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# From Integrity Agency to Accountability Network: The Political Economy of Public Sector Oversight in Canada

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**From Integrity Agency to Accountability Network:  
The Political Economy of Public Sector Oversight in Canada**

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## I. INTRODUCTION

The federal integrity agencies that are delegated collective responsibility for public sector oversight in Canada face a common challenge to stabilize their ongoing independence from political control.<sup>1</sup> Strong independence serves key functional goals of accountability in public administration, guarantees fairness and access for individuals, and reinforces the rule of law. But these agencies share with their brethren in regulatory policymaking and administrative adjudication the ambiguous middle position as “structural heretics” in Canada’s institutional landscape, being neither government, with its internal logics of patterned hierarchy, nor courts, with their constitutional protections of judicial independence.<sup>2</sup> What limited warranties of independence administrative agencies enjoy—or rather, what warranties their users enjoy—are underwritten by statute or common law, and consequently vulnerable to shifting political

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<sup>1</sup> These agencies include the Office of the Auditor General; the Office of the Chief Electoral Officer; the Office of the Commissioner of Official Languages; the Office of the Information Commissioner; the Office of the Privacy Commissioner; the Office of the Public Sector Integrity Commissioner; the Office of the Conflict of Interest Commissioner; the Office of the Lobbying Commissioner; the Public Services Commission; the Canadian Human Rights Commission; and the Parliamentary Budget Officer. See Part II.A, below, for a definition of “integrity agency” and a description of their functions.

<sup>2</sup> JE Hodgetts, *The Canadian Public Service: A Physiology of Government 1867-1970* (Toronto: University of Toronto Press, 1973) at 138–56. See also HN Janisch, “The Role of the Independent Regulatory Agency in Canada” (1978) 27 UNBLJ 83; HN Janisch, “The Independence of Administrative Tribunals in Canada: In Praise of ‘Structural Heretics’” (1988) 8:2 J Nat’l Ass’n Admin L Judges 75 (describing the institutional location of Canadian administrative agencies and arguing in favour of their status as “structural heretics”).

preferences and to an increasingly partisan national politics.<sup>3</sup> Integrity agencies thus share in the “puzzle” of agency independence in Canada, a challenge thrown into stark relief by politicians’ continued attempts to influence agency decision-makers and to punish those who pursue divergent policy paths—formally, by removing them from office, or informally, by exerting public pressure to conform.<sup>4</sup>

What options are available to address this problem? Administrative law scholars appear mainly to have converged on the conclusion that long-term stability in arm’s length relationships between administrative agencies and government ultimately depend on the will of political leadership.<sup>5</sup> Given the unwillingness of courts to extend to administrative agencies the constitutional protections afforded to the judiciary,<sup>6</sup> and the dynamics of party government in Westminster-style parliamentary systems, these scholars have noted that without strong political commitment, lasting agency independence is likely to remain an elusive goal. But they have generally declined to take the next important step of asking about: (1) what objectives actually

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<sup>3</sup> See Peter Aucoin, “New Political Governance in Westminster Systems: Impartial Public Administration and Management Performance at Risk” (2012) 25:2 Governance 177 (arguing that New Public Management reforms in Canada and other Commonwealth countries have “transformed into a form of politicization that explicitly runs counter to the public service tradition of impartiality in the administration of public services and the nonpartisan management of the public service” at 178). See also Dennis Grube “Responsibility to Be Enthusiastic? Public Servants and the Public Face of “Promiscuous Partisanship” (2014) 28:3 Governance 305 (discussing trends in partisanship among senior public servants across Commonwealth countries).

<sup>4</sup> See Lorne Sossin, “The Puzzle of Administrative Independence and Parliamentary Democracy in the Common Law World: A Canadian Perspective” in Susan Rose-Ackerman & Peter L Lindseth, eds, *Comparative Administrative Law* (Cheltenham, UK: Edward Elgar, 2010) 205 at 205 [Sossin, “Puzzle of Administrative Independence”] (describing the puzzle of administrative independence in Canada and comparing approaches in other Commonwealth jurisdictions including the United Kingdom, Australia and New Zealand). See also Katrina Miriam Wyman, “Appointments to Adjudicative Tribunals: Politics and the Courts” (1999) 57:2 UT Fac L Rev 101; Katrina Miriam Wyman, “The Independence of Administrative Tribunals in an Era of Ever Expansive Judicial Independence” (2001) 14 Can J Admin L & Prac 61 (providing a further example of formal government sanctions against the Ontario Labour Relations Board through powers over appointment processes).

<sup>5</sup> See Sossin, “Puzzle of Administrative Independence”, *ibid* at 223. See also Hudson Janisch, “The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right?” (2012) 49:4 Alta L Rev 785 at 820 [Janisch, “The Relationship Between Governments”].

<sup>6</sup> See Part II.C, *infra*.

structure politicians' preferences for agency independence in practice; and (2) what structural reforms or innovations might be available to better stabilize those political preferences over time.

In this article I aim to accomplish three goals. First, I identify the relevant dimensions of independence and control that govern relationships between federal integrity agencies and their political principles, and I describe some recent events that underscore the challenges of maintaining long-term agency independence in a volatile political climate. Second, I introduce the Principal-Agent framework as a model of political economy into the Canadian context and reflect on the power of this model to describe some of the institutional conditions that make the delegation of oversight powers in Canada systematically uncertain. Finally, I evaluate the possibilities for “accountability networks”, populated by interconnected agencies, to function as alternative institutional arrangements that reinforce agency independence. In short, a network model relies on horizontal linkages between agencies to counterbalance the shifting political preferences that can make independence in existing Principal-Agent relationships so unstable. In order to formulate an early account of how such accountability networks might take shape in Canada, I build from the several possible network components that are emerging in practice to facilitate collaboration and mutual oversight between agencies. While I remain cautious about the complexities and pitfalls a formal approach that binds independent agencies too closely together, I argue that network models provide a useful starting point for thinking about new architectures of agency independence beyond conventional emphases on the malleable rules and norms of agency appointments, membership tenure, budgets and administration.

Understanding the role of agency networks in this context also connects to broader questions about how to approach badly needed systemic reforms of administrative justice systems as a whole. This Article builds from an incremental and bottom-up perspective that takes

seriously the role of agencies as autonomous actors, not only as policy implementers, enforcers and dispute resolvers, but also as professional entities that develop new competencies and organizational cultures over time, and are valuable participants in mapping out new ways to make administrative justice more effective, efficient and accessible.<sup>7</sup> The need for such reforms results from Canada's chequered history of establishing administrative agencies in response to the ad hoc demands of the moment, leading to "kaleidoscopic" systems of administrative justice in which claimants increasingly find that institutional resources, expertise, their own knowledge of the system, and their legal rights are all fragmented between unconnected entities with diverse norms and mandates.<sup>8</sup> This has been equally true for adjudicative tribunals, for conventional regulatory bodies and for the federal integrity agencies.<sup>9</sup> When developing new architectures of administrative justice to meet these challenges, this study suggests that reformers should consider networks as a plausible—if understudied—conceptual approach going forward.

