that our governments should be structured in such a way that good people, who know enough to make wise choices, do the decision-making. William Blackstone noted in 1776 that, given the power of Parliament, careful selection of its members was required: “... it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge...” W. Blackstone, *Commentaries on the Laws of England*, Bk. 1 (London: 1776) at 160-161, quoted in Martin Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) at 147. F.A. Hayek was also of the view that legislation-making “should not be governed by interests but by opinion”, and that those opinions should be the ones held by experienced people. He thus suggested “an assembly of men and women elected at a relatively mature age for fairly long periods, such as fifteen years.” F.A. Hayek, *The Political Ideal of the Rule of Law* (Cairo, 1955) at 36, quoted in Loughlin, *ibid.* at 92.

While some of these aspirations may be reflected in the people who hold power in the twenty-first century, it is safe to say that our system for electing such people is not based entirely on their possessing these virtues. This is not surprising, as the rule of reason advocated by Aristotle – people animated by justice exercising practical wisdom and rationality to achieve it in the real world – was not the kind of “rule of law” that grew up in English-speaking democracies. As Judith Shklar notes, the competing concept of the rule of law, which many trace to Montesquieu, consisted instead of checks and balances that would pit one power-holder against another so that neither could pursue their own interests to the detriment of the citizen.³⁰⁰ It was this version of the rule of law that flourished in England and found favour, for example, with A.V. Dicey, that champion of the common law, who saw no need for judges to act as “exponents of morality”.³⁰¹

Subsequent attempts to re-invigorate the notion of the rule of reason, according to Shklar, have come up against the fact that society as a whole is very different from the values- and ethics-based polity that Aristotle postulated.³⁰² Alisdair MacIntyre, in his book *After Virtue*, has explored in detail why society, and in particular governments, now consider managerial expertise and value-neutrality to be the highest virtues. In MacIntyre’s view, modernity has reduced ethical questions to ones involving rules – which rules should be followed and why? Notions of “the good life” or *eudaimonia* as a measure of a society’s success have been rejected, to be replaced by the view that what constitutes the good life from any general standpoint is a question which cannot be answered, since all individuals are free to form a different view. If there is no way to obtain a common sense of the good and

³⁰⁰ *Supra* note 292 at 4.

³⁰¹ A.V. Dicey, *Introduction to the Law of the Constitution*, (London: McMillan, 1927) at 60.

³⁰² *Supra* note 292 at 12.

moral life for a community, it follows that only rules matter – character counts only to the extent that it predisposes people to follow the rules, not because character itself leads to right action.³⁰³

If this is were indeed the place to which society had come, and if ethical behaviour did consist entirely, in society's view, of "following the rules", i.e. staying within the confines of the law, then arguably there would be no need for officers of Parliament, and they could not draw their legitimacy from the underlying ethical structure of our society. Police, prosecutors and judges would enforce the law when the rules were broken, and the rest of the time there would be no ethical or moral inquiry to be had about the conduct of government officials. However, the Chief Justice tells us that even judges are expected to apply more than "the rules" when they make decisions.

It may be that part of the explanation for the reduction in the public's trust of government and politicians has its roots in society's alienation from the kind of community and tradition in which actions were motivated by the virtues (assuming that such a community ever really existed). Such an inquiry is beyond the scope of this thesis. What the virtue ethicists, and MacIntyre in particular, do point to is the possibility that an institution like the officers of Parliament may be society's response to the perceived moral and values vacuum in which society, and government in particular, now floats.³⁰⁴ This possibility has been raised in the jurisprudence. Chief Justice Dickson suggested that society itself, rather than government policy-making or legislation, may provide the source and reason for the

³⁰³ *Supra* note 9 at 85-86 and 118-119.

³⁰⁴ Or to the "drawing off [of] the liquid in which our moral ideals were suspended", to borrow a phrase from Michael Oakeshote. M. Oakeshote, *Rationalism in Politics* (London: 1962), quoted in Loughlin, *supra* note 299 at 234.

existence of officers of the Legislature: “The Ombudsman represents society’s response to these problems of potential abuse and of supervision.”³⁰⁵

At the end of his book, MacIntyre draws a comparison between current North American society and the Dark Ages which followed the collapse of the Roman Empire. He notes that at a certain point general public support for the Empire simply stopped, presumably at different times in different places. What took the place of the Empire as the defining symbol of the moral and political community were smaller polities, in which the moral tradition could be nurtured and protected from the ensuing chaos: “What [men and women of good will] set themselves to achieve instead – often not recognizing fully what they were doing – was the construction of new forms of community within which the moral life could be sustained so that both morality and civility might survive the coming ages of barbarism and darkness.”³⁰⁶ MacIntyre wonders whether North American society has also reached a point where new mechanisms are needed to preserve and enhance a moral approach to life while we live through the “dark ages” of individualism and managerial expertise.

MacIntyre’s prescription is dramatic, but it is possible that a significantly more prosaic recipe for moral renewal and preservation has been developed in the positions of officers of Parliament. If so, perhaps it can be argued that they represent an attempt to protect something fundamental to the ethical structure of our society. If our ethical tradition is not just about rule-following, and if we are not so pluralistic a society that we have forever rejected the notion of shared underlying norms, then it may be that the practice of virtues such as probity, justice and integrity occupies a central place in our societal structure. The

³⁰⁵ *B.C. Development Corp.*, *supra* note 243 at 461.

³⁰⁶ *Supra* note 9 at 263.

legitimacy of officers of Parliament may lie in their capacity to embody the relevant virtues, acquire the knowledge, experience and practical wisdom necessary to apply them in the real world of modern government, and thereby to help establish an administration that reflects a “good life” and not just bureaucratic efficiency. It may be this that Ann Abraham, the U.K. Parliamentary Commissioner for Administration, means when she says she is “the purveyor of ‘individual benefit’... but also... the purveyor of much broader ‘public benefit’, not just in the configuration of administrative justice but in the oversight of public service delivery and policy.”³⁰⁷

However, at least one question is begged by the above. If either the representation of the general will that there be integrity in government, or the preservation and promotion of underlying societal values is to form the basis of the legitimacy of officers of Parliament, then that legitimacy will be dependent on the officers being an effective means of representing that will or preserving those values. In other words, their efficacy becomes an important additional factor in determining their legitimacy. Is this an institution that “works” to accomplish these goals? It is to that question we turn next.

(c) Efficacy – Are officers of Parliament the right tool?

