

**GOVERNOR IN COUNCIL APPOINTMENTS:
RECENT CHANGES AND SUGGESTIONS FOR REFORM**

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INTRODUCTION

Governor in Council (GIC) appointments are sometimes called patronage appointments because the formal process seemingly continues to enable political influence, despite the fact that many of these appointments now involve competitive processes and requirements for substantive competency. GIC appointments are made by the Governor General on advice from the Privy Council Office (PCO) and are handled through a process that recognizes the Prime Minister's right to make the final decisions on all appointments.⁽¹⁾ Traditionally, many of these appointments have involved the provision of paid employment to supporters of the government or members of political networks because of their political affiliations.

In 1998, the Public Policy Forum reviewed appointments to Crown corporations and found that, in general, Crown corporations were well directed and well managed.⁽²⁾ However, it also noted the ongoing perception that appointments were based on political considerations rather than on merit. Given the wide role GIC appointees play in Canadian life, from regulating the types of pesticides that are approved for use in Canada to deciding which refugees can seek protection in this country, the review noted that "Canadians are looking for better management in government, for government to be more efficient, more accountable and more transparent." The perception that GIC appointments are made on a partisan basis is problematic in this time of heightened attention to accountability and transparency in government. Partisan patronage appointments are often perceived as weakening the legitimacy of the public sector.⁽³⁾

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- (1) Currently, there are approximately 500 full-time and 1,900 part-time GIC appointments to agencies, boards and Crown corporations.
 - (2) Peter Larson and Bill Neville, *Protecting the Shareholder: A Review of the Governance Structure of Canadian Crown Corporations*, Public Policy Forum, Ottawa, 1998.
 - (3) Peter Aucoin and Elizabeth Goodyear-Grant, "Designing a Merit-Based Process for Appointing Boards of ABCs: Lessons from the Nova Scotia Reform Experience," *Canadian Public Administration*, Vol. 45, No. 3, Fall 2002, pp. 301-327.

This paper will explore the recent history of changes to the GIC appointments process. In addition, it will look at some options for reforming that process, including an office similar to the Public Appointments Commission proposed by the Conservative government on 11 April 2006 in Bill C-2, the Federal Accountability Act.

RECENT CHANGES TO THE GOVERNOR IN COUNCIL APPOINTMENTS PROCESS

A. Background

Patronage was initially a well-entrenched and widely tolerated tradition in Canada, dating from pre-Confederation.⁽⁴⁾ But things were to change during World War I, when reports of inadequate clothing and equipment for the military, coupled with allegations of profiteering by certain government-friendly businesses, brought an end to Canadians' tolerance of patronage. Due to the controversy surrounding this issue, in 1917 the government committed itself to a merit principle of appointment in the civil service.

In 1918, the *Civil Service Act* was passed. This act broadly established merit as the central criterion for federal public service hiring and promotion. Though initially full of loopholes, the *Civil Service Act* is generally recognized as having been a major turning point in the development of the merit-based public service. While tensions continued through the 1920s and 1930s, by the 1940s most full-time public service positions were staffed in accordance with the merit principle. Various factors figured in the gradual displacement of patronage by merit: the size and complexity of the public service; requirements for more specialized and technical skills; unionization; and increased public and bureaucratic intolerance of overt political interference.⁽⁵⁾ Though a statutory requirement only in the public service, the merit principle became widely viewed by Canadians as a necessary consideration in the GIC appointments process.

Controversy over patronage issues has flared up periodically over the years. For example, the role of patronage in GIC appointments became a very public concern during the 1984 federal election campaign. A central issue of that election was perceived Liberal Party

(4) For a history of the role patronage appointments played in pre- and post-Confederation Canada, see Jack Stilborn, *Political Patronage: A Newly Troubled Tradition*, BP-199E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 1989.

(5) *Ibid.*, p. 16.

patronage. During his final days in office, Prime Minister Pierre Trudeau appointed over 70 Liberals to various GIC positions. When new Liberal leader John Turner was sworn in as Prime Minister, he did not rescind those appointments despite widespread outrage expressed by the media and the public.