In Part II, I define "integrity agencies" and describe the main functions and features of the nine agencies currently active at the federal level. I then outline both formal and informal dimensions of integrity agency independence, drawing on recent case studies that have attracted broad public attention to illustrate. In Part III, I turn to a more detailed description of the political economy of agency independence, with the goal of characterizing politicians' choices to delegate public sector oversight authority based on their predicted benefits and costs. Transaction cost

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<sup>7</sup> See Lorne Sossin & Jamie Baxter, "Ontario's Administrative Tribunal Clusters: A Glass Half-full or Half-empty for Administrative Justice?" (2012) 12:1 OUCIJ 157 [Sossin & Baxter] (describing how an incremental approach to administrative justice reform might be accomplished using the model of "administrative tribunal clusters" currently being developed in the province of Ontario).

<sup>8</sup> *Ibid* at 158. See also Ann Chaplin, "Officers of Parliament: Accountability, Virtue and the Constitution" LL.M. Thesis, University of Ottawa Faculty of Law (2009) [Chaplin, "Officers of Parliament"] (noting the lack of comprehensive vision in structuring the federal integrity sector at 15)

<sup>9</sup> See Élise Hurtubise-Loranger, "Commonwealth Experience I: Federal Accountability and Beyond in Canada" in Oonagh Gay & Barry Winetrobe, eds, *Parliament's Watchdogs: At The Crossroads* (London: The Constitution Unit, UCL, 2008) 71 [Hurtubise-Loranger] ("[t]he creation of officer of Parliament positions has been done on an *ad hoc* basis in Canada and usually in response to political pressures" at 72).

models developed in American context provide a good counterpoint to understand the logics of delegation in Canada, as these models turn out to rest on key assumptions about a system of political checks and balances that is largely absent here. This theoretical inquiry underscores the need to refocus research on alternative mechanisms that might anchor agency independence, which leads, in Part IV, to an overview of the strategies that integrity agencies use to form network linkages with each other. I describe how these linkages might influence politicians' incentives to maintain agency independence over the long-term and conclude with some reflections on network models that reformers might consider in future work.

## II. UNDERSTANDING AGENCY INDEPENDENCE

Most integrity agencies have, traditionally, been peripheral actors in Canada's administrative state. But with growing interest in accountability discourse and recent efforts by Parliament to clothe federal agencies in stronger oversight powers, several of these bodies have risen to public prominence and now stand at the centre of many contemporary controversies about public sector regulation. This section begins with a working definition of integrity agencies at the federal level and then describes the relevant indicators or metrics of agency independence in both formal and informal dimensions.

### A. Defining "Integrity Agencies"

Canada's constitutional doctrine of ministerial responsibility requires that Ministers of government answer to Parliament for their own actions and for those of their subordinates, in line



with broad public values of transparency, accountability and governance.<sup>10</sup> Historically, the oversight roles played by elected parliamentarians included information-gathering, reporting and sanctioning functions that sought to shed light on the activities of public administration and to hold executive actors, including their administrative delegates, publically accountable for their work. But with the growing complexity of modern governance, these oversight functions have themselves been delegated to administrative bodies. Federal integrity agencies are entities created by Parliament and delegated the power to perform certain aspects of that institution's oversight and regulatory functions at an arm's length from the political and bureaucratic actors traditionally subject to Parliamentary scrutiny.

It is not always easy to identify exactly which federal entities should be grouped together under the “integrity agency” umbrella—a term that I use in preference to others such as “Officer of Parliament” or “agent of Parliament”. The term “Officer of Parliament” includes a class of agencies that is broader than those I am concerned with here and encompasses a disparate collection of bodies and offices including the Speakers of the two Houses of Parliament, parliamentary clerks and an array of administrators such as the Parliamentary Librarian.<sup>11</sup> In some recent literature, the label “agent of Parliament” has been widely used, but I avoid this term

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<sup>10</sup> Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25 at para 80 (per LeBel J.). See also Nicholas D’Ombain, “Ministerial Responsibility and the Machinery of Government” (2008) 50:2 Canadian Public Administration 195.

<sup>11</sup> See Paul G Thomas, “The Past, Present and Future of Officers of Parliament” (2003) 46:3 Canadian Public Administration 287 at 292 [Thomas]. See also House of Commons, Special Committee on the Modernization and Improvement of the Procedures of the House of Commons, *Report of the Special Committee on the Modernization and Improvement of the Procedures of the House of Commons* (June 2001) at para 42 (Chair: Bob Kilger), online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031818>> (referring to all these bodies collectively as “Officers of Parliament”).

mainly for reasons of conceptual clarity when discussing the Principal-Agent model elaborated in Part III, below.<sup>12</sup>

Broadly speaking, the federal integrity agencies that I address in this article have the following shared characteristics—they:

- Receive their delegated authority directly from Parliament, through their empowering statute and other relevant primary legislation;
- Are headed by a single commissioned officer who is appointed by statute (although the nature of appointment processes may differ between agencies, and may involve a mix of parliamentary and executive actors);
- Exercise delegated powers to oversee the day-to-day business of government, which powers may include but are not limited to: own-initiative investigations; inquiries made upon special request from Parliament; investigating and responding to complaints from private citizens or public servants about public service activities; and education, advocacy and policy reform related to their subject matter jurisdictions; and;
- Report on their oversight activities directly to Parliament (although reporting mechanisms may sometimes flow through parliamentary committees or other parliamentary offices).

The oldest and likely the most well known of the federal integrity agencies is the Office of the Auditor General (est. 1868), the entity responsible for overseeing the government's stewardship of public funds.<sup>13</sup> Historically, the Auditor General's Office served its main function

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<sup>12</sup> See Jeffrey Graham Bell, "Agents of Parliament: A New Branch of Government?" (2006) 29:1 Canadian Parliamentary Rev 13 at 15 [Bell] (offering reasons using the term "agent of Parliament" at 15).

<sup>13</sup> See *Auditor General Act*, RSC 1985, c A-17 [*Auditor General Act*]. See also Office of the Auditor General of Canada, "Who We Are", (17 July 2014), online: <[http://www.oag-bvg.gc.ca/internet/English/au\\_fs\\_e\\_370.html](http://www.oag-bvg.gc.ca/internet/English/au_fs_e_370.html)>.

through its “attest audit mandate” to examine financial statements included in the public accounts and other financial records presented by Treasury Board or the Finance Minister.<sup>14</sup> These functions now also include a newer “value-for-money” audit mandate to oversee the efficiency and effectiveness of public sector financial, human and physical resources management.<sup>15</sup> Because of its central place in many high-profile and well-publicized controversies surrounding government expenditures, the Auditor General has frequently been at the centre of public debates about public sector accountability.<sup>16</sup> By comparison, the Office of the Chief Electoral Officer (est. 1920), rebranded as “Elections Canada” in the early 1980s, has generally operated with much less visibility in its role as the primary supervisor of federal elections and guardian of electoral fairness and impartiality.<sup>17</sup> But in the wake of a high-profile scandal surrounding the misuse of automated telephone services (“robocalls”) to supply misinformation about the location of local polling stations to voters in the 2011 federal election, Elections Canada, undertook a closely watched investigation and has rapidly become a more prominent figure in federal politics.<sup>18</sup> That profile has, even more recently, continued to grow

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<sup>14</sup> *Auditor General Act*, *ibid*, s 6.