So far in this chapter we have begun to consider whether legitimacy for officers of Parliament can flow through their representation of the “general will” of the populace or through being an expression, and a tool for the preservation of, the underlying values of the

³⁰⁷ *Supra* note 241 at 207.

society. But neither of these sources will confer legitimacy on an institution which does not, in fact, represent the general will or preserve societal values.³⁰⁸

The final piece of the legitimacy puzzle, therefore, requires a consideration of whether these officers, with this kind of structure and mandate, are the right kind of mechanism to accomplish those ends. It should be noted that it is not my intention to ask, empirically, whether the current officers or their predecessors have been successful in advancing the virtues their offices are intended to embody. We are staying in the realm of theory in this chapter, and will be exploring instead whether the characteristics of these offices match up with those theorists through the ages have proposed for an institution whose purpose is to ensure the legitimacy of government.

Commentators on the theories underlying the state confirm that the increased complexity of political and administrative structures has created oversight and control challenges that the legal system cannot handle alone. Martin Loughlin opines that both law, in the strict sense, and the common understanding of professional ethics as practiced by career politicians and bureaucrats have “gradually lost their authority”. The decline of the latter is put down to the increased rate technological and societal change. The inadequacy of the former in this context may be the outcome of the predominant view of the rule of law as a system of checks and balances between power-holders, rather than the rule of reason or the practice of virtue. Whatever the cause, as Loughlin describes it, law is not seen any longer “as an expression of the constitutive order of society” and “lacks the clear normative structure required to establish conditions of justice”.³⁰⁹

³⁰⁸ Oliver, for example, comments on the requirement of efficacy in relation to the “authoritativeness” of law: *supra* note 261 at 174.

³⁰⁹ *Supra* note 299 at 233-234.

The notion that the “conditions of justice” are missing from our public sector and its structure is reminiscent of what MacIntyre refers to when he explains the incompatibility of justice as a virtue with a society which is not bound together by any common understanding of the good life (in the Aristotelian sense).³¹⁰ Loughlin notes that one of the results of the lack of a moral context for the practice of government is that major changes in society, such as economic shifts or the need to adapt the English system of government to that of the European Union, place constant pressure on the government to rethink its role in society and restate its governing priorities. The result of these pressures, in turn, has been “increasingly systematic review of government programmes” and “the strengthening of accountability mechanisms”.³¹¹

Thus a link is made between weakening of the “conditions” for just or virtuous government administration and the need for accountability mechanisms. Those mechanisms, in which officers of Parliament would surely be included, are equated with reforming the context in which a shared understanding of the content of justice as a virtue will again become a motivation for action in the public sector.

And, indeed, such a prescription would be consistent with one of the fundamental requirements Aristotle himself outlined for the preservation of a state based on the practice of virtue. In his list of offices required for such a state, he included an office to “examine and audit” the others, which would have no other purpose. “Such offices,” he continued, “are called by various names – Scrutineers, Auditors, Accountants, Controllers.”³¹²

Bruce Ackerman expands upon the Aristotelian prescription and maintains that preventing corruption requires a whole separate branch of government. In a much-cited

³¹⁰ *Supra* note 9 at 250.

³¹¹ *Supra* note 299 at 234.

³¹² *Supra* note 288 at 243.

article entitled “The New Separation of Powers”, Ackerman proposes an “integrity branch”. It would be peopled by officers with significant powers to oversee administrative activity, who enjoyed protection against influence through such means as high salaries and a guarantee that they would not pursue subsequent employment under the people they oversee. Their budgets should be fixed, as a percentage of government revenues, by the Constitution.³¹³

Several of these recommendations are reflected in the characteristics of our eight officers of Parliament. Above all Ackerman emphasizes independence, indeed “insulation” for the people who do this work, hence his idea of a separate “branch” of government. The most important aspect of his work for our purposes is the link he makes between a body with these characteristics and the legitimacy of the democratic state. The way Ackerman describes it, such an institution is the only effective guarantee that corruption will be kept within bounds and the faith of the populace in their government preserved. He ties the faith to be re-established by this means not only to democracy, but to the rule of law as well. Thus, in Ackerman’s view, actors such as the officers of Parliament are the right tool to preserve both the authority of the democratic institutions established by the Constitution and the values underlying a democratic society.³¹⁴

Almost 250 years before Ackerman, Jean-Jacques Rousseau had a very similar suggestion for what to do to avoid abuse of power by those in charge of the government. He noted that the larger the state becomes, the more opportunities it presents power-holders to be tempted to the misuse of their authority. To counteract this tendency, the “sovereign” (by

³¹³ Bruce Ackerman, “The New Separation of Powers” (2000) 113 Harv. L. Rev. 686 at 694.

³¹⁴ *Ibid.*

which it will be remembered Rousseau meant the whole body politic, guided by the general will) must put mechanisms in place to control the government.³¹⁵

For that purpose, he recommended “intermediate magistrates”, “separated from the government altogether”.³¹⁶ These magistrates would form tribunals, of which he identified two kinds. One, roughly approximating courts as we know them, would be “the defender of the laws” and would protect the people against their government, or, sometimes, the government against claims by the people. It would have significant power and could “prevent anything from being done”.³¹⁷

The other kind of tribunal described by Rousseau was the “censorial tribunal”, who would make decisions not to enforce the law, in the sense of legislation, but to reflect “public judgement”.³¹⁸ The “law” the censors administer is public opinion, which Rousseau equates with “the morals of the nation”, and they apply this standard to “particular cases”. Rousseau feels that the censorial magistrates can “preserve” the morals of a society, but cannot restore them once they are lost. Their work is done through wise individual decisions, the prevention of systemic departures from the moral path and sometimes by “settling points on which opinion is uncertain”. He has great faith in the efficacy of this institution, which he says was used to great effect by the Romans and Lacedaemonians, although it is a concept “alien to the moderns”.³¹⁹

³¹⁵ *Supra* note 270 at 68.

³¹⁶ *Ibid.* at 91.

³¹⁷ *Ibid.* at 145.

³¹⁸ *Ibid.* at 151.

³¹⁹ *Ibid.* at 152-153. Chief Justice Dickson also saw the Roman censors as a precedent for today’s officers of the Legislature: “The need for some means of control over the machinery of government is nearly as old as government itself. The Romans, as long ago as 200 B.C., established a tribune—an official appointed to protect the interests and rights of the plebians from the patricians. They also had two censors—magistrates elected approximately every five years to review the performance of officials and entertain complaints from the citizenry. And the dynastic Chinese had the Control *Yuan*, an official who supervised other officials and handled complaints about maladministration.” *B.C. Development Corp.*, *supra* note 243 at 458.