In the televised leaders' debate during the federal election campaign, Mr. Turner defended his decision by declaring, in response to a journalist's question, "I had no option [other than to uphold the appointments]." His principal opponent, Progressive Conservative Party leader Brian Mulroney, replied: "You had an option, sir. You could have said 'I'm not going to do that, it's wrong for Canada.'" Many observers considered the debate as the turning point in the campaign. On election night, Mr. Mulroney and the Progressive Conservative Party won the largest majority in Canadian electoral history.

B. 1985: The McGrath Committee

The dramatic impact of the patronage issue on the 1984 election illustrates the political sensitivity surrounding the appearance of patronage in the GIC appointments process. Mr. Mulroney's first term in office marked the beginning of a series of reforms to the process in response to shifting public attitudes. In his government's first Speech from the Throne, Mr. Mulroney announced the creation of a Special Committee on the Reform of the House of Commons (commonly referred to as the McGrath Committee). This seven-member special committee was appointed to examine the powers, procedures, practices, organization and facilities of the House of Commons.

The third report of the McGrath Committee addressed the scrutiny of GIC appointments.⁽⁶⁾ It set out four principles that guided its recommendations on the role of Parliament with respect to GIC appointments:

1. the primary purpose of a nomination procedure is to seek the best possible people;
2. it is important that the public see appointments as more than simply political patronage;
3. there are good reasons for excluding certain appointments from any political scrutiny; and
4. some appointments warrant different degrees of scrutiny.

(6) Special Committee on the Reform of the House of Commons, *Third Report*, 18 June 1985.

Based on these principles, the Committee recommended that certain types of GIC appointments should be subject to prior parliamentary review.

Sections 110 and 111 of the Standing Orders of the House of Commons were brought into effect in 1989 following the recommendations of the McGrath report. The text of the two sections is as follows:

110. (1) A Minister of the Crown shall lay upon the Table a certified copy of an Order in Council, stating that a certain individual has been appointed to a certain non-judicial post, not later than five sitting days after the Order in Council is published in the *Canada Gazette*. The same shall be deemed to have been referred to a standing committee specified at the time of tabling, pursuant to Standing Order 32(6), for its consideration during a period not exceeding thirty sitting days.

(2) A Minister of the Crown may, from time to time, lay upon the Table a certificate stating that a specified individual has been nominated for appointment to a specified non-judicial post. The same shall be deemed to have been referred to a standing committee specified at the time of tabling, pursuant to Standing Order 32(6), for its consideration during a period not exceeding thirty sitting days.

111. (1) The committee specified pursuant to Standing Orders 32(6) and 110, during the period of thirty sitting days provided pursuant to Standing Order 110, shall if it deems it appropriate, call the so named appointee or nominee to appear before it during a period not exceeding ten sitting days.

(2) The committee, if it should call an appointee or nominee to appear pursuant to section (1) of this Standing Order, shall examine the qualifications and competence of the appointee or nominee to perform the duties of the post to which he or she has been appointed or nominated.

(3) The committee shall complete its examination of the appointee or nominee not later than the end of the ten sitting day period indicated in section (1) of this Standing Order.

(4) The office of the Minister who recommended the appointment shall provide the *curriculum vitae* of such an appointee or nominee to the committee upon written application from the clerk of the committee.⁽⁷⁾

According to these Standing Orders, though, standing committees are involved in the appointments process in an advisory capacity only. They may report their conclusions to the House of Commons, but cannot veto any nomination or appointment.

(7) Standing Orders of the House of Commons, sections 110 and 111.

C. 1999: The Privy Council Office Guide Book

In 1999, the Privy Council Office released *A Guide Book for Heads of Agencies: Operations, Structures and Responsibilities in the Federal Government*, which included a section on GIC appointments.⁽⁸⁾ This document laid out the roles of each player in the GIC appointments process: from the agency head (or the chair of the board of directors in Crown corporations), who consults with the responsible minister on the appointment needs of the organization and makes recommendations for the reappointment of members, to the Office of the Director of Appointments in the Prime Minister's Office (PMO), who develops recommendations for GIC appointments.