<sup>15</sup> *Id*, s 7. See also Antoine Pastré & Todd Cain, *The Role of Independent Guardians: Description and Synthesis – A Background Paper for a Discussion Forum on Achieving Balance in Accountability and Oversight* (Ottawa: Institute on Governance, 2012) at 9–10, online: <[http://iog.ca/wp-content/uploads/2012/12/2012\\_April\\_Independent-Guardians-Profiles.pdf](http://iog.ca/wp-content/uploads/2012/12/2012_April_Independent-Guardians-Profiles.pdf)>; Sharon Sutherland, “The Politics of Audit: the Federal Office of the Auditor General in Comparative Perspective” (1986) 29:1 *Canadian Public Administration* 118 (noting that the Office of the Auditor General underwent a number of changes during the 20<sup>th</sup> century, including a significant expansion in its oversight powers).

<sup>16</sup> Peter Aucoin, “Auditing for Accountability: the Role of the Auditor General” Institute on Governance Occasional Paper Series (1998), online: < <http://iog.ca/publications/auditing-for-accountability-the-role-of-the-auditor-general/>> at 2.

<sup>17</sup> *Canada Elections Act*, SC 2000, c 9, s 16. The Chief Electoral Officer’s original empowering legislation was the *Dominion Elections Act*, SC 1920, c 46.

<sup>18</sup> See Commissioner of Canada Elections, “Summary Investigation Report on Robocalls” (April 2014), online: <[https://www.cef-cce.gc.ca/rep/rep2/robocalls\\_e.pdf](https://www.cef-cce.gc.ca/rep/rep2/robocalls_e.pdf)> (detailing these events and reporting on results of the investigation). See also Bruce Cheadle, “Robocalls probe comes up empty”, *The Globe and Mail* (24 April 2014) A8 (detailing related shortcomings in Elections Canada’s investigatory powers). This investigation was formally undertaken by the Commissioner of Canada Elections, who was at the time an appointee of the Chief Electoral Officer. Amendments to the *Canada Elections Act* in 2014 altered the Commissioner’s status by providing for his or her appointment by the Director of Public Prosecutions and relocating the Commission within that Office of Public

alongside controversies related to a new package of federal electoral reforms under the *Fair Elections Act*,<sup>19</sup> which I describe in more detail below.<sup>20</sup>

Although the Auditor General and the Chief Electoral Officer both have longstanding positions in federal politics, Parliament has been relatively active in creating six additional integrity agencies since the early 1970s—three of them within the last decade. The first Commissioner of Official Languages (est. 1970) was appointed after the Royal Commission on Bilingualism and Biculturalism raised concerns in the late 1960s about the equality of French and English languages in federal institutions.<sup>21</sup> This Office is responsible for improving language equality both in the affairs of Parliament and in government administration, and is tasked with preserving and developing official language communities in Canadian society more broadly.<sup>22</sup> The Offices of the Information Commissioner (est. 1983) and the Privacy Commissioner (est. 1983) are responsible for overseeing the use of public information by federal entities and access to that information by the public.<sup>23</sup> The former is principally tasked with investigating complaints related to access to information requests, but also makes special reports to Parliament on matters within the scope of its powers.<sup>24</sup> Likewise, the bulk of the Privacy Commissioner's work is directed at investigating complaints related to government breaches of privacy or refusals for access to personal information.<sup>25</sup> In addition to the Privacy's Commissioner's

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Prosecutions, see Canada Elections Act, *ibid*, s 509, as amended by *Fair Elections Act*, SC 2014, c 12, s 108 [*Fair Elections Act*].

<sup>19</sup> *Id.*

<sup>20</sup> See Part II.B, *infra*.

<sup>21</sup> *Official Languages Act*, RSC 1985, c 31 (4th Supp) [*Official Languages Act*]; Canada, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1967). See also Bell, *supra* note 12 at 16.

<sup>22</sup> *Official Languages Act*, *ibid*, s 2. See also Office of the Commissioner of Official Languages, "Mandate" (1 March 2012), online: <[http://www.ocol-clo.gc.ca/html/mandate\\_mandat\\_e.php](http://www.ocol-clo.gc.ca/html/mandate_mandat_e.php)>.

<sup>23</sup> *Access to Information Act*, RSC 1985, c A-1 [*Access to Information Act*]; *Privacy Act*, RSC 1985, c P-21 [*Privacy Act*]; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*].

<sup>24</sup> *Access to Information Act*, *ibid*, ss 30, 39(1).

<sup>25</sup> *Privacy Act*, *ibid*, s 29.

jurisdiction over public sector management of information under the Privacy Act, this Office oversees complaints against private sector entities pursuant to the *Personal Information Protection and Electronic Documents Act*.<sup>26</sup> The Privacy Commissioner also carries out compliance audit functions and has been active in public education efforts, especially on issues related to online privacy.<sup>27</sup>

Three new federal integrity agencies created since 2007 all deal with different aspects of professional wrongdoing, ethics and conflicts of interest within the public service and, as a result, may occupy especially delicate relationships with the government officials and parliamentarians who are subject to their scrutiny. The Public Sector Integrity Commissioner (est. 2007) administers federal “whistleblower” legislation that is designed to provide a confidential mechanism for public servants and members of the public to disclose information about professional wrongdoing in the public sector, and to protect those whistleblowers from future reprisals.<sup>28</sup> This Office is empowered to conduct investigations and to issue recommendations to chief executives for corrective measures, but does not exercise the power to directly sanction misbehaviour.<sup>29</sup> The Public Sector Integrity Commissioner is also obliged by legislation to report directly to Parliament about each case in which wrongdoing is uncovered, as well as to report on more systemic concerns.<sup>30</sup> The Conflict of Interest and Ethics Commissioner (est. 2007) is responsible for helping elected and appointed officials to avoid conflicts between their public duties and private interests. This Office provides confidential advice, reviews the reports of officials and parliamentarians concerning their assets, liabilities and public activities, and

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<sup>26</sup> *PIPEDA*, *ibid*, s 11.

<sup>27</sup> *Privacy Act*, *supra* note 23 at s 37. See, e.g., Office of the Privacy Commissioner of Canada, “A Guide for Individuals: Protecting Your Privacy” (no date), online: <[https://www.priv.gc.ca/information/pub/guide\\_ind\\_e.pdf](https://www.priv.gc.ca/information/pub/guide_ind_e.pdf)>.

<sup>28</sup> *Public Servants Disclosure Protection Act*, SC 2005, c 46, ss 8, 19 [*PSDPA*].

<sup>29</sup> *Ibid*, s 22.

