

FEATURE: PRIME MINISTER'S POWER



PMO photo by Deb Ransom

Prime Minister's power: Prime Minister Stephen Harper, pictured last week talking to United States President Barack Obama about emergency rescue efforts to Haiti. The decline of Parliament beyond its designed role has been due to the opportunistic behaviour of all Prime Ministers beginning with Pierre Trudeau (and perhaps earlier), and continues under Prime Minister Harper today.

The incredible decline of Parliament

The weakness and decline of Parliament is due to institutional design and the opportunism of Prime Ministers.

By B. THOMAS HALL
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Much ink has been spilled lamenting the decline of Parliament. *Maclean's* national editor Andrew Coyne provides a useful summary in a recent column: "... so degraded is Parliament's condition already—the consequence of many previous such assaults on Parliamentary rights, each of which was thought too trivial on its own to be worth making a fuss—that it's hard for the public to see what is being lost. It's only Parliament, after all. It's not as if it's something important."

Here we argue that weakness of the legislative branch of Canada's government is primarily due to the design of Canada's version of the Westminster model of government inherited from Great Britain. The Westminster model has been called a fusion form of government in contradistinction to the separation of powers and checks and balances system in the United States. Fusion refers to the fact that the executive branch—headed by the PM—has enormous influence over the

legislative branch, and the latter provides few checks or balances on the enormous powers of the PM. In other words, the legislative branch has a very limited degree of independence—far less, for example, than the judicial branch. And Canada's Parliament has far less autonomy than the American Congress, which has various ways, entrenched in law, to check the power of the President.

The decline of Parliament beyond its designed role has been due to the opportunistic behaviour of all Prime Ministers beginning with Pierre Trudeau (and perhaps earlier). It has coincided with the rise of what Prof. Donald Savoie calls "court government." Prime Minister Harper has shown aggravated disrespect for Parliament in many ways (see Stanbury, *The Hill Times*, Jan. 11, 2010).

The focus of this piece is on how the Canadian version of the Westminster model gives the PM (and his/her close advisers and associates—the king and his court) so much potential control over Parliament. This can be seen by examining the nuts and bolts of institutional design. When

reviewing the powers of the PM it must be understood that he currently has some 85 people in the PMO and the vast majority of the over 800 people in the PCO to effect his will. Further, he can call upon, indirectly, thousands more federal employees through his 30-odd Cabinet ministers. Also, the PM's "deputy minister" is the head of the public service, and the PM can move deputy ministers around and promote assistant and associate DMs.

Ways in Which the Prime Minister Can Control Parliament

The PM has a monopoly over the supply of government bills to the legislature. These are the ones which, under a majority government, are nearly certain to be passed by the Commons, and only in the rarest instance will not be approved by the Senate. The PM applies party discipline to get his way. Remember that he (like every other party leader) must sign the nomination papers of each person seeking election under his party's banner. Further, the leaders themselves are chosen not by caucus but by their party, and the campaigns are leader-focused so that the

fortunes of candidates depends on the leaders, not the other way round. More importantly, the ambition of MPs to get into the Cabinet is a powerful inducement to do the PM's bidding.

David Mitchell, CEO of the Public Policy Forum, in a personal communication, argues that "the modern party system and, in particular, party discipline has been the great corruptor of Parliament. And in Canada we have the most rigid and inflexible party system in any modern parliamentary democracy."

The PM of a majority government decides which, if any, opposition amendments will be accepted for a government bill. When there is a minority government, the PM has to contend—as do opposition parties—with the prospect of an election if the opposition parties are adamant about a proposed amendment.

The PM has a complete monopoly over the supply of subordinate legislation, primarily regulations. They become law by means of a Cabinet committee, the Special Committee of Council—see Stanbury, *The Hill Times*, Jan. 12, 2009.

The PM can use party discipline (the whips) to pass government bills. In most cases, this is also true for a minority government. However, private members' bills are much harder to control. In principle, Private Members' Business is not supposed to be whipped. The way a recorded division is taken is designed to reflect that the MPs are not voting by party.

The PM decides on the schedule and the order in which government legislation will be considered in the Commons. The government House leader meets regularly with the other parties' House leaders to discuss future business. But this is not a decision-making group, and the government can, under the Standing Orders, call its business—including Opposition Days—in any order it wishes. Once this meta decision is made, the rules govern the legislative process and other business. The rules give the biggest chunk of House time to Government Orders (bills, motions) rather than to Private Members' Business. A fairly recent rule—introduced under

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PM Harper has shown aggravated disrespect for Parliament in many ways, argue authors

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the Liberals—allows the government to choose whether a bill will go to committee before second reading, which opens the bill to more amendments.