The Guide Book also laid out requirements with respect to advertising vacancies for GIC positions. The Director of Appointments in the PMO and the responsible minister are to consult as to whether there is a need to advertise in the *Canada Gazette* to fill a vacancy. Advertisements in newspapers and specialized magazines can then be used, if the nature of the job warrants a competitive process.

D. 2002-2004: The “Democratic Deficit”

Prior to becoming the leader of the Liberal Party of Canada in 2003, Paul Martin delivered a speech at Osgoode Hall Law School (in Toronto) detailing his views on the “democratic deficit.”⁽⁹⁾ In this speech, Mr. Martin criticized the attitude that in order to get things done in Ottawa, the important question was “Who do you know in the PMO?” With respect to senior government appointments, Mr. Martin stated that a process must be established that would ensure broad and open consideration of proposed candidates, and that standing committees should have an opportunity to review the qualifications of GIC nominees before appointments are confirmed by the government.

After becoming Prime Minister in December 2003, Mr. Martin followed through on the principles detailed in his 2002 speech and announced that standing committees, and Parliament, would play a more important role in the appointments process. Appointments to

(8) Privy Council Office, *A Guide Book for Heads of Agencies: Operations, Structures and Responsibilities in the Federal Government*, Ottawa, August 1999, http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=mog/cover_e.htm.

(9) Paul Martin, “The Democratic Deficit,” *Policy Options*, December 2002-January 2003, <http://www.irpp.org/po/archive/dec02/martin.pdf>.

certain key positions, including heads of Crown corporations and agencies, would now be subject to prior parliamentary review.⁽¹⁰⁾ This announcement, in and of itself, was not a new development. As described above, since 1989 the Standing Orders of the House of Commons have specified that both GIC nominations and GIC appointments may be reviewed by standing committees of the House. What was new in Mr. Martin's announcement was the commitment that the government would consult with House committees on how best to proceed on prior review of these appointments. This development was spelled out in greater detail in the February 2004 document *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform*.⁽¹¹⁾ The action plan proposed that appointments to certain key positions, including heads of Crown corporations and agencies, should be subject to prior parliamentary review. Committees could identify which appointments they would like to have subject to prior review on a priority basis.⁽¹²⁾

E. 2004: Crown Corporation Appointments

In March 2004, the then President of the Treasury Board, Reg Alcock, made an announcement concerning the implementation of an interim appointments process specifically for CEOs, directors and chairs of Crown corporations – all of which are GIC appointments. The declared aim was to create a process that was competency-based, professional and transparent. The new process had four elements:

1. A permanent nominating committee was to be struck by Crown corporation boards. The nominating committee was to establish appropriate criteria for candidate selection.
2. A professional recruitment firm was to be engaged to assist nominating committees in the search for qualified candidates. In addition, public advertisements were to be posted in newspapers and in the *Canada Gazette* for all openings for the positions of CEO and chair of corporations.

(10) Privy Council Office, *Governing Responsibly: A Guide for Ministers and Ministers of State*, Ottawa, December 2003, p. 26,

http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=Publications&doc=guidemin/guidemin_toc_e.htm.

(11) Privy Council Office, *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform*, Canada, 2004, http://www.pco-bcp.gc.ca/docs/Publications/dr-rd/dr-rd_e.pdf.

(12) Following through on this action plan commitment, in November 2004 the Leader of the Government in the House of Commons, Tony Valeri, wrote to the chairs of all standing and joint standing committees asking for their views as to which appointments should be subject to prior review. In addition, Mr. Valeri asked the Standing Committee on Procedure and House Affairs to consult with parliamentarians as to how best to proceed with prior review of appointments. Several committees indicated that they were interested in prior review of the appointments that are referred to them.