<sup>30</sup> *Ibid*, s 38(1).

investigates contraventions of the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons*.<sup>31</sup> The Commissioner of Lobbying (est. 2008) is tasked with conducting investigations into wrongful lobbying activities, maintaining a national Register of lobbyists, and developing educational programs to foster public awareness about federal efforts to regulate lobbying.<sup>32</sup>

Finally, the Parliamentary Budget Officer (est. 2006) is mandated to provide independent analysis to Parliament about national finances, government estimates and trends in the national economy; to undertake research on these matters upon request by certain parliamentary committees; and to estimate the financial cost of any proposal upon request by a member of the House of Commons or the Senate.<sup>33</sup> The Parliamentary Budget Officer occupies a more tentative position in the class of federal integrity agencies compared to the other eight offices I have described, for at least two reasons: first, because this Officer is the only head of a federal integrity agency who holds office at pleasure,<sup>34</sup> and second, because the agency has been formally established as an Officer of the Library of Parliament<sup>35</sup>—a status which has generated considerable controversy around the Officer’s appropriate reporting responsibilities and reporting mechanisms.<sup>36</sup> I include the Parliamentary Budget Officer as an integrity agency for the purposes of this Article, at least in part, on instrumental grounds: the Office’s novel features have, in the course of institutional design and in the exercise of its functions, been central to important debates about the appropriate balance of agency independence and control in Canada.

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<sup>31</sup> *Conflict of Interest Act*, SC 2006, c 9, s 2; House of Commons, *Standing Orders of the House of Commons Including the Conflict of Interest Code for Members* (January 2014) at r 108, online: Parliament of Canada <[www.parl.gc.ca/About/House/StandingOrders/SOPDF.pdf](http://www.parl.gc.ca/About/House/StandingOrders/SOPDF.pdf)> [*House of Commons Standing Orders*].

<sup>32</sup> See *Lobbying Act*, RSC 1985, c 44 (4th Supp), s 4 [*Lobbying Act*].

<sup>33</sup> *Parliament of Canada Act*, RSC 1985, c P-1, s 79.1; Office of the Parliamentary Budget Officer, *PBO at a Glance*, <<http://www.pbo-dpb.gc.ca/en/PBO+at+a+Glance>>.

<sup>34</sup> *Parliament of Canada Act*, *ibid*, s 79.1(2).

<sup>35</sup> *Ibid*, s 79.1(1).

<sup>36</sup> See *infra*, Part II.B.2

Those features provide a useful contrast between the Parliamentary Budget Office and its peer agencies, illustrating how key design choices around agency tenure, reporting and budgeting can have direct impacts on formal and operational independence.

## B. Two Dimensions of Agency Independence

This brief overview of the federal integrity agencies in Canada suggests that many of these entities undertake similar functions in their respective areas of expertise.<sup>37</sup> It is also clear that, to perform those oversight functions effectively, integrity agencies will require substantial independence from political influence—not only from actors in government and the civil service, but also from the parliamentarians who delegate and structure agency authority and are simultaneously subject to oversight in various areas. The question taken up in this part of the Article is: What factors structure that independence in law and in practice? In addressing this descriptive question here, I do not intend to skirt important normative problems about the necessary balance of agency independence and control, but I set these tensions aside for the moment and return to them when I address the idea of a network architecture for structuring agency independence in Part IV.

Tracking an emerging trend in recent scholarship on the design of regulatory regimes in Europe, it is helpful to draw an analytical line between the formal (or *de jure*) and actual (or *de facto*) independence of administrative agencies.<sup>38</sup> From this perspective, formal independence is comprised of explicit guarantees, normally established by statute, such as terms of appointment and dismissal, reporting requirements, and budgetary controls. Based on his study of regulatory

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<sup>37</sup> But see Chaplin, “Officers of Parliament”, *supra* note 8 (noting the diversity of tasks performed by, and underlying rationales for, the different agencies at 27).

<sup>38</sup> See generally Fabrizio Gilardi & Martino Maggetti, “The Independence of Regulatory Agencies” in David Levi-Faur, ed, *Handbook on the Politics of Regulation* (Cheltenham, UK: Edward Elgar, 2011) 201 [Gilardi & Maggetti].

agencies in Western Europe, Fabrizio Gilardi describes four dimensions of formal independence: (i) the status of the agency head, including his or her term of office, and appointment, dismissal, and renewal procedures; (ii) the agency's relationship with elected politicians, including statutory declarations of independence, obligations and duties, and whether the agency's decisions can be overturned; (iii) the agency's financial and organizational arrangements, including its source of budget, internal organization and control over human resources; and (iv) the agency's regulatory competencies, including its powers to set policy, monitor or investigate performance, and sanction misbehaviour.<sup>39</sup>

This formal dimensions of independence contrasts with a growing interest in the actual or operational independence of administrative bodies.<sup>40</sup> An emerging body of research on administrative agencies suggests "there is little reason to believe that formal independence automatically translates into independence in practice."<sup>41</sup> This work suggests that, to gain a full picture of how political forces shape and constrain the activities of integrity agencies, we must account for factors such as the frequency with which agency heads enter and exit, the frequency of contacts between politicians and those within the agency, the partisanship of nominations, and the influence of politicians on budgets and internal organization. These non-formal aspects will

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<sup>39</sup> See Fabrizio Gilardi, "The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors" (2005) 11:4 Swiss Political Science Rev 139 at 146; Fabrizio Gilardi, "The Institutional Foundations of Regulatory Capitalism: the Diffusion of Independent Regulatory Agencies in Western Europe" (2005) 598 Annals American Academy Political Social Science 84. For an alternative view in the Canadian context describing a mix of formal and informal factors, see Philip Bryden, "A Canadian Perspective on Tribunal Independence" (Paper delivered at the Canadian Council of Administrative Tribunals, May 2007) at 13–14, online: University of Toronto Faculty of Law <<http://www.ccat-ctac.org/downloads/P-2%20Bryden.pdf>> (identifying four types of instruments for safeguarding agency independence in the adjudicative field: constitutional protections; common law rules; legislative safeguards and "non-legal" mechanisms, including guidelines, memoranda of understanding between an agency and the host ministry and the relationships among the minister, deputy minister and the tribunal chair).

<sup>40</sup> See e.g. Martino Maggetti, "De Facto Independence After Delegation: A Fuzzy-set Analysis", online: (2007) 1:4 Regulation & Governance 271 <<http://onlinelibrary.wiley.com/journal/10.1111/%28ISSN%291748-5991>>.

<sup>41</sup> Gilardi & Maggetti, *supra* note 38 at 204.



interact with and overlap formal controls to some degree and, in general, serve to broaden or constrain the level of independence established more explicitly by legislative action.<sup>42</sup>

Political discretion to shape both formal and actual independence in Canada is, of course, also circumscribed by common law safeguards of agency independence—such as they are. In the final section of Part II, below, I briefly describe the current status of these judicial safeguards, which provide important context for understanding broader debates around agency independence and the limited scope of those debates to date.