Mechanisms such as officers of Parliament have thus been seen by theorists as essential and appropriate tools to preserve an honest bureaucracy, in a functioning democracy, which embodies both respect for the general will and the rule of reason. Key features of such accountability systems are independence, indeed “complete separation” from government institutions, a sensitivity to the public judgment or the underlying values of the nation, a settled disposition to act in accordance with the virtues they are intended to preserve, and the capacity to make wise individual decisions, prevent systemic problems and settle disputed points of ethics even when public opinion is uncertain.

This vision, of a watching group of moral giants safeguarding the populace from government corruption, is consistent with the myth that surrounds the officers of Parliament, as discussed in Chapter 1. Thus the theory behind their legitimacy is based, at bottom, in the goal of achieving a governing system in which the “good life” or *eudaimonia* is practiced – a flourishing, morally meritorious life that is responsive to the demands of the nation and of individuals. Such a goal would seem to correspond to another of the values identified by Chief Justice McLachlin as underlying our nation and its Constitution – that of “good governance”.³²⁰

D Conclusion

It should be noted that I am not suggesting that the current officer of Parliament positions were actually established solely for the reasons advanced in this chapter. As explored in Chapter 1, at the time most of these offices were established, the reasons likely

³²⁰ The Chief Justice quotes the *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government* wherein one of the principles was described as: “the entrenchment of good governance based on the highest standards of honesty, probity and accountability.” *Supra* note 259 at 9.

had more to do with particular historical events and political agendas. The theoretical analysis undertaken here is not an answer to the question: “Why do we have officers of Parliament?” It begins instead by asking “Given their unusual structure and accountability, can we say that the exercise of power by officers of Parliament is legitimate?”

I have attempted to show that an affirmative answer to that question can be reached by viewing the officers of Parliament as a mechanism to uphold virtues such as transparency, justice and integrity in government, which in turn promotes democracy, the rule of law and good governance. This perspective finds support in the process by which they are appointed, which is geared toward determining whether a candidate possesses character and objectivity and, in its elaborate consultative requirements, arguably allows for the "general will" to have a voice in their selection. Their mandate itself, together with the permanent bureaucracies that support the officers, and their independence from the other branches of government, confers a mantle of credibility. The result is that each officer is considered by the courts and others to be an authoritative voice of integrity.³²¹ Their legitimacy appears to rest, therefore, on their perceived capacity to bring back the practice of virtue, the living of a "good life" and the rule of reason to government. In so doing they act in accordance with the general will that such practices be restored and as "representatives" of the sovereignty in its attempt to control the perceived excesses of a government animated by amoral bureaucratic and political goals. The officers of Parliament can therefore be seen as an attempt to replicate the independent magistrates, censors, auditors or integrity branch members described by governance philosophers through the ages as essential to obtaining good government.

³²¹ Again, we are speaking of the views that are held of the offices themselves, not of the particular officers of Parliament who hold them at any given time. Incumbents seem to benefit from a presumption of integrity, but this can of course be overturned by those who prove, in fact, unworthy of that level of respect – witness the example of one of the Privacy Commissioners considered in the last chapter.

It is possible that their confusing constitutional position, in structural terms, is in fact the logical outcome of an attempt to create an institution that can benefit from these other sources of legitimacy. Since independence from the other branches of government, representation of the “general will”, rather than the views of constituents, and the ability to approach their work from the perspective of particular virtues are the hallmarks of their qualifications, then it does not make sense for them to belong to any of the executive, the legislature or the judiciary. In that case, their legitimacy may not have to derive from their position in one of the recognized branches of government or their accountability to the public through elected representatives.

If it is true that officers of Parliament are an effective means to represent the will of the society concerning the values or virtues it wishes to see practiced in government, and if they do indeed promote democracy, the rule of law and good governance, then those goals may legitimize their authority. If these other sources of legitimacy are accepted as valid, then the conferral of power and authority on officers of Parliament may be justified in ways that are distinct from those which apply to other government actors.

Chapter 5: The legitimacy of officers of Parliament - lessons learned

We have now had a chance to consider who the officers of Parliament are, the impact they can have on government and the public, and their legitimacy, both as regards existing institutions under our Constitution and beyond. The final question is “what does all this mean?” Are there lessons that we can take away and apply to the problems of when more officers of Parliament should be created, whether their mandates should be expanded, and whether any adjustments should be made to their current legislative structure?

A The reasons for their structure and mandates

In Chapter 3, we discovered that officers of Parliament derive their legal authority from Acts of Parliament, but that answers to the deeper questions of their legitimacy as the holders of governmental powers, having to do with the structure of the Constitution and democratic accountability, were less clear.

In Chapter 4 we went on to consider whether there were other theories that support the legitimacy of officers of Parliament. Possibilities included the role of officers of Parliament as democratic representatives, not by election, but through their representation of the “general will” of the populace. We also asked whether the “general will” that seemed to be behind the creation of and the faith placed in officers of Parliament was consonant with the underlying values or ethical structure of our polity. In that respect we asked whether the phenomenon of officers of Parliament could be seen as an attempt to re-establish a moral community to support the practice of certain virtues in government, such as probity, justice and integrity. Finally, we saw that the structure and attributes of officers of Parliament do accord with those that philosophers through the ages have associated with the task of

preserving the integrity of democratic government, overseeing the practice of the virtues by the holders of power and settling disputes about ethical issues.

Why are officers of Parliament suited to this role? The description we have been using is that of non-partisan persons of integrity, who are independent of the executive, the legislature and the judiciary. Freedom from partisanship separates the officers from party politics and the electoral system, reflecting the fact that their representative role is of a different nature than that of elected officials. At the same time, however, the fact that they are selected by politicians, rather than the public service staffing regime, means that they are not expected to step into the public service culture of neutrally serving elected politicians in the context of an efficiently-run bureaucracy. Broad-based consultation, the involvement of two branches of government in their nomination, and consideration of their appointment by a parliamentary committee, convey that the resulting appointees embody society's views on issues of integrity within government. Their lengthy tenures and complex removal provisions then ensure that the persons selected are able to apply their virtue and practical judgment to the matters before them as they see fit. Finally, their duties and titles imply that these are persons who are expected to embody the virtues they are mandated to preserve and promote.

Beyond these structural issues, the work of the officers of Parliament can itself be seen as supporting the goals contained in the theories of legitimacy we have explored. Their direct connection to members of the public and, through their reports and media connections, to the public at large, can be seen as an essential aspect of their role of representing the general will. Through individual complaints, and perhaps media questioning and public commentary on their work, the officers gain insight into the desires of the populace for

justice, probity and integrity in government, and the ways in which those desires are not being met. In their recommendations following investigations, and in their reports, the officers then act as the “spokesmen” of the “people’s opinion”, as Rousseau describes the function of the censorial tribunal.³²²

Their influence is persuasive, rather than directive. In this, they act in a capacity that goes beyond the settling of individual disputes. The officers are entrusted with the promotion of values in a systemic sense, and with seeing that the particular virtues they are charged with are applied across government.

