
Funding the Officers of Parliament: Canada's Experiment

by Jack Stilborn

The House of Commons Advisory Panel on the Funding and Oversight of Officers of Parliament was established in the fall of 2005 as a two-year pilot project that, more recently, has continued on an ad hoc basis. Centrally, it provides the Treasury Board with recommendations from Parliament concerning the budget requests of officers of Parliament. The expectation was that this could make Parliament the de facto decision-maker about officers of Parliament budgets, and free the officers from concerns about budgetary retribution should their actions antagonize a government. This article provides background on the Panel, an overview of how it works, and an examination of noteworthy developments. It concludes by exploring potential issues and some relevant options.

It is the exclusive prerogative of the Crown to place recommendations for spending before Parliament. Strict adherence to this principle underlies what has remained the central formal limitation upon the independence of the officers of Parliament in Canada at the national level. With the exception of the Conflict of Interest and Ethics Commissioner, the estimates of the officers of Parliament have been developed in the same way as those for government departments.¹ Increases to spending authorities (in effect, organizational budgets) are achieved by submissions to the Treasury Board, developed through a process involving scrutiny by Treasury Board Secretariat (TBS) officials and discussions between them and officer of Parliament staff. Ultimately, submissions are considered by the Board along with TBS recommendations. Treasury Board decisions determine the spending estimates that are subsequently placed before Parliament by the President of the Treasury Board for approval.

While no officer of Parliament overtly accused

governments of using their budgetary authority to compromise the independence of officers, by the late 1990's concerns about the potential for interference were being widely expressed by the officers. These were no doubt exacerbated by effectiveness challenges resulting from the budgetary restraint period of the mid-nineties. Among the proposals for change was that of former Auditor General Denis Desautels, who described the existing budget-setting process as an "uncomfortable arrangement." He recommended the United Kingdom model, where an all-party committee of MPs sets the budget of the National Audit Office.²

The concerns of the officers of Parliament were subsequently taken up by two standing committees of the House of Commons – Access to Information and Privacy, and Public Accounts – along with the Senate Standing Committee on National Finance, in reports that recommended variants on the United Kingdom model.³ The relatively detailed recommendations developed by the House Standing Committee on Access to Information and Privacy were, in important respects, substantially reflected in the advisory panel process that was subsequently launched.⁴

The House of Commons Advisory Panel on the Funding and Oversight of Officers of Parliament held its initial meeting on November 3, 2005. Reflecting

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the recommendations of the standing committees and the British model, it is an informal mechanism (i.e. not embodied in the Standing Orders of the House, and thus possessing no formal authority). It enables parliamentarians to provide recommendations to the Treasury Board concerning requests by Officers of Parliament for budget increases or concerning Treasury Board policies or directives.⁵ The Panel thus provides Parliament with a means of influencing Treasury Board decisions without conflicting with the Royal Recommendation principle, since final budgetary decisions and their proposal to Parliament remain formally in the hands of the Treasury Board.⁶ However, while the Treasury Board remains the formal authority, it was generally expected that a practice if not a convention that Panel recommendations would be adopted by the Treasury Board would need to develop, as has been the case in the United Kingdom. If the government were able to adopt or reject Panel recommendations at will, then the protection to the independence of officers of Parliament that the Panel had been created to provide would be, in practice, negligible.

In addition to its role in budget-setting, the Panel has a supplementary role reflected in the inclusion of “oversight” in its title. It has the capacity to review concerns of officers of Parliament concerning administrative directives and other forms of central agency oversight, and make recommendations to the Treasury Board. This role responds to the fact that the officers of Parliament are generally subject to Treasury Board managerial and administrative directives and policies, along with those of the Privy Council Office, and these may not be appropriate in light of the distinctive roles of the officers of Parliament.

How the Panel Works

The Panel has met periodically since 2005, as budget requests from the officers of Parliament require consideration, and has continued on an *ad hoc* basis since the elapse of the two-year trial period initially envisioned for it.⁷ The Panel is composed of 13 Members of the House of Commons, including the Speaker (who serves as chairperson) and representatives of all political parties in proportion to their numbers in the House. Meetings are held in a House of Commons committee room and, thus far, have involved consideration of budget submissions from individual officers of Parliament, along with the Assessment documents that would normally be provided by TBS officials to the Treasury Board to support its deliberations. Meetings begin with presentations by both the officer of Parliament and

the Treasury Board Secretariat officials who have been involved in the development of the submission, and then involve exchanges between Panel members and the officer of Parliament, primarily, although Panel members may also involve TBS officials.