The PM decides which bills will be a matter of confidence—except for supply (or appropriation) bills, which are, by constitutional convention, considered matters of confidence because if Parliament doesn't grant supply, the government can't operate. Ways and means, or taxation, bills are not automatically confidence matters in Canada because, unlike the U.K., we don't have an annual finance bill, which is a matter of confidence. Budget implementation bills, which are based on ways and means resolutions, are treated as matters of confidence since the Budget itself is considered a matter of confidence. Again, that is a convention, and the government could allow such budget bills to be amended if it wanted. The Harper government has included in such bills things that are not really budgetary matters, and relied on confidence to claim that the bills couldn't be amended.

The PM effectively appoints Senators to replace those who die, resign or retire at age 75. (The number of Senators per province is set out in the Constitution.) This is another instance of the PM acting as the sole adviser to the Governor General; although the Constitution gives that role to the Privy Council, which includes the ministers. As sole adviser, the PM doesn't need to consult with, or gain the support of, his ministers. (Further, ministers' roles with regard to their departments have also been reduced by the PM and PMO—see John Ivison, *National Post*, Jan. 12, 2010.)

The PM can, as sole adviser to the Governor General, have Parliament prorogued or dissolved any time he finds it convenient to do so. David Mitchell points out that prorogation “kills all Parliamentary business, including legislation that has been introduced, debated but not yet passed into law. Likewise, it summarily ends the often impressive efforts of parliamentary committees mid-stream...” (*The Ottawa Citizen*, Jan. 9, 2010).

The PM effectively controls the appointment of all officers of Parliament, such as the chief electoral officer, information commissioner and auditor general, as well as other officers like the Parliamentary budget officer. The PMO selects the nominee

and the Commons, or Commons and Senate, can only say yea or nay to the appointment.

Through the Treasury Board, the PM can set the budget of all the officers of Parliament. A tight budget can effectively limit the effectiveness and independence of the officer. Note that the Parliamentary budget officer is not an officer of Parliament as many believe. His budget, as part of the Library of Parliament's budget, is set by the two Speakers, based on the Parliamentary librarian's recommendations.

When he has a majority, the PM can modify the legislative mandate of existing officers of Parliament. Even as head of a minority government, the PM can effectively determine the mandate of any new officers of Parliament.

With a majority government, the PM selects the chair and the MPs of his party who will form the majority of every Commons committee. During minority governments, however, opposition party MPs may have a majority of the members. (The chair of the Public Accounts Committee is always an opposition MP. Three other committees have now opposition chairs: the Access to Information, Privacy and Ethics Committee; the Government Operations and Estimates Committee; and the Status of Women Committee. This change stemmed from compromises reached under a Liberal government with the Conservative/Canadian Alliance official opposition. Note too that a committee chair's procedural rulings are all subject to appeal to the committee, so the majority of members can overturn any decision they don't like, no matter how well founded it is.)

When faced with requests for information from a Parliamentary committee, the PM can cite the Secrecy Act, etc., and refuse to hand over the requested unredacted documents (see James Travers, *The Hill Times*, Dec. 21, 2009).

Part of the information MPs (and Senators) obtain that may be useful in criticizing the PM and his government and trying to hold it to account comes from requests under the Access to Information Act. The PM can instruct the PCO to filter the proposed responses of departments and agencies—as Harper has done. More generally, the PM has a wide variety of techniques to determine the extent to which secrecy will prevail throughout the government (see Stanbury, *The Hill Times*, June 15, 2009).

So what is left for Parliament?

MPs can propose their own bills. The rules, largely made by previous majority governments, are complex (covering about 30 pages in *Private Members' Business: Practical Guide*, ninth ed., Oct. 2008). Their overall effect is to limit greatly the odds that such private members' bills will become law because the lottery procedure is so selective and so little time is granted to private members' business. Very few bills used to be votable, but the rules were changed by a Liberal government and Conservative/Alliance/Reform opposition to allow almost every bill that comes up for debate—following the lottery—to be put to a vote. Only if the government has majority and decides to whip its MPs, can it be sure of defeating a bill it does not like. Bills that call for expenditure can now be proposed, but cannot be passed at third reading unless the government presents a royal recommendation. Private members' bills have caused the Harper Government much consternation because some bills have proposed tax reductions that would reduce revenue.

MPs can also propose resolutions, and while these may garner the support of a majority in the Commons, they do not have the force of law. However, some resolutions, or motions, do become orders when adopted. An order of the House can, for example, change the rules of the House or give additional mandates to committees. However, motions under Routine Proceedings are another matter: the government has almost complete control of that part of House business, which includes motions regarding sittings and conduct of business. But MPs can, during Routine Proceedings, move concurrence in committee reports to discuss matters they want and to delay government business.