B The need for a decision-making framework

Commentators, including some officers of Parliament, have noted the need to introduce some order into the creation of new officers and the expansion of their mandates. There are concerns that indefinite replication of this group of actors, who operate outside normal legislative and bureaucratic institutions could result in “a third force” operating in the federal government.³²³ Yet, as the U.K. Parliamentary Ombudsman has noted, pressures to increase the number of such officers continue to mount, leading, in her view, to the need for “strategic direction, and a coherent framework for the development of new ombudsman schemes”.³²⁴ A study by The Constitution Unit of the School of Public Policy at University College, London referred to a New Zealand parliamentary committee report on the subject,

³²² *Supra* notes 318 and 319 and accompanying text.

³²³ See *House of Commons Debates* No. 009 (25 April 2006) at 1045 (Hon. Stephen Owen) (speech at Second Reading of Bill C-2, the *Federal Accountability Act*, *supra* note 6).

³²⁴ Abraham, *supra* note 238 at 9.

noting its recommendation that “Parliament should consider creating an Officer of Parliament only rarely”.³²⁵

Such hesitancy is not surprising. As we explored in Chapter 2, officers of Parliament, while not empowered in most cases to make binding orders or judgments, do have the capacity to influence both Parliament’s work and that of government departments and central agencies. Further, we noted the impact that their investigatory and reporting functions can have on the reputations of people who become the subject of their investigations, and on the perception of the public vis-à-vis their government. We have also seen that the accountability of officers of Parliament departs from the model that applies either to elected politicians or to public servants in any other government department or agency. The ensuing ambiguity in accountability is something that may cause policy-makers to pause when calls are made for the creation of additional officers of Parliament.

The need for a framework is also dictated by what the U.K. Ombudsman refers to as the “inevitable” growth in this phenomenon. As recent discussions concerning the Parliamentary Budget Officer and the Commissioner of the Environment make clear, the appetite for extending the group enjoying the status of stand-alone officers of Parliament has not abated.³²⁶ How to resist the public policy advocacy group who makes the case that the environment, aboriginal rights, the interests of children or ensuring consular services to Canadians abroad “deserves” its own officer of Parliament? The creation of a cohesive group of officers, with certain common characteristics, likely means that when such proposals arise we will see calls for the “highest common denominator”, so that each new officer shares all the most salient guarantees of status and independence.

³²⁵ Gay and Winetrobe, *supra* note 77 at 10.

³²⁶ See Kathryn May, “Speakers move to handcuff budget officer” *The Ottawa Citizen* (4 November 2008) A1 and Doyle, *supra* note 249.

C New officers of Parliament/new mandates?

How then, to frame decision-making around the creation of new officers of Parliament, or the expansion of the mandates of existing officers? One possibility is to go back to the original four factors identified in Chapter 1 as forming the background to the establishment of the officers we have. It will be remembered that these were: 1) the increased complexity of government activity and, consequently, of the oversight task; 2) the need to provide some coercive pressure to convince the executive to conform to standards of probity; 3) the requirement of prestige and visibility for an issue, to identify it as of national or ethical importance; and 4) the establishment of an oversight process that is free of partisan influence.

The difficulty is that, while some or all of these factors may have actually gone into the creation of the current officers of Parliament, it is questionable whether they are reasons that correspond to the theories that undergird their legitimacy. As explained in Chapter 4, causes based in historical events or political expediency may provide a factual explanation for the existence of officers of Parliament, but they may not provide validation for their authority. Neutral factors such as complexity, prestige and non-partisanship do not, by themselves, forge a link to a virtues-based mandate.

If new officers of Parliament, or new responsibilities for existing officers, are to benefit from the sources of legitimacy explored here, it would appear that their substantive mandates should have something to do with supporting democracy by countering government corruption and with restoring the virtues that are perceived as missing from government. The virtues which are reflected to a greater or lesser extent in the mandates of the current officers

are transparency, probity, justice and integrity. All of these values can be seen as linked to the underlying principles of our system of government, as outlined by Chief Justice McLachlin: democracy, the rule of law, human rights and good governance.³²⁷ Of these, only human rights are not directly implicated in the mandate of the existing officers of Parliament – a point that will be explored later in this chapter. The other three categories describe the issues that can be seen as justifying the establishment of these offices, with their unusual accountability and institutional attributes.

It would appear, therefore, that two kinds of criteria should go into the decision of whether to create a new officer of Parliament. One is substantive: does the proposed mandate, including the ways in which it is to be fulfilled, advance the cause of democracy, the rule of law, or good governance? In particular, does it advance those concepts by protecting virtues such as justice, probity or integrity in government, or the transparency required to ensure them? Is it, in addition, a sufficiently significant issue that it can be said that either the “general will” or the underlying ethical culture of the country demands that it be addressed?

The second question is structural: is the officer of Parliament model, including its unique elements of status, independence and accountability, the only model that will adequately accomplish the mandate in question? Given the cautions urged by various commentators and the anomaly to our constitutional structure that these officers represent, new offices of this kind should not be created unless the task in question does not lend itself to any other mechanism.

Substantively, therefore, we would be asking questions such as these about any newly proposed mandate: “Is it about promoting justice in government activity, beyond protecting

³²⁷ *Supra* note 259 at 9.

the legal rights of individuals?"; "Is it about government integrity, including but going beyond fighting corruption?"; "Is it about probity, that extends beyond just rule-keeping?" and "Is it about ensuring that government information revealing its practices in these matters is available for examination?". In addition, the importance of the issue will be relevant. Only subject-matter that engages fundamental principles will arguably justify conferring governmental authority on an officer whose legitimacy does not stem directly from the Constitution and its conventions. The mandate should be one which engages the alternative sources of legitimacy we have examined: a deeper conception of representative democracy and the central place of certain virtues in the ethical structure of the nation. Thus, it will be subject-matter that corresponds to a deeply- and widely-held public concern, or a central, underlying value like the rule of law or good governance, that will validate a decision to place its protection beyond the domain of the executive, the legislature or the judiciary.