Although the Panel is not a House Committee, the fact that meetings occur in a House committee room, follow a ‘presentation and questions’ format similar to that employed by committees, and are normally scheduled for up to two hours on each submission (the length of a typical standing committee meeting), give them more than a passing resemblance to the standing committee meetings in which Panel members more routinely participate. The major difference is that all meetings occur *in camera* and deal with subject matter of a largely technical and administrative nature, since most budget submissions seek small increments of funding in response to administrative pressures. These characteristics have enabled greater procedural informality than is typical for standing committees, and have contributed to a relatively non-partisan atmosphere and consensus-based decision-making.

It is noteworthy that, in most cases to date, the officer of Parliament and TBS officials have reached agreement on the substance of the submission before it is received by the Panel, thus avoiding any need for the Panel to resolve disagreements. Reflecting the absence of issues in dispute, meetings in this circumstance typically involve exchanges that migrate among issues that are akin to those that might receive attention at a committee meeting on annual estimates: the operations and performance of an officer of Parliament and developments in his or her jurisdiction that are of interest to individual Panel members. Mixed in, to a greater or lesser degree, are exchanges about the more specific operational questions raised by the funding request. Such a meeting will conclude with agreement on the substance of the submission, following which a memorandum is prepared for signature by the Speaker advising Treasury Board ministers of the Panel’s recommendations. This is forwarded to the Treasury Board for attention by ministers when they consider the submission and TBS advice.

Some Issues and Options

Thus far the frequent achievement of agreement between the officers and TBS officials on budget submissions before appearing at the Panel, combined with a cautious and non-partisan approach by Panel members to their work, have generally ensured that the Panel process works smoothly. As well, several officers of Parliament have applauded the creation of the Panel and its work.⁸

However, the fact that public or political conflict has not arisen is not, by itself, a basis for concluding that something significant is being accomplished. Two exceptions to the prevailing pattern of Panel activity may point to potential effectiveness issues, and the need for a consideration of options to address them.

'Protecting' the Officers From Fiscal Discipline

While most Panel meetings have considered submissions on which the officer of Parliament and TBS officials agree, on a limited number of occasions the Panel has been faced with divergences between an officer's spending request and the recommendations of TBS officials. The central problem, when this happens, is that the Panel is required to take a position on issues that are likely to reflect TBS concerns about administrative or management matters, rather than a politically-driven hostility to the mission or conduct of an officer. If it sides with an officer, the Panel is not protecting officers of Parliament from the danger of political interference that was the original rationale for its creation. Instead, there is a danger that it may be reducing the capacity of TBS officials to foster fiscal discipline and good management.

To date, with only one exception, disagreements between officers of Parliament and TBS officials have been resolved in favor of the TBS recommendations. There has, however, been one exceptional occasion, early in its life (November 2005), when the Panel addressed a disagreement between an officer and TBS officials by recommending a budgetary increase greater than the TBS officials had been prepared to support, but not the full amount the officer had been seeking. While this approach no doubt reflected good faith political instincts to seek compromise solutions and reasonable trade-offs, it is less clear that it met the requirements of fiscal responsibility and administrative efficiency.

Since there has been only one instance of unusual Panel generosity to an officer in the over four years of its existence, it may be tempting to relegate this 'issue' conclusively to the realm of things which are not broken, and therefore do not need to be fixed. However, it is far from clear that a pattern of Panel support for TBS recommendations entirely eliminates questionable forms of officer leverage from the new budgetary process. From the point of view of an officer whose request has encountered resistance from TBS, the prospect of seeking resolution at the level of the Panel is a 'no-lose' option, since the worse that is likely to happen is that the Panel will support the restraint being sought by TBS officials. From the point of view of TBS officials, on the other hand, the failure to resolve

differences with an officer means that the TBS concerns will have to be defended before the politicians on the Panel, who often have warm working relationships with the officers of Parliament and general political incentives to support them. There is thus at least a mild incentive for TBS officials to explore every possible option for compromise agreement with an officer, in order to avoid the possibility of a less predictable compromise effort by the Panel.