MPs can also propose a motion for the production of papers. This “a special type of motion asking the government to table a document or documents in the House; when transferred for debate, a motion for the production of papers falls under Private Members' Business.” (source: *Private Members' Business...*) “The chief law clerk of the Commons has advised the Special Afghanistan Committee that Parliament is supreme under the Canadian Constitution and has the authority to compel the government to disclose the documents and information it is withholding on grounds of national security.” (Tim Naumetz, *The Hill Times*, Jan. 11, 2010) and for more detail, see Hall, *The Hill Times*, Jan. 11, 2010.

MPs have an opportunity to question the PM and his ministers in the daily Question Period. On occasion, this tool can be effective—but only if the opposition MP is very well-informed

and several such MPs coordinate their questions. Columnist Rex Murphy (*National Post*, Jan. 9, 2010) put it this way: “Question Period is a verbal equivalent of the World Wrestling Federation, all hype and confected theatrics. Members ... dance with half-truths when it serves their purpose, launch reckless attacks on the first hint of scandal, play act to the cameras in and out of the House...” Although a member of the opposition may address a question to Minister X, any minister, or parliamentary secretary, may, because of Cabinet solidarity, reply. So the PM can respond to any question he wishes. This can sometimes be used to protect weak ministers.

The members of the House Public Accounts Committee may meet with the auditor general to help determine what departments, agencies, or programs will be the subject of a special study. (The OAG considers requests from the PAC, but is not obliged to carry out any audits suggested. The OAG is fiercely independent and refuses to let the committee dictate what it will audit or the scope of an audit.)

Parliament reviews the annual estimates. The record shows that despite the occasional sound and fury, Parliament is rarely able to change any of the vast supply of numbers put before it for its approval. The consideration of estimates in committees is largely a useless exercise regardless of which party controls the committee. Despite efforts at reform, the system is hugely flawed, and so the government pretty well has free rein to spend as it sees fit. The huge annual expenditures get approved by a fixed date each year whether Parliament has finished its puerile review or not. The activities of the Commons Finance Committee are now nearly all show and no substance. It is simply a specialized talking shop, even when experts are called to testify.

With a majority government, the PM's people can select the majority of the members of every Commons committee. (The caucus leaders of other parties chose the MPs for each committee. The numbers from each party reflect the proportion of seats held in the House.) “Historically, the leaders of both caucuses in the Senate negotiate to divvy up chairs of committees, and in the past the minority caucus has retained some of the chairs.” (Harris MacLeod, *The Hill Times*, Jan. 11, 2010). Yet, it is possible for a standing committee to exercise considerable discretion in what it investigates and how it will do so. (Senate committees have to have their studies agreed to by the Senate; not so for Commons standing committees.)

Some Senate committees, for example, have done exemplary work on a range of issues —

even if their impact on policy has been limited as far as can be ascertained. (But influence can be delayed and indirect.) For committees to do really useful work, however, two things are necessary: the members have to cooperate across parties (which is why Senate committees are often better), and the committee has to obtain sufficient resources to get professional advisors and researchers.

Most MPs engage in a variety of services for their constituents. Each had a basic budget of \$280,500 in 2008/09 for this function and others necessary to run his/her office. Ironically, only a few MPs can rely on such efforts to keep their jobs when an adverse swing affects their party because elections are leader-focused.

MPs have a number of important privileges and immunities that go beyond free speech in the performance of their responsibilities as elected representatives to inquire, to debate, and to legislate. MPs have immunity for words spoken and actions taken as part of the debates and proceedings of the House and its committees. No other words or actions are protected by parliamentary privilege. In fact, if an MP says something to another MP in committee, but not as part of the proceedings, the words spoken are not privileged. This is why cameras aren't allowed to move around in committee rooms and why photos and tape recordings aren't allowed. The only other individual privileges are relatively minor and exist only during a session and for 40 days before and after a session: freedom from arrest for a civil matter, exemption from subpoenas to be a witness in court or other proceedings, both civil and criminal; and exemption from jury service.

Conclusion: The design of the Canadian variant of the Westminster model of government gives the Prime Minister—the head of the executive—the possibility of exercising a great deal of control over Parliament. Stephen Harper is just one in a long line of PMs who have exploited this opportunity and in the process have gradually weakened Parliament—particularly the House of Commons—a very great deal. It might be argued that this is a natural outcome of responsible government: if the Government is going to be responsible to, and subject to the support of the House, then it will naturally try to ensure continuing support by dominating the House. Perhaps—but the time for changing the balance is now.

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