If the substantive question is answered in the affirmative, we would then inquire whether it is necessary for the mandate to be accomplished through this particular mechanism rather than any other. The questions could include: "Must the officer fulfilling the mandate be appointed in a way that aims to ensure he or she is non-partisan and in possession of the virtues reflected in the mandate?"; "Must the officer be independent, both substantively and administratively, from both the legislature and the executive, while not being a member of the judiciary?"; "Should he or she be able to interact with the public directly, either through the receipt and investigation of individual complaints or through public release of reports and recommendations?"; "Is this mandate best promoted by decision-making that takes the form of findings and persuasive recommendations, rather than binding legal orders?"; "Are the

interests of persons whose reputations may be affected by the work adequately protected by an officer of Parliament investigatory model?”

To test if this is an effective framework, perhaps we could return to the executive bodies to which officers of Parliament are compared in the Appendix and in Chapter 3, the PSC, the SIRC and the CHRC. Do these institutions have mandates that advance the virtues of justice, probity, integrity or transparency, in the sense described above? And is it the case that their mandates can really only be effectively accomplished through the unique mechanism of an officer of Parliament?

The PSC ensures that non-partisan staffing rules, and rules about the political activities of public servants are followed. This is an aspect of probity. And in both the preamble to the *Public Service Employment Act* and the provision dealing with political activities, there are references to various principles, such as merit, respect and political impartiality.³²⁸ This suggests that the probity sought to be protected by the PSC goes beyond mere rule-keeping to the implementation and advocacy of particular values. It is also arguable that a neutral public service, appointed in accordance with merit, is both vital to our democratic institutions under the Constitution and reflects an important value inherent in our democratic culture.

Assuming, therefore, that the mandate of the PSC would pass the substantive test for the creation of an officer of Parliament, the next question is whether it would pass the structural test. Does it require a body which is independent, both substantively and administratively, from the executive, the legislature and the judiciary? Is the appropriate mechanism one that merely investigates and recommends, without the authority to issue binding orders or legal judgments? In the case of the PSC, these two questions have been

³²⁸ *Supra* note 176, Preamble, s. 112.

answered in the negative. The staffing function is one which is, by its nature, executive. What is required for meritorious and non-partisan staffing decisions is that the PSC not be subject to direction or interference by politicians. However, separation from the rest of the executive would be difficult to achieve, given the mandate. Staffing proceeds in the public service under delegations issued by the PSC to deputy heads of government departments and agencies. Thus a relationship between the delegator and delegate is established and continues, as the PSC sets terms and conditions of the delegations, which can subsequently be restricted or revoked, as well as determining the procedures and policies for staffing. Further, while following an audit the PSC may make recommendations to deputy heads, this is only one item in its arsenal of remedies, should it find staffing improprieties. The PSC's revocation or other restriction on a department's staffing authority has binding legal force, unlike the report of an officer of Parliament. Under certain circumstances the PSC may directly revoke appointments. And violations of the political activities provisions can lead to dismissal or other binding "corrective action".³²⁹ For these reasons, while the PSC shares certain structural similarities with officers of Parliament, it would not appear that the full officer of Parliament model is the only mechanism whereby the PSC's mandate can be accomplished.

A similar analysis might be undertaken with respect to both SIRC and the CHRC. In the case of the CHRC, application of the substantive part of the test would reveal that the mandate is one that is connected with one of the values identified by Chief Justice McLachlin as going to the core of our democratic society – that of human rights. The CHRC's mandate is to ensure that the legal right of individuals to be free from discrimination is respected. Its work includes advice about special programs to aid disadvantaged groups, and the promotion

³²⁹ *Ibid.*, ss. 15-17, 68-69.

of means to reduce discrimination generally.³³⁰ However, it is not a mandate that is targeted exclusively, or even mainly, at government integrity in a systemic sense. The CHRC is tasked with defending the substantive rights of citizens, rather than the general interest of society as a whole in the integrity of government. Since the federal government comes within its mandate, the latter is often advanced as a side effect of its work on the former. By contrast, in the case of the officers of Parliament, transparency or probity in the government is generally the central focus, with the investigation of individual cases constituting a means to that end.

Structurally, it would not appear that the only mechanism by which the CHRC can perform its functions adequately is through the officer of Parliament model. A large portion of its work is the processing the claims of individuals for infringement of their legal rights and, where warranted, referring those to a tribunal for legal resolution. In this, it acts more like the administrative arm of an adjudicative administrative tribunal. Since its investigations have legal consequences, the more informal format of the officer of Parliament model is not appropriate. This is reflected, for example, in the warrant requirements for CHRC investigators.³³¹ Its substantive jurisdiction also extends beyond the government to the entire federal sector, including private organizations.³³² Private sector regulation does not require the same degree of separation between the regulator and the executive and legislative branches as does the oversight of government activities. For these reasons, it would appear that the officer of Parliament structure is not the best or only mechanism by which the CHRC's mandate can be accomplished.

³³⁰ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 27.

³³¹ See Appendix.

³³² *Canadian Human Rights Act*, *supra* note 330, s. 2.

In the case of SIRC, the core of the substantive mandate is to review the performance of the Canadian Security Intelligence Service and the government's administration of security clearances. No reference is made in the legislation to particular values or virtues which its work is intended to promote, although it is arguable that both probity and justice are relevant goals. Structurally, the SIRC's chief responsibility is to advise the Minister of Public Safety, the Director of the Service and the relevant deputy heads of government departments and agencies of the results of its reviews and investigations, rather than making frequent or direct reports to Parliament.³³³ Thus the SIRC's mandate, as currently constituted, does not seem to be one which requires the officer of Parliament model.

This experimental use of the test formulated above should not be taken as a conclusive analysis that the subject matter dealt with by any of the PSC, CHRC or SIRC could never properly form the mandate of an officer of Parliament. Policy-making is an art, not a science, and in this area is driven by a large number of situational, ethical and political considerations. The test that has been suggested is a first attempt to articulate the analysis that could lie behind thoughtful decisions about whether to create or extend officer of Parliament positions. It is very unlikely that it contains all of the relevant factors that would go into any given decision of this nature. Its best use, perhaps, would be negative, as establishing a kind of reverse onus. Is it fair to say that, given the particular attributes of officers of Parliament, a negative answer to all or most of the questions posed above should be a sign that the subject matter considered does not raise the need for an additional officer of Parliament mandate? If so, then perhaps these considerations represent a useful contribution to a decisional framework around this unique accountability mechanism.

³³³ *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, ss. 52-55.

D Matters for potential reform

So far in this chapter we have considered the potential for our examination of officers of Parliament to guide decisions about the creation of such positions in the future. What about the existing officers? Does the analysis contained in this thesis yield any prescriptive requirements for reform of the structures we currently have?