Protecting the Officers Except When They Are Attacked

It is centrally the willingness of the Treasury Board to accept Panel recommendations that provides the key protection from government interference for the officers. Only when a convention, or at least a practice, that Treasury Board will adopt such recommendations becomes entrenched, as it has in other countries such as the U.K., does the Panel provide a new level of protection against politically motivated attempts to constrain the activity of officers through budgetary strangulation or recrimination.

The second exception to the normal pattern of the Panel process relates to the behavior of the Treasury Board rather than the Panel itself. In early 2009, the Treasury Board did not accept the full amount of a funding increase for the Access to Information Commissioner that the Panel had recommended. As a result, the 2009-10 Supplementary Estimates (A) did not provide for advocacy and systemic initiatives that had been supported by both the Panel and TBS officials.⁹

There may well be reasonable grounds for skepticism about the various "proactive" activities in which a number of officers of Parliament have become increasingly involved over the years. However, the fact that the Treasury Board chose to set aside the recommendation of the Panel, and was able to do so without inspiring discernible reaction from Parliament, suggests that the advisory panel process does not guarantee that officers of Parliament are insulated from unilateral government budgetary action.

It is difficult to determine the significance of this single exception to the prevailing pattern of Treasury Board acceptance of Panel recommendations. The fact that it occurred without prompting a response from Panel members or Parliament would suggest, however, that Canada is still some distance from establishing a convention that Parliament should have the final say, in practice if not in constitutional theory, over the budgets of its officers. More broadly, it raises the question of whether the Panel is actually making a

difference to the protection of officers, since rejections of their budgetary requests once they had survived scrutiny by TBS officials were exceptional events even before the creation of the Panel. A central prospective impact of the creation of the Panel was to free officers of Parliament from concerns about budgetary reprisals that could discourage actions that might incur governmental disfavor. Here, even a single exception might reasonably be expected to have a significant impact, to the extent that officers are vulnerable to such concerns in the first place. Fortunately, in Canada, such concerns do not appear to have discernibly muted criticism of governments by officers in the past, or to be doing so today.

A further consideration relating to this issue is its relationship with the fiscal discipline issue explored above. The possibility that the Treasury Board can exercise its ultimate formal responsibility for budgets and refrain from accepting the full amounts recommended by the Panel (and its own officials) is the sole counterbalance current arrangements provide to inappropriate forms of officer of Parliament leverage that may be operative in the current Panel process. Therefore, before we commit ourselves to a rigid convention precluding Treasury Board departures from Panel recommendations, we need to be confident that this would not open a door to abuse.

Possible Next Steps

Options that have been discussed in recent years would involve further establishing the Panel, by either adding Senators to its membership or creating a complementary Senate Panel, and by entrenching it in the Standing Orders (or equivalent) of one or both Houses. Before proceeding in this direction, however, attention should be given to more clearly separating administrative apples from political oranges in the Panel process, and increasing the Panel's effectiveness in doing what it was created to do. There are two possible reforms that might contribute.

One reform would be to adopt the practice of scheduling meetings on submissions where there is agreement between an officer of Parliament and TBS officials for a minimal period of time, perhaps 30 minutes, with the possibility of extension if needed. This would reduce the expenditure of Panel members' time on wide-ranging discussions that can be occasioned by routine and uncontroversial funding requests. The infrequency of Panel meetings means that such gains would be modest, but at least the use of Members' time would be aligned with that of Treasury Board ministers, where minor and primarily administrative requests are typically dispensed with in

minutes. This option might also help to differentiate routine from significant requests in the minds of Panel members and focus attention on the latter, where it is genuinely needed.

A second and complementary reform would be to establish a procedure through which the Panel could respond to any future failures of the Treasury Board to adopt a Panel recommendation concerning the budget of an officer of Parliament. The President of the Treasury Board could be invited to appear before the Panel and explain the decision of the Board, perhaps in conjunction with a right of the officer to be present and respond. Such a procedure could, perhaps, provide a basis for the Panel to consider, *in camera* and away from polarizing influences, whether the Treasury Board decision was primarily a reflection of fiscal prudence or an attempt to impede the work and effectiveness of an officer. In the latter case, the Panel could invite the appropriate standing committee to consider the budgetary issue in a more public venue.¹⁰ Predictably, a procedure of this kind would compromise, at least intermittently, the nonpartisan working culture that has thus far prevailed among Panel members, but it might provide a basis for greater effectiveness concerning the fundamental issue that led to the creation of the Panel.