### 1. *Formal Independence*

In one of the most comprehensive studies of Canadian integrity agencies to date, Paul Thomas describes what he calls the “structural” features that determine agency independence and accountability.<sup>43</sup> Although Thomas’ approach sometimes combines elements of what I have called formal and actual independence,<sup>44</sup> his main descriptions of the relevant formal factors align closely with Gilardi’s typology. I touch on each factor briefly in turn, supplementing Thomas’ original work with insights from recent reforms and the evolving structure of integrity agencies created since the mid-2000s.

#### (a) *Status of the agency’s head*

The majority of integrity officers hold office for a seven-year fixed term, but there are exceptions. The Chief Electoral Officer is not appointed for a fixed term and holds office during good

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<sup>42</sup> See Chris Hanretty and Christel Koop, “Shall the Law Set Them Free? The Formal and Actual Independence of Regulatory Agencies” (2012) 7 *Regulation & Governance* 195 at 199 (using metrics of formal and actual independence to define “the degree to which that agency takes day-to-day decisions without the interference of politicians—in terms of the offering of inducements or threats—and/or the consideration of political preferences”).

<sup>43</sup> Thomas, *supra* note 11 at 297.

<sup>44</sup> *Ibid.* (As Thomas notes, “the leadership styles and cultures within the various institutions are at least as important as the distribution of formal authority. The leader of a parliamentary agency who is determined to resist executive encroachment on the autonomy of the agency can mount an effective campaign of resistance” at 297-98)

behaviour, while the Auditor General is appointed for ten years, though each must retire at age 65.<sup>45</sup> These provisions provide both agency heads with better-than-average tenure security, freeing them from the potential pressures and conflicts involved in seeking reappointment. By comparison, the Parliamentary Budget Officer holds office for a five-year term at pleasure, meaning that the appointment that can be rescinded at the discretion of the Governor in Council.<sup>46</sup> Officers other than the Parliamentary Budget Officer are removable only for cause, and reappointments are generally permitted, with the exception of the Auditor General and the Chief Electoral Office, whose terms are non-renewable.<sup>47</sup>

Until 2007, appointment processes for integrity officers varied widely, but were standardized for most agencies with the introduction of the *Federal Accountability Act* [FAA],<sup>48</sup> which also established the offices of the Public Sector Integrity Commissioner, the Commissioner of Lobbying and the Conflict of Interest and Ethics Commissioner. These three officers—in addition to the Auditor General and the Commissioners of Official Languages, Information and Privacy—are now appointed by the Governor in Council after consultation with the leader of each recognized party in the Senate and House of Commons and by approval, via resolution, of both Houses.<sup>49</sup> The *FAA* reforms were implemented with a view to giving Parliament a more meaningful role in the appointments process.<sup>50</sup> The Chief Electoral Officer is appointed by resolution of the House of Commons.<sup>51</sup> Because the Parliamentary Budget Officer was not established as a full-fledged Officer of Parliament, he or she stands alone as the only

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<sup>45</sup> *Canada Elections Act*, *supra* note **Error! Bookmark not defined.**, s 13(1); *Auditor General Act*, *supra* note 13, s 3(1.1).

<sup>46</sup> *Parliament of Canada Act*, *supra* note **Error! Bookmark not defined.**, s 79.1(2).

<sup>47</sup> *Auditor General Act*, *supra* note 13, s 3(3); *Canada Elections Act*, *supra* note **Error! Bookmark not defined.**, s 13(2).

<sup>48</sup> *Federal Accountability Act*, SC 2006, c 9 [FAA].

<sup>49</sup> See e.g. *Auditor General Act*, *supra* note 13, s 3(1).

<sup>50</sup> Hurtubise-Loranger, *supra* note 9 at 75.

<sup>51</sup> *Canada Elections Act*, *supra* note **Error! Bookmark not defined.**, s 13(1).

integrity officer appointed by government without direct parliamentary involvement. Instead, the Parliamentary Budget Officer is selected by the Governor in Council from a list of three names submitted by a special committee that includes the Parliamentary Librarian.<sup>52</sup>

By convention, the nominee for appointment to lead an integrity agency is asked to appear before a parliamentary committee in advance of a resolution formalizing the appointment. This practice, however, apparently remains uncertain and in the past it has generated some controversy when, for example, opposition parties have opposed a nomination because of insufficient consultation or because the appointee and government were perceived to be too closely affiliated.<sup>53</sup>

(b) *Mandate review*

Another key indicator of formal independence is the process by which the mandates and policy directions of integrity agencies are reviewed and revised over time. Only two agencies—Lobbying and the Public Sector Integrity—currently have periodic review requirements built into their empowering legislation. The federal *Lobbying Act* requires that a designated Senate, House of Commons or joint committee conduct a review of the *Act* every five years.<sup>54</sup> Presumably, this process includes a review of the Commissioner's mandate, although it is not clear that this aspect of the legislative scheme must be specifically addressed by the committee. Likewise, the *Public Servants Disclosure Protection Act* [PSDPA] requires periodic five-year reviews of the *Act*—although these reviews are carried out by the executive through the Treasury Board, rather than by a parliamentary committee.<sup>55</sup>

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<sup>52</sup> See *Parliament of Canada Act*, *supra* note **Error! Bookmark not defined.**, s 79.1(3).

<sup>53</sup> See Thomas, *supra* note 11 at 300; Hurtubise-Loranger, *supra* note 9 at 75. See also *House of Commons Standing Orders*, *supra* note 31 at r 111.1.

<sup>54</sup> *Lobbying Act*, *supra* note 32, s 14.1(1).

<sup>55</sup> PSDPA, *supra* note 28, s 54.

The remaining integrity agencies are not subject to standing review requirements, but ad hoc measures have been implemented in the past to carry out mandate review, sometimes in ways that appear to lack transparency. Thomas notes that the Office of the Auditor General was heavily involved in the review process leading up to the 1977 amendments to the *Auditor General Act* introducing value-for-money auditing, by establishing an Independent Standing Committee to consult with private-sector parties.<sup>56</sup> Similarly, an overhaul of the federal *Access to Information Act* was conducted by an “insider task force” of senior civil servants in the early 2000s—a process that was heavily criticized by parliamentarians, the Information Commissioner and advocacy groups, and demonstrated the considerable control over the agency exercised by bureaucrats close to the executive.<sup>57</sup>

(c) *Financial and organizational arrangements*

These factors have become a focal point of criticisms about constraints on the formal independence of the federal integrity agencies. Controversies have centred on which political actors should exercise control over budgetary review and financial decisions. In the face of repeated calls for parliamentary committees to be more involved in proposing and reviewing budgets for integrity agencies, successive governments insisted on strict adherence to the principle that all spending decisions must originate within Cabinet.<sup>58</sup> Based on this view, it was argued that agency budgets should be established exclusively by government and outside of parliamentary control. Following a report addressing this issue by the House of Commons Standing Committee on Ethics and Access to Information in 2005, however, an ad hoc all-party advisory panel of parliamentarians was established to consider funding requests for several

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<sup>56</sup> Thomas, *supra* note 11 at 298.

<sup>57</sup> See *ibid* at 298–99.