One matter which could be the subject of further study is that of conferring on an officer of Parliament a responsibility that is focused entirely on private sector activity. Most of the officer of Parliament jurisdiction involves matters that are entirely within the public sector, or which target the interactions between the public and private sectors. Examples of the latter would be the LC's mandate, and the new authority of the AG to audit recipients of government funding. At the moment, the only purely private sector mandate in the group derives from the fact that the PC has now been given, in addition to her duties under the *Privacy Act*, the responsibility to accept and investigate complaints under the *Personal Information Protection and Electronic Documents Act*.³³⁴ As discussed in Chapter 1, that statute gives the PC the duty to receive complaints about the use of personal information by private companies and to audit those companies to ensure compliance.

Substantively, we have seen that the legitimacy of officers of Parliament, and their separation from the accountability and control structures of the executive branch, has to do with their capacity to preserve and restore certain underlying values within government. That legitimacy is less clear when instead of overseeing government, they are asked to take on a government activity themselves, such as regulating the activities of private persons and industries.

³³⁴ See *supra* note 39 and accompanying text.

Structurally, the guarantees of independence associated with the oversight of government activity, independence that extends to both the legislature and the executive, and to both substantive and administrative matters, are not required for the many government agencies who oversee activity in the private sector. Bodies like the National Energy Board, the Superintendent of Financial Institutions and the Canadian Food Inspection Agency, while operating more independently than ordinary government departments, do not enjoy the same freedom from structural and administrative constraints as our eight officers of Parliament.³³⁵ To varying degrees, ministerial responsibility for these three entities can operate in the usual way, so that their supervision of private sector actors can be brought under parliamentary and public scrutiny through questions to the minister responsible for them. Retaining some substantive and administrative connection with the political executive also means that there are avenues for government policy about the particular area of regulation to be communicated to the regulator, as appropriate. There is a question to be raised about the justification of removing a private sector regulatory function from these normal avenues of executive responsibility to Parliament by placing it within the aegis of an officer of Parliament.

Another issue to consider is that of transparency, in terms of the current avenues of accountability to which the officers are subject. It was noted in Chapter 1 that recently, efforts have been made to standardize some aspects of their appointment and administration.

³³⁵ See *National Energy Board Act*, R.S.C. 1985, c. N-7; *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985 (3rd Supp.), c. 18; *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6. Of these, the National Energy Board is the most independent of executive influence, with its members removable only on an address by the Houses of Parliament. Nonetheless, the Chairman is chosen by the Governor in Council from the membership, and can be removed from that office without any parliamentary involvement, as happened in 2008. See *National Energy Board Act*, *supra*, s. 6 and “Nuclear safety watchdog head fired for ‘lack of leadership’: minister” *CBC News* (16 January 2008), online: [CBC News <www.cbc.ca/canada/story/2008/01/16/keen-firing.html>](http://www.cbc.ca/canada/story/2008/01/16/keen-firing.html). See also Gay and Winetrobe, *supra* note 77 at 62, commenting that the inclusion of regulatory, rather than core governance issues, in an officer of Parliament mandate, “lays the Officer template open to be applied inappropriately”.

This process has yielded two results. One is that we now have a unit of sorts, consisting of all eight offices, who are treated similarly for appointment and budgeting purposes. The other is that some of these arrangements have led to an increased discrepancy between how the legislation describes their accountability, particularly for financial and administrative matters, and reality.

One example is the advent of the parliamentary panel to oversee the budgets of officers of Parliament. As discussed in Chapter 3, this ad hoc all-party panel is now charged with overseeing the annual estimates process for officers of Parliament. The parliamentarians on the panel review the budget estimates prepared by the officers and provide their recommendation to Treasury Board. All of this takes place before the “appropriate minister” for each officer (as identified under the *Financial Administration Act*) signs off on the estimates so they can be formally presented by the President of the Treasury Board to the House of Commons.³³⁶

This arrangement inserts a decision by parliamentarians between the request by officers for money to fund their activities in the coming year and the appropriate minister’s decision to accept and champion that request in Parliament. This leaves ministers of the Crown notionally responsible for institutions which now have a direct connection to the very people who would hold those ministers responsible for their performance. On the one hand, this situation increases the link between the officers and Parliament, and the supervisory capacity of parliamentarians over their work and administration. On the other, it arguably removes any control the appropriate minister might otherwise have had to question the amount of the budget proposed or the purposes for which the money is sought.

³³⁶ See *supra* notes 12, 164-172 and accompanying text.

All of this may be to the good, if this kind of enhanced independence from executive control really renders the officers more effective in carrying out their very important mandates. However, it results in a situation in which the legislation reflects one reality: that an identified minister of the Crown is responsible for signing off on, and therefore endorsing, the financial affairs of these offices; while the actual practice reflects a different reality: that a panel of parliamentarians has taken on the responsibility for that decision, leaving the minister without effective control.

One of the fundamental purposes behind the creation and work of officers of Parliament, as we have seen, is transparency. That goal would appear to be undermined when Canadians read of one avenue of accountability in their statute books, concerning these officers who are so important to our polity, while another process takes place in reality. It would therefore seem to be in keeping with the purposes for which these officers exist for significant changes in their accountability and administration to be reflected both in legislation and in the Standing Orders of the House of Commons (or the Rules of the Senate, as appropriate).

E Conclusion

The phenomenon of officers of Parliament appears to be here to stay. Not only in this country, but internationally, there is an increasing number of independent moral actors, providing a non-judicial oversight of government activity. Given the unique nature and accountability of such bodies, some jurisdictions are becoming cautious about the appropriate range of their responsibilities. In the University College of London study referred to earlier

the approaches of New Zealand and South Africa of officers of Parliament were compared.

A legislative committee of the former declared that:

1. An Officer of Parliament must only be created to provide a check on the arbitrary use of power by the Executive
2. An Officer of Parliament must only be discharging functions which the House of Representatives itself, if it so wished, might carry out
3. Parliament should consider creating an Officer of Parliament only rarely.³³⁷

On the other hand, South Africa has listed bodies analogous to officers of Parliament in its Constitution, including “The Public Protector (Ombudsman)”, “The Auditor-General” and “The Electoral Commission”.³³⁸ Constitutional entrenchment could be expected to have a significant effect on the permanence and autonomy of such officers and on the interpretation of their jurisdiction and powers.

In this country, while we have not yet considered enshrining our officers in the Constitution, neither have we limited them to activities that Parliament itself might do. The eight officers of Parliament have mandates that range from on-site investigations, to legislative and policy commentary, to court appearances and media interaction. They also, now, have a standardized set of appointment, administrative and budget requirements and protections which give them a unique status among federal government entities, as well as a high degree of independence from both Parliament and the executive.