Conclusion

Independent information and advice for Parliament and the public remain especially important supports for democracy in Westminster-model systems, where there is no separation of powers to limit the executive. The objective of ensuring that the independence of the officers of Parliament is not compromised by government control of budgets thus continues to be valid.

While most of the activity of the Panel would be consistent with the view that it has been effective, the two exceptional cases discussed above raise questions. It is possible that the Panel has been a significant protector of the independence of the officers, but equally possible that it has merely been generally inoffensive to governments. Indeed, there is even a possibility that it has been more effective in impeding fiscal discipline and good management than in protecting the officers from political interference.

The next stages of the funding panel experiment should focus on ensuring that it actually makes a difference to the independence of officers of Parliament, while seeking a better balance between the protection of officer independence and the maintenance of administrative and fiscal controls. The incremental changes proposed above could contribute. More

broadly, they might help parliamentarians to focus on the scrutiny and issue ventilation roles that are central to Parliament's effectiveness, and protect them from greater involvement in executive responsibilities that are deeply uncongenial to the Westminster-model parliament.

Notes

1. The estimates of the Conflict of Interest and Ethics Commissioner are tabled in the House by the Speaker of the House of Commons.
2. Auditor General, *Report of the Auditor General of Canada to the House of Commons – Reflections on a Decade of Serving Parliament*, February 2001, Office of the Auditor General, Ottawa, pp. 80-81 (see also the Auditor General's November 2003 Report, *Matters of Special Importance*, which reiterates this proposal).
3. See Kristen Douglas and Nancy Holmes, "Funding Officers of Parliament," *Canadian Parliamentary Review*, 28, 3, Autumn, 2005.
4. See House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Fourth Report, "A News Process for Funding Officers of Parliament,"* 2005. The main difference was that an informal advisory panel rather than the House Board of Internal Economy became the parliamentary mechanism.
5. Budget requests of the Ethics Commissioner were already subject to approval by the Speaker of the House, placing this officer in a distinct category. For this reason, the Ethics Commissioner (now the Conflict of Interest and Ethics Commissioner) was not included in the pilot project.
6. It should be noted that the concern addressed by the creation of the Panel is not addressed through the performance by standing committees of their scrutiny and accountability roles when estimates are reviewed each year. The principle of the Royal Recommendation limits Parliament's role.
7. Reflecting its informal character and low public profile, the panel has received limited public attention.
8. Its impact was applauded by the Information Commissioner in his *Annual Report (2006-2007)*, Chapter 1, and it has received positive references by several officers of Parliament in appearances before standing committees. It also receives brief attention by Paul Thomas, in "Parliamentary Scrutiny and Redress of Grievances," *Canadian Parliamentary Review*, Spring 2007, p. 11; and Elise Hurtubise-Loranger in "Commonwealth Experience – Federal Accountability and Beyond in Canada," Chapter 6 of Oonagh Gay and Barry K. Winetrobe, Eds., *Parliament's Watchdogs: At The Crossroads*, In association with the U.K. Study of Parliament Group, The Constitution Unit, University College of London, 2008, p. 71 ff. For a more recent treatment relating impacts of the Panel to general trends in the officer of Parliament community, see Jack Stilborn, "The Officers of Parliament: More Watchdogs, More Teeth, Better Governance?" Chapter 12 of G. Bruce Doern and Christopher Stoney, Eds., *How Ottawa Spends, 2010-2011 – Recession, Realignment and the New Deficit Era*, McGill-Queen's University Press, 2010.
9. See, for example, Information Commissioner of Canada, *Annual Report, 2006-2007*, Minister of Public Works and Government Services Canada, 2007, p. 19.
10. See House of Commons Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, June 3, 2009, especially Mr. Marleau's introductory statement and responses to questioning by Mr. Bill Siksay.
11. This approach might also help to avoid problems that have arisen in the U.K., where a statutory body composed of parliamentarians – The Public Accounts Commission – has been responsible for National Audit Office estimates since 1983. In 2007 concerns about the personal expenses of the Comptroller and Auditor General led to criticism of Parliament's ineffectiveness in exercising financial control, and have prompted governance reforms. See Oonagh Gay, "The U.K. Perspective: Ad Hocery At The Centre," Chapter 2 of Gay and Winetrobe, p. 19.