3. The nominating committee was to make recommendations to the board of directors, and the board would provide a short list of candidates to the minister responsible for the corporation. Based on this list, the minister would make a recommendation for appointment.
4. The appropriate parliamentary committee would then review the candidate recommended by the minister.⁽¹³⁾

However, rather than clarifying the appointments process, the interim process contained ambiguities that were noted by the Standing Committee on Government Operations and Estimates in its report on the appointment of Gordon Feeney as Chairman of the Board for Canada Post. The Committee recommended that the President of the Treasury Board develop a set of “unambiguous requirements” for the appointments process.⁽¹⁴⁾

F. 2005: Guidelines for Crown Corporations

Following the report of the Government Operations and Estimates Committee, and after further consultation with interested parties, the President of the Treasury Board tabled a report entitled *Meeting the Expectations of Canadians – Review of the Governance Framework for Canada’s Crown Corporations* in February 2005.⁽¹⁵⁾ The processes and recommendations laid out in this review supplanted the interim process outlined in March 2004. The review stated that boards of directors of Crown corporations would advise the government on the appropriate selection criteria for chairs, as well as competency profiles and future needs for directors. The government would make these selection criteria available to the public. However, the report reaffirmed that the government will continue to make the final determination on the selection criteria and board profiles.

(13) Treasury Board Secretariat, “President of the Treasury Board Announces New Appointment Process for Top Executives of Crown Corporations,” 15 March 2004, http://www.tbs-sct.gc.ca/media/nr-cp/2004/0315_e.asp.

(14) Standing Committee on Government Operations and Estimates, *Third Report – The Process Used in Appointing Mr. Gordon Feeney as Chairman of the Board, Canada Post*, December 2004, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?COM=8980&Lang=1&SourceId=96706>.

(15) President of the Treasury Board, *Meeting the Expectations of Canadians – Review of the Governance Framework for Canada’s Crown Corporations*, February 2005, http://www.tbs-sct.gc.ca/report/rev-exa/gfcc-cgse_e.pdf.

POTENTIAL REFORM OPTIONS

Despite the reforms made to the GIC appointments process since 1985, there continues to be controversy over perceived partisanship in the choice of some candidates. Perhaps due in part to the increased attention paid by the Martin government to appointments, the media have been more critical of certain appointments. For example, in February 2005, Prime Minister Martin referred the nomination of Glen Murray as head of the National Round Table on the Environment and the Economy to the Standing Committee on Environment and Sustainable Development. The Committee voted against endorsing the candidate by a margin of 7 to 4 and issued a report to the House of Commons calling for Murray's name to be withdrawn and another candidate proposed.⁽¹⁶⁾ The issue for the Committee was not any lack of credentials on Mr. Murray's part, but instead his ties to the Liberal party.⁽¹⁷⁾ Despite this objection, Mr. Martin certified the nomination. The media had much to say about this appointment, both in support of and against the government.⁽¹⁸⁾ These sorts of controversies will continue to arise until there is agreement on what role, if any, political considerations should play in GIC appointments, and until the role is consistently reflected in practice.

The history of ongoing minor changes to the GIC appointments process since 1989, along with persisting controversy, would seem to indicate a need for some sort of meaningful reform. In the last three years, changes to the process have added layers of roles and responsibilities to the players involved, but they have not alleviated the impression that these appointments are influenced excessively by partisan preferences. As long as the sole discretion to recommend GIC appointments rests with the Prime Minister, controversy is likely to continue.

A number of possible reforms to the process have been proposed over the years. The following sections provide a brief overview of these options.

(16) Standing Committee on Environment and Sustainable Development, *Report 4 – Certificate of Nomination of Glen Murray*, March 2005, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?COM=8976&Lang=1&SourceId=106004>.

(17) Mr. Martin had asked Mr. Murray to step down as the mayor of Winnipeg to run in the 2004 federal election as a Liberal candidate. Mr. Murray's campaign was unsuccessful.