None of this seems likely to change. We will no doubt continue with the usual Canadian approach to the evolution of our constitutional and governmental structures – crafting each new mechanism to fit the perceived requirements of the times. The intention of this thesis has merely been to bring a little clarity to the specific phenomenon of officers of

³³⁷ Gay and Winetrobe, *supra* note 77 at 10 and 63, as well as *supra* note 325 and accompanying text.

³³⁸ *Ibid.* at 10.

Parliament, their relationships with each of the branches of Government, and the reasons these actors have been accorded legitimacy as part of our governance structure.

Specifically, I have tried to show the following:

1. That officers of Parliament are widely seen as essential for the preservation and promotion of integrity within government.
2. That the eight officers of Parliament, while dissimilar in many ways, have now enough in common to be considered a unit within the federal government, enjoying certain identifying attributes;
3. That the mandates and powers of the officers give them the capacity to have an important impact on government and the interests of Canadians;
4. That these bodies do not really belong to or share in the accountability mechanisms of any of the other three branches of government. Their functions place them outside Parliament, their structure means they are beyond the effective control of the executive and they are not part of the judiciary;
5. That, nonetheless, arguments exist to support their legitimacy as performing a unique “representative” role in our democracy and as a recognized means of preserving the virtues and principles which underlie our governance structures;
6. That future development of the phenomenon of officers of Parliament should be guided by this account of their structure, accountability and legitimacy; and
7. That, as much as possible, the legislation and orders that deal with officers of Parliament should reflect the reality of their accountability and relationships with other government actors.

If these observations are of use either in furthering our understanding of the current officers of Parliament, or in the future development of these unusual government bodies, then the goal of this thesis will have been accomplished.

Appendix: Comparison of three executive agencies with the officers of Parliament

1. The Canadian Human Rights Commission (CHRC)

The CHRC has as its mandate the responsibility of seeing that discriminatory practices of various kinds do not occur within entities under federal jurisdiction, including the government of Canada. To that end, the CHRC receives and investigates complaints of discriminatory practices and determines whether such complaints should be referred to the CHRT for adjudication. The CHRC also has a variety of less formal functions, including commenting on federal regulations and orders and trying by “persuasion, publicity or any other means” to reduce discriminatory practices.³³⁹

The complaint investigation function of the CHRC clearly makes it similar to several of the officers of Parliament. One distinction between the CHRC’s procedure and that of some of the officers is that the *Canadian Human Rights Act* makes no mention of case reports being sent to Parliament. The results of the CHRC’s investigations go automatically only to the complainant and the person against whom the complaint was made.³⁴⁰

The CHRC reports to Parliament on its activities generally. Such reports are made both annually and where a matter coming within the scope of its responsibilities is considered so urgent or important it cannot wait for the annual report. Like the officers of Parliament, and unlike almost all other executive bodies, the CHRC’s reports are filed directly with the

³³⁹ *Supra* note 330, ss. 27(1), 40(1). The Commission also comments on pension legislation: s. 62.

³⁴⁰ *Ibid.*, s. 44(4)(a). Although the Commission may also choose to notify any other person whom it considers necessary to notify: s. 44(4)(b).

Speakers of both Houses, and are not tabled through a minister of the Crown.³⁴¹ The statute does not require that a committee of Parliament be designated to review the reports.³⁴²

The powers of the CHRC to investigate complaints are extensive, and include the right to enter and search any premises, but only if the investigator has been issued a warrant by a judge of the Federal Court.³⁴³ These powers go beyond those of some officers of Parliament, but fall short of others, notably the AG, COL, IC, PC and PSIC, who can enter federal government premises without a warrant.

The CHRC is not subject to direction by any minister or executive authority in its operations, but, like the PC, can be directed by the Minister of Justice to undertake studies.³⁴⁴

Administratively, the CHRC shares some of the same hallmarks of independence from the executive as the officers of Parliament. Although appointed by the Governor in Council acting alone, Commissioners can only be removed on address of Senate and House of Commons.³⁴⁵ Their salaries are fixed by the Governor in Council, but they are given the authority to, by by-law, prescribe remuneration for part-time members and employees, as well as travel and living expenses. However, such by-laws are made subject to the approval of the Treasury Board.³⁴⁶ Its financial regime is otherwise the same as for other executive entities. The officers and employees of the CHRC are appointed under the authority of the *Public Service Employment Act*.³⁴⁷

³⁴¹ *Ibid.*, ss. 61(1) and (2).

³⁴² Also like the officers of Parliament, the Standing Orders of the House of Commons provide that the CHRC's reports stand automatically referred to a committee designated for that purpose in the Standing Order: Canada, House of Commons, *Standing Orders of the House of Commons* (June, 2009), Canada, House of Commons, *Standing Orders of the House of Commons* (June, 2009), S.O. 108(3)(c)(x)(e).

³⁴³ *Ibid.*, s. 43.

³⁴⁴ *Ibid.*, s. 27(1)(f).

³⁴⁵ *Ibid.*, ss. 26(1) and (4).

³⁴⁶ *Ibid.*, ss. 32(2), 37(1)(e) and (f).

³⁴⁷ *Ibid.*, s. 32(1).

2. The Public Service Commission (PSC)

The mandate of the PSC is to appoint and to provide for appointments to and from within the public service.³⁴⁸ This authority the PSC then delegates to deputy heads of departments.³⁴⁹ The purpose of the PSC and its mandate is to ensure that membership in the public service is “based on merit and non-partisanship” by removing appointment authority from the hands of the Crown and Cabinet, where it originally resided.³⁵⁰ Since the ultimate appointment authority is that of the PSC, it can revoke its delegations to deputy heads where warranted and is given the responsibility to audit the exercise of appointment authority by departments.³⁵¹

The PSC’s audit function is an oversight mechanism that is similar, in some ways, to the responsibility given to officers of Parliament. However, because of its primary purpose as the home of appointment authority within the public service, the PSC is seen as clearly located “within the executive branch”, a status that some feel disentitles it from performing functions appropriately conferred on officers of Parliament. Thus, the Minister responsible for the *Federal Accountability Act* explained that amendments to the original *Public Servants Disclosure Protection Act* were necessary to remove the power to investigate disclosures of wrongdoing from the President of the PSC in order to give it to an officer who was “more independent”.³⁵²

For audit and investigation purposes the PSC, like several of the officers of Parliament, has the powers of a Commissioner under the *Inquiries Act*.³⁵³ It reports to

³⁴⁸ *Public Service Employment Act*, *supra* note 176, s. 11.