<sup>58</sup> See *ibid* at 301.

integrity agencies on an ongoing basis.<sup>59</sup> The advisory panel accepts requests from individual agencies and makes recommendations to the Treasury Board based on its findings, although the committee has no power to issue binding decisions.<sup>60</sup>

Integrity agencies themselves have also voiced concerns about Treasury Board scrutiny of their decisions regarding human resources, reporting and staff compensation, arguing that oversight of their internal operations exposes investigation records and other sensitive materials to government officials, and linking these concerns to broader problems of political interference with agency operations.<sup>61</sup>

(d) *Agency reporting requirements*

All integrity agencies are required to report periodically to Parliament on their activities by submitting annual and special reports to the appropriate parliamentary committee. Most reporting provisions are relatively general, requiring only that agencies submit an annual report within a particular deadline. An exception is the *PSDPA*, which establishes several specific reporting requirements related to data on investigations, any recommendations issued by the Public Sector Integrity Commissioner and their status, and any “systemic problems that give rise to wrongdoings.”<sup>62</sup> The extent to which parliamentary committees actually fulfil their responsibilities to review agency reports, however, may be highly variable. According to Thomas, “[m]ost reports never undergo thorough review”, leaving agency activity unmonitored in many cases.<sup>63</sup> Once annual reports are submitted to Parliament and tabled in the House of

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<sup>59</sup> See Hurtubise-Loranger, *supra* note 8 at 76–77.

<sup>60</sup> *Ibid* at 77. See also Thomas, *supra* note 10 at 302 (noting that the Auditory General is afforded some special protections of independence with respect to budgets).

<sup>61</sup> Hurtubise-Loranger, *supra* note 9 at 77.

<sup>62</sup> *PSDPA*, *supra* note 28, s 38(2).

<sup>63</sup> Thomas, *supra* note 11 at 302.

Commons and/or in the Senate, they are normally made publically available, thereby improving the public's ability to participate in agency monitoring.<sup>64</sup>

## 2. *Actual Independence*

The four factors that constitute federal integrity agencies' formal independence suggest that, on their face, these agencies may be relatively well insulated from political influence, at least when compared to the situation of most executive administrative agencies in Canada—although important concerns about the structure of appointment, budgetary and legislative review processes persist, in spite of attempts at reform. But these formal structures offer only a partial picture of how legislative protections translate into real independence in practice. Establishing a full understanding of integrity agencies' actual or *de facto* independence is beyond the scope of this study and likely a fertile area for future empirical work, but a series of recent case studies surrounding the work of integrity agencies will help to illustrate the importance of, and the challenges surrounding, the dynamics of agency independence. These cases suggest that the formal independence of integrity agencies may not always be realized on the ground, and they demonstrate the complexities sometimes involved in trying to distinguish between these two dimensions.

*Public Sector Integrity Commissioner (2010)*. The office of the Public Sector Integrity Commissioner was established in response to concerns raised by the Gomery Commission on public sector oversight, which issued its recommendations in response to a federal sponsorship

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<sup>64</sup> See e.g. *Privacy Act*, *supra* note **Error! Bookmark not defined.**, s 40(1); *Access to Information Act*, *supra* note **Error! Bookmark not defined.**, s 40(1).

program spending scandal.<sup>65</sup> The Gomery Commission's final report drew attention to the fact that public servant whistleblowers enjoyed inadequate protections against future reprisals.<sup>66</sup> Canada's first Integrity Commissioner, Christiane Ouimet, was appointed to lead the agency soon after it was created in 2007, but in 2010 the Commissioner was widely criticized in the media for having done little to address the many complaints made by public servants under the new regime during her nearly three-year tenure. Media reports revealed that Ouimet had investigated just seven of the 228 complaints received by her office, and that none of these investigations had resulted in findings of wrongdoing.<sup>67</sup> Moreover, the parliamentary committee responsible for ensuring the agency's accountability to Parliament had not reviewed any of the Commissioner's three annual reports detailing the activities of her office.

Ouimet resigned her commission once the details of this long inactivity were made public. These events led to accusations by opposition parties that Ouimet was under political pressure from government to minimize the impact of her office, so as to render the federal whistleblower legislation largely impotent.<sup>68</sup> The Auditor General subsequently launched a probe, sparked by complains from employees within the Office of the Public Sector Integrity Commissioner about mistreatment by Ouimet during the course of their employment, though Ouimet herself later

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<sup>65</sup> Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible? Fact Finding Report*, by Justice John H Gomery (Ottawa: Public Works and Government Services Canada, 2005) at 201–03, online: <<http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-03-06/www.gomery.ca/en/phase1report/index.asp>>. See also Canada, Legal and Legislative Affairs Division, Parliamentary Information and Research Service, “Federal Public Sector Whistleblowing (In Brief)”, by Élise Hurtubise-Loranger & Rebecca Katz, No 2008-63-E (Ottawa: Library of Parliament, 2012) at 1–2, online: Government of Canada Publications <[http://publications.gc.ca/collections/collection\\_2012/bdp-lop/eb/2008-63-eng.pdf](http://publications.gc.ca/collections/collection_2012/bdp-lop/eb/2008-63-eng.pdf)>.

<sup>66</sup> Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations*, by Justice John H Gomery (Ottawa: Public Works and Government Services Canada, 2006) at 44–46, online: <<http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-03-06/www.gomery.ca/en/phase2report/index.asp>>.

<sup>67</sup> Gloria Galloway, “Integrity Commissioner's Office Urged to Reopen Files”, *The Globe and Mail* (11 December 2010) A19.

<sup>68</sup> Richard Brennan, “Ethics Czar ‘Intimidated’ Staff, Engaged in ‘Reprisal’”, *Toronto Star* (10 December 2010) A1.

contested the Auditor General's findings and public perception of events.<sup>69</sup> In the wake of the affair, critics also raised questions about the effectiveness of other integrity agencies created alongside of the Office of the Public Sector Integrity Commissioner, with some accusing the agencies of lacking the proper incentives to pursue complaints of wrongdoing or of caving to political pressure to side-line their investigations in order to avoid embarrassing powerful political interests.<sup>70</sup>

Suggestions that some integrity agencies had been under political influence to minimize the impact of their offices highlight the important role that controls over actual independence can play in thwarting the ultimate ends of delegation to integrity agencies. Whether or not these criticisms are valid in any particular case, at a minimum they point to the complex interaction between formal and *de facto* dimensions, and between agency independence and control. While the relatively loose reporting and oversight requirements set by Parliament may suggest a high level of formal independence for agencies of their face, the Ouimet affair makes clear that these same factors may actually contribute to stricter *de facto* constraints on independence in practice—such as when gaps in an agency's own accountability enable politicians to exercise influence over that agency to underperform.