(18) See, for example, Editorial, "Glen Murray is no crony," *The Globe and Mail* [Toronto], 21 March 2005; and Mark Kennedy, "Prime Minister comes up short on tall order: Anti-patronage pledge: Senate choices may paint Martin further into corner," *National Post* [Toronto], 17 March 2005.

A. Merit-based System of Appointment

In a merit-based system of appointment, appointments are based not on political nomination or influence, but instead on a competitive assessment that measures candidates against criteria related to the requirements of a job. If applied in the GIC appointments process, this system would potentially mean that every GIC appointee would be the most qualified person for the position. Indeed, Justice Gomery, in the second report of the Commission of Inquiry into the Sponsorship Program, recommended that initial appointments to the board of directors of a Crown corporation should be made by the government on the basis of merit.⁽¹⁹⁾

However, the merit-based system by itself might not be very practical because only some of the GIC positions involve the sorts of specific skills that would make such a merit appointment process practicable. Examples of such appointments are those with the Canadian Radio-television and Telecommunications Commission or Atomic Energy of Canada Limited. For the bulk of the available GIC positions, implementing the merit-based system of appointment alone could be too cumbersome.⁽²⁰⁾ In addition, a merit-based appointment to a GIC position does not preclude the possibility that partisanship was also involved in the appointment.

Most, if not all, democracies do include some sort of merit principle in their appointments process. Australia, for example, stresses that appointments are based on the merit system to ensure that candidates are ranked on the basis of their assessed abilities. However, as in Canada, there is no independent assessor responsible for monitoring appointments, and thus it is difficult to avoid claims of patronage.

B. Increased Scrutiny in Standing Committees

Another option for reform is to endow committees of the House of Commons with greater powers to meaningfully review specific categories of GIC nominations and appointments. Following the McGrath report of 1985, committees were allowed to review both GIC nominations and appointments; in practice, however, such review has been very limited. From 1989 to 2004, only 62 meetings out of a total of 12,783 committee meetings concerned GIC nominations or appointments.⁽²¹⁾ Allowing committees to potentially influence a GIC nomination or appointment could lead to increased attention being paid to these appointments.

(19) Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability – Recommendations*, Ottawa, 2006, pp. 188-190.

(20) Stilborn (1989), pp. 27-30.

(21) Data compiled by the Library of Parliament using information from the *Annual Report on Committees Activities and Expenditures* prepared by the Committees Directorate of the House of Commons.

In a research paper completed for the Gomery Commission, Peter Dobell and Martin Ulrich suggest that the government establish a formal selection process. After names had been gathered for a GIC appointment, committees could review the candidates as an “opportunity for MPs to expose to the public the qualifications of candidates, their links to the government and to particular interests, the process by which they were selected, and sensitize the candidates to parliamentary interests – including their responsibility for financial stewardship.”⁽²²⁾ Endowing committees with a more meaningful role in the process could increase their interest in considering GIC nominations and appointments.

However, given the high number of GIC positions, it is unlikely that committees could integrate widespread review of GIC nominations or appointments into their already busy agendas. Some committees have only one or two GIC positions within their mandated portfolios (such as the standing committees on the Status of Women and on Access to Information, Privacy and Ethics) while others have thousands (such as the standing committees on Canadian Heritage and on Industry, Science and Technology). A committee devoted entirely to reviewing GIC nominations and appointments could be set up to avoid burdening the other committees and distracting them from their other required agenda items, or committees might establish subcommittees on nominations and appointments. However, each of these options also has limitations as a means of coping effectively with the volume of GIC nominations and appointments.

C. Public Appointments Commission

In Bill C-2, the Federal Accountability Act, the Conservative government is proposing to establish a Public Appointments Commission. The draft Act states that “the Governor in Council may establish a Public Appointments Commission consisting of a chairperson and not more than four other members to perform such functions as the Governor in Council may specify, and may appoint the chairperson and other members and fix their remuneration and expenses.”⁽²³⁾ On 21 April 2006, the Prime Minister announced that the Commission’s mandate would be to:

(22) Peter Dobell and Martin Ulrich, “Parliament and Financial Accountability,” *Restoring Accountability Research Studies: Volume 1 – Parliament, Ministers and Deputy Ministers*, Canada, 2006, p. 52.