³⁴⁹ *Ibid.*, s. 15.

³⁵⁰ *Ibid.*, Preamble. And see Forcese and Freeman, *supra* note 5 at 216-217.

³⁵¹ *Public Service Employment Act*, *supra* note 176, s. 17.

³⁵² *House of Commons Debates*, Vol.141, No. 002 (25 April 2006) at 1015 (Hon. John Baird).

³⁵³ *Public Service Employment Act*, *supra* note 176, s. 18.

Parliament annually, through a designated minister. The PSC also has the power to, at any time, make a special report to Parliament commenting on a matter within its jurisdiction, where the matter is too urgent or important to wait for the next annual report.³⁵⁴

Like the AG, the PSC can be assigned additional functions in relation to the public service by the Governor in Council, but unlike the provision in the AG's Act, this power is not limited by the requirement that such additional duties be consistent with the PSC's primary duties.³⁵⁵

The level of independence in the appointment of the PSC stands somewhere between that of the CHRC's Commissioners and officers of Parliament. Two of the PSC Commissioners are simply appointed by the Governor in Council. The appointment of the President of the PSC requires the approval of the Senate and House of Commons. Before commencing their functions, all the PSC Commissioners have to take an oath of office before the Clerk of the Privy Council.³⁵⁶

The removal procedure for PSC Commissioners is the same as for the officers of Parliament, but their remuneration is determined by the Governor in Council, and there are no special financial provisions or immunities that apply. The PSC is staffed in accordance with the *Public Service Employment Act*.³⁵⁷

³⁵⁴ *Ibid.*, s. 23. The Act contains no instructions on how special reports are to be tabled. The legislation does not require that there be a designated committee for the PSC, but the House of Commons' Standing Orders provide that the PSC's reports stand automatically referred to the Committee on Government Operations and Estimates. Canada, House of Commons, *Standing Orders of the House of Commons* (June, 2009), S.O. 108(3)(c)(vi).

³⁵⁵ *Ibid.*, s. 12.

³⁵⁶ *Ibid.*, ss. 4(5) and (8).

³⁵⁷ *Ibid.*, ss. 4(6), 5(1) and 9.

3. The Security Intelligence Review Committee (SIRC)

Oversight of a government activity is the SIRC's primary function, although unlike most officers of Parliament, it focuses primarily on one institution, the Canadian Security Intelligence Service. The SIRC investigates complaints about the activities of the Service and reviews the reports, directives, regulations and arrangements concerning those activities.³⁵⁸ It also has a mandate to handle complaints about the awarding of security clearances by the Government.³⁵⁹ Its powers include the ability to access any information under the control of the Service and the right to demand information and explanations from the Service's employees. This is a similar power to that of the AG and other officers of Parliament to have access to government premises and personnel during investigations. When dealing with complaints the SIRC has the powers of a superior court of record.³⁶⁰

Reports following investigations are provided to the Minister (currently the Minister of Public Safety and Emergency Preparedness) and to the Director of the Service, not to Parliament. However, the SIRC prepares an annual report to Parliament, which is tabled by the Minister, and also has the power to file special reports on the request of the Minister or on its own initiative. It is required to consult with the Director of the Service on the preparation of its reports, in order to ensure that applicable security requirements are respected.³⁶¹

It appears that the SIRC was intended, at its inception, to perform a very similar role to that performed by officers of Parliament. The Commission of Inquiry Concerning Certain Activities of the RCMP, which reported in August, 1981, recommended the establishment of an "Advisory Council on Security and Intelligence" which would oversee security

³⁵⁸ *Supra* note 333, ss. 38 and 41.

³⁵⁹ *Ibid.*, s. 42.

³⁶⁰ *Ibid.*, ss. 39(2) and 50.

³⁶¹ *Supra*, note 333, ss. 2 and 51-55.

intelligence activities and report to the Solicitor General. It was recommended that the Council also report “at least annually to the parliamentary Committee on Security and Intelligence so that Members of Parliament representative of all political parties will know of any situations in which the Solicitor General has rejected the views of the Advisory Council.”³⁶² In other words the reports to Parliament were to be an enforcement mechanism to ensure recommendations were followed. It would not appear that the Commission’s recommendations were fully implemented. Unlike the PSIC or the COL, the SIRC’s legislation does not provide for either a designated committee or a detailed procedure for follow-up reports to Parliament where its advice is ignored.³⁶³

The appointment provisions for members of the SIRC differ from those of the CHRC and the PSC, but contain another aspect of the officer of Parliament appointment procedure – that of consultation. Members are appointed by the Governor in Council from among the Queen’s Privy Councillors for Canada who do not sit in the Senate or House of Commons. Prior to their appointment, the Prime Minister must consult with the Leader of the Opposition and the leader of each party having at least twelve members in the House of Commons. There is no Senate involvement in the appointments, nor is the approval of either House, acting as a whole, required.³⁶⁴ There is therefore less parliamentary involvement than in the selection of officers of Parliament, although the same level of political involvement.

Of interest here is that the pool from which the members of SIRC can be drawn is clearly executive in nature. The Queen’s Privy Council for Canada, under the *Constitution*

³⁶² Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security Under the Law – Second Report*, vol. 2 (Ottawa: Department of Supply and Services, 1981) at 884.

³⁶³ Although, like all reports required by an Act of Parliament to be submitted to the House of Commons, the SIRC’s reports are deemed to be permanently referred to the appropriate standing committee, in this case the Standing Committee on Public Safety and National Security – see Canada, House of Commons, *Standing Orders of the House of Commons* (June, 2009), S.O. 32(5).

³⁶⁴ *Canadian Security Intelligence Service Act*, *supra* note 333, s. 34(1).

Act, 1867, is the body established to “aid and advise in the Government of Canada”.³⁶⁵ In other words, together with the Governor General, it is the body in which is invested the formal executive power under the Constitution.³⁶⁶

There is no provision for the removal of members of the SIRC, but they hold their offices during good behaviour and may therefore be removed by the Governor in Council for cause. Members of the SIRC have their remuneration fixed by the Governor in Council. The SIRC may conduct its own staffing, but only with the approval of the Treasury Board.³⁶⁷

³⁶⁵ *Supra*, note 11, s. 11.

³⁶⁶ Although, by convention, that authority is only exercised by those members of the Privy Council who currently hold a seat in Parliament, i.e. the Cabinet.

³⁶⁷ *Canadian Security Intelligence Service Act*, *supra* note 333, ss. 34(1) and (4), 36.

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