*Parliamentary Budget Officer (2012) and Chief Electoral Officer (2014)*. Following a major round of federal public service cuts and staff reductions amounting to \$5.2 billion in federal cutbacks in 2012, the Tory Government claimed that nearly 70 percent of those expenditure cuts would be accomplished via improved operating efficiencies. To scrutinize the

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<sup>69</sup> Auditor General, "Report of the Auditor General of Canada to the House of Commons: The Public Sector Integrity Commissioner" (December 2010), online: < [http://www.oag-bvg.gc.ca/internet/docs/parl\\_oag\\_201012\\_e\\_34448.pdf](http://www.oag-bvg.gc.ca/internet/docs/parl_oag_201012_e_34448.pdf) > at 14; Christiane Ouimet, "Statement to the Standing Committee on Public Accounts Regarding the Report of the Auditor General of December 14, 2010" (10 March 2011) [on file with author]. See also Joanna Smith, "Ethics Boss Shows no Remorse", *Toronto Star* (11 March 2011) A1.

<sup>70</sup> Gloria Galloway, "Watchdogs – or Lapdogs?", *The Globe and Mail* (28 December 2010) A4.



accuracy of this claim, Parliamentary Budget Officer Kevin Page issued a series of information requests to government departments for data about planned employee layoffs and their impacts on government service levels.<sup>71</sup> Officials in more than 56 different executive departments, however, refused or failed to respond to Page's requests for disclosure. After the Page complained about these efforts to stonewall the investigation, Treasury Board President Tony Clement publically accused Page of overstepping his mandate, arguing that the Parliamentary Budget Officer was limited by its statutory mandate to examining government expenditures and had no authority to scrutinize government cuts and austerity measures.<sup>72</sup> Page's office subsequently launched a Federal Court reference asking the Court to affirm his jurisdiction to acquire the requested information.<sup>73</sup> In the course of its ruling, the Court observed that "by establishing the position of a Parliamentary Budget Officer and enshrining his or her mandate in legislation, Parliament intended that independent, *i.e.* independent from Government, financial analysis should be available to any member of Parliament, given the possibility that the Government of the day may be a majority government with strong party discipline."<sup>74</sup> Although the Court ultimately declined to rule on grounds of nonjusticiability, it nonetheless preserved its own authority to determine questions of integrity agency jurisdiction in the face of parliamentary privilege asserted by the Attorney General and the Speakers of the Senate and House of Commons.

The dual response by government in this case—of refusing compliance outright and then exerting pressure on the agency to conform through non-formal channels such as statements in the media—may illustrate the willingness of politicians to constrain the independence of

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<sup>71</sup> Les Whittington, "Spending Watchdog Challenges Harper's Claims", *Toronto Star* (7 November 2012) A4.

<sup>72</sup> Canadian Press, "Budget Officer Ready to Fight for his Powers", *Toronto Star* (8 October 2010) A3.

<sup>73</sup> *Page v. Mulcaire*, 2013 FC 402.

<sup>74</sup> *Ibid.* at para 46.

integrity agencies when the activities of those agencies run directly counter to political interests. Likewise, the case suggests that integrity agencies will respond strategically to attempts to limit their independence, even if courts are ultimately unwilling or unable to address questions of integrity agency independence directly.

This legal battle concerning the powers of the Parliamentary Budget Officer is also related to, and in part a consequence of, a larger dispute over the formal independence of that office within the landscape of parliamentary oversight, illustrating again the complex interaction between different dimensions of independence. The Parliamentary Budget Office was originally created to ensure “truth in budgeting” as part of the same *FAA* reforms that led to the Offices of the Public Sector Integrity Commissioner, the Lobbying Commissioner and the Conflicts of Interest and Ethics Commissioner..<sup>75</sup> But unlike these other agencies—whose formal independence is more clearly established in their enabling legislation—important ambiguities in the Parliamentary Budget Office’s enabling provisions have led to an ongoing battle about its relationship to Parliament. At the root of the controversy is the fact that the office was created within the Library of Parliament, making it unclear whether the Parliamentary Budget Officer is responsible directly to Parliament or to the Parliamentary Librarian, an appointment made by the Governor in Council.<sup>76</sup> Although members of the Tory Government originally indicated that they viewed the Parliamentary Budget Officer as an independent officer, their position appeared to shift as Page became increasingly active in politically sensitive matters. More recently, the Parliamentary Librarian joined with the two House Speakers to solicit a legal opinion arguing that, although the Parliamentary Budget Office was established as independent from the

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<sup>75</sup> *FAA*, *supra* note \_\_ at s 116. See Brooke Jeffrey, “The Parliamentary Budget Officer Two Years Later: A Progress Report” (2010) 33:4 Canadian Parliamentary Rev 37 at 37–38 [Jeffrey].

<sup>76</sup> Jeffrey, *ibid* at 38.

executive, the Parliamentary Librarian retained authority to adopt policies, rules or orders binding on office.<sup>77</sup> These controversies were further complicated by disputes over the independence of the Parliamentary Budget Officer in staffing and budgeting decisions, and over Page's practice of releasing his reports directly to the public on the office's website. After two months of hearings on these matters in 2009, a Joint House-Senate Committee recommended, among other restrictions, that any reporting activities requested of the Parliamentary Budget Officer by a parliamentarian or a parliamentary committee should remain confidential until approved by the party making the request.<sup>78</sup>

.A more recent contest between the federal Tories and Chief Electoral Officer Marc Mayrand marks a second illustration how politicians may use both formal legislative measures and public pressure to constrain the independence of integrity agencies. In early 2014, the federal government introduced a package of legislative reforms as part of the *Fair Elections Act*, which addressed several areas of electoral reform—including the controversial elimination of “vouching” procedures used by voters lacking the requisite identification documents—but also severely curtailed the investigation and public relations powers of the Chief Electoral Officer.<sup>79</sup> Although the legislation was promoted by government as responsive to Elections Canada's own compliance review in the wake of voting irregularities in the 2011 federal election,<sup>80</sup> Mayrand reacted strongly against the changes,, arguing that they limited his office's ability to speak publically about democracy and largely constrained the agency to purely administrative

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<sup>77</sup> *Ibid* at 40.

<sup>78</sup> House of Commons, Press Release, “The Library of Parliament Committee Presents Its Conclusions and Recommendations on the Activities of the Parliamentary Budget” (16 June 2009), online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3996583&Language=E&Mode=1&Parl=40&Session=2>>.