(23) Government of Canada, *Bill C-2*, 1st Session, 39th Parliament, s. 228.

- establish guidelines governing selection processes for Governor in Council appointments to agencies, boards, commissions and Crown corporations;
- approve the selection processes proposed by Ministers to fill vacancies within agencies, boards, commissions and Crown corporations for which they are responsible;
- monitor, review and evaluate selection processes in order to ensure that they are implemented as approved; and
- provide an annual report to the Prime Minister, to be tabled in both Houses of Parliament, on the Government's performance in following the code of practice.⁽²⁴⁾

The Public Appointments Commission would be located within the Prime Minister's portfolio. The government was originally planning to have guidelines governing the appointments process in place by early fall 2006. On 16 May, however, the House of Commons Standing Committee on Government Operations and Estimates rejected the proposed head of the Commission; it was then announced that the government would not proceed with its plan under minority government circumstances. In the interim, therefore, the government is expected to follow interim practices that it had announced previously, making necessary appointments as required, and ensuring that fair and open selection processes based on merit are followed. To this end, a government Web site was established to list positions that are to be filled.⁽²⁵⁾

An example of how the proposed Public Appointments Commission could function can be seen in the United Kingdom's Office of the Commissioner for Public Appointments (OCPA). The Commissioner for Public Appointments is an independent officer whose job it is to regulate, monitor, report and advise on the way in which ministers make appointments to the boards of public bodies.⁽²⁶⁾ The Commissioner ensures that appointments are made based on merit following a fair, open and transparent procedure. In each of its annual reports, the OCPA provides a detailed breakdown of all ministerial appointments and reappointments made to 1,100 public bodies. As an example of the volume of items the Office

(24) "Prime Minister nominates first chairperson of the Public Appointments Commission," 21 April 2006, <http://www.pm.gc.ca/eng/media.asp?category=1&id=1122>.

(25) See the Governor in Council Appointments Web site at www.appointments-nominations.gc.ca.

(26) For more information on the Office of the Commissioner of Public Appointments, see www.ocpa.gov.uk.

handles each year, U.K. ministers made over 3,300 appointments and reappointments in 2004-2005. The Office keeps detailed statistics on each one, including the appointee's gender, ethnicity and recent political activity.⁽²⁷⁾ In addition, the Commissioner investigates complaints from members of the public concerning individual appointment processes.

It is important to note that the Commissioner of Public Appointments is not responsible for making appointments to public bodies. Those are still made by the responsible minister, sometimes after consultation with the Prime Minister. There is a requirement to advertise vacancies to fill chair positions, positions that are paid, and positions with a high profile or that have responsibility for managing significant public funds. In effect, the Commissioner acts as an auditor of appointments.

CONCLUSION

It has been argued that the Governor in Council appointments process needs to be reformed to help dispel the perception of patronage in some appointments. That goal might be partly achieved through the creation of a sort of auditor general of appointments with the establishment of the Public Appointments Commission. But, as Peter Aucoin has stated, the establishment of a Public Appointments Commission would be only a first step. Because the final responsibility for making GIC appointments will continue to rest with the Governor in Council on the advice of the PCO, "no claim can be made that partisanship in appointments is ... eliminated."⁽²⁸⁾ Unless individual Members of Parliament, through committee work, are given a meaningful role to play in the examination of nominations and appointments, the current system will continue to be open to criticisms of patronage.

(27) The Commissioner for Public Appointments, *Tenth Report 2004-2005*, United Kingdom, 2005, http://www.ocpa.gov.uk/publications/pdf/2005_report.pdf.

(28) Peter Aucoin, "Naming, Blaming and Shaming: Improving government accountability in the light of Gomery," Presentation delivered as part of the Breakfast on the Hill Seminar Series, Ottawa, 11 May 2006.