<sup>79</sup> *Fair Elections Act*, *supra* note **Error! Bookmark not defined.**

<sup>80</sup> Harry Neufeld, “Compliance Review: Final Report and Recommendations - A Review of Compliance with Election Day Registration and Voting Process Rules” (March 2013), online: <[http://www.elections.ca/res/cons/comp/crfr/pdf/crfr\\_e.pdf](http://www.elections.ca/res/cons/comp/crfr/pdf/crfr_e.pdf)>.

functions.<sup>81</sup> In response to these criticisms, Democratic Reform Minister Pierre Poilievre attacked Mayrand in the House of Commons and in the media as simply wanting “more power, a bigger budget, and less accountability.”<sup>82</sup>

*Bill C-520 Disclosure Measures.* Perhaps the most direct attempt by government to constrain the actual independence of integrity agencies in the name of greater accountability in recent years has been its support for a private member’s bill, Bill C-520, which at the time of writing had passed second reading in the Senate and been referred to the Standing Committee on National Finance before Parliament was dissolved ahead of a general election scheduled for the fall of 2015.<sup>83</sup> This proposed legislation purports to support non-partisanship in the federal integrity agencies (excluding the Parliamentary Budget Office), by requiring every applicant for a position with one of the agencies, as well as all current employees, to disclose any “partisan position” held in the previous decade.<sup>84</sup> Moreover, the bill requires agencies to publish on their websites the declarations of prospective and current employees with respect to past partisan positions.<sup>85</sup> Conservative MP Mark Adler, the bill’s sponsor, has stated that, “given their high level of political visibility, I believe it is crucial that agents and their staff work in a non-partisan way to maintain the confidence of parliamentarians and Canadians” and that the bill’s provisions “would provide enhanced transparency and accountability for parliamentarians, who must have confidence that the work of agents of Parliament is impartial.”<sup>86</sup> Critics of the proposed legislation, however, have suggested that the tools provided to politicians through Bill C-520

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<sup>81</sup> Leslie MacKinnon, “Elections Head Feels Benched by Electoral Reform Bill” (6 February 2014) *CBC News*, online: <<http://www.cbc.ca/news/politics/elections-head-feels-benched-by-electoral-reform-bill-1.2526359>>; Susana Mas, “Election Reform Bill an Affront to Democracy, Marc Mayrand Says” (8 February 2014) *CBC News*, online: <<http://www.cbc.ca/news/politics/election-reform-bill-an-affront-to-democracy-marc-mayrand-says-1.2527635>>.

<sup>82</sup> Alex Boutilier, “Pierre Poilievre Attacks Head of Elections Canada”, *Toronto Star* (8 April 2014).

<sup>83</sup> Bill C-520, Second Session, Forty-first Parliament, 62-63 Elizabeth II, 2013-2014 [Bill C-520].

<sup>84</sup> *Ibid.* at s. 4, 6-8.

<sup>85</sup> *Ibid.* at s. 6(3) and 9.

<sup>86</sup> House of Commons Debates, Vol. 147, No. 020, 2nd Session, 41st Parliament (November 20, 2013).

could be used to intimidate integrity agencies<sup>87</sup> and to curtail the powers,<sup>88</sup> thereby exerting a strong influence over the actual independence of these entities in practice, if not specifically engaging with the factors of formal independence described above. Even more remarkably, several of the integrity Officers have jointly declared their opposition to the bill, taking “the rare step of banding together” to express concerns about the proposed legislation’s disclosure requirements.<sup>89</sup>

These case studies offer a good starting point to describe the political economy of delegation to integrity agencies in Part III, below. While anecdotal evidence is helpful to illustrate some of the real barriers to lasting agency independence in Canada, it has limited power to predict how agencies might secure greater independence in the future. The premise will be that scholars can usefully engage with theoretical models that can help to explain the underlying logics of delegation to integrity agencies as the basis for predicting how politicians’ calculus of the costs and benefits about the structure of delegated authority will impact on independence over time. Before turning to that discussion, I briefly outline the role of the courts in safeguarding the independence of administrative agencies more generally.

### C. The Role of Courts

Courts, of course, have some role to play in policing the boundaries of administrative agency independence by ensuring that the rights of agency users are vindicated in accordance

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<sup>87</sup> *Ibid.* However, some of these concerns were met by the removal of a provision enabling Senators or Members of Parliament to request an investigation of any employee of an integrity agency.

<sup>88</sup> Alex Boutilier, “Tory MP’s proposed bill likened to witch hunt” (15 January 2014) *Toronto Star*.

<sup>89</sup> Alex Boutilier, “Watchdogs present united front against Tory disclosure bill” *Toronto Star* (26 February 2014).

with the principles of natural justice.<sup>90</sup> The posture of Canadian courts with respect to common law protections of agency independence, however, has been described as both “ambivalent”<sup>91</sup> and “confusing.”<sup>92</sup> Commentators have written at length on this case law elsewhere, and I do not attempt to reproduce their comprehensive work here.<sup>93</sup> Two general insights from the cases, however, are relevant to the political economy of agency independence described below. First, when addressing administrative agency independence, courts have adopted as their starting point a particular model of judicial independence—with its constitutional guarantees for formal security of tenure, financial security, and independence over administration—and have applied this framework in a limited and relatively constrained fashion to the various contexts of administrative justice.<sup>94</sup> In *Canadian Pacific Ltd. v. Matsqui Indian Band*, Lamer C.J. noted that “while administrative tribunals are subject to the *Valente* principles [for judicial independence], the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue,” depending “on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.”<sup>95</sup> Significantly, the Supreme Court confirmed in *Ocean Port Hotel Ltd. v. British Columbia* that any common law guarantees of institutional independence for administrative agencies lie outside of the constitutional protections

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<sup>90</sup> See Lorne Sossin and Charles W. Smith, “Politics of Transparency and Independence before Administrative Boards, The” (2012) 75 *Sask. L. Rev.* 13 [Sossin and Smith] at 26 (noting that the “right” to independence is accurately characterized as a right held by agency or tribunal users).

<sup>91</sup> Lorne Sossin, “The Ambivalence of Administrative Justice in Canada: Does Canada Need a Fourth Branch?” in *Lamer: The Sacred Fire*, eds Daniel Jutras and Adam Dodek (2009) 46 *Sup Ct L R* 51 [Sossin, “Ambivalence”].

<sup>92</sup> Ron Ellis, *Unjust by Design: Canada’s Administrative Justice System* (Vancouver: University of British Columbia Press, 2013) at 20.

<sup>93</sup> See Sossin, “Ambivalence”, *supra* note 65; Sossin and Smith, *supra* note 64 at 26-36.

<sup>94</sup> See Sossin and Smith, *supra* note 64 (providing a thorough description of this approach); *Valente v. The Queen*, [1985] 2 SCR 673, 24 DLR (4th) 161 at paras 27, 40, 47 (noting the three required aspects of judicial independence); *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3, 122 DLR (4th) 129 at paras 79-80 (per Lamer C.J. applying the criteria for institutional independence articulated in *Valente* to administrative tribunals) and para 83 (citing *Consolidated Bathurst Packaging Ltd. v. I.W.A., Local 2-69*, [1990] 1 SCR. 282 as a previous occasion in which the Supreme Court applied these criteria to administrative tribunals).

<sup>95</sup> *Matsqui*, *ibid.* at para 87.

afforded to courts themselves, and are thus vulnerable to statutory override, for any reason, when this objective is clear from legislative intent.<sup>96</sup> Courts, in other words, have generally approached agency independence as a matter for legislatures to decide—though it is open to question how sensitive to context this deferential posture has actually proven to be in practice.<sup>97</sup>

A second but less noticed feature of the cases is that courts have demonstrated some willingness to scrutinize the actual or *de facto* independence of administrative agencies, beyond the formal terms of the relevant legislation.<sup>98</sup> While some critics have expressed the concern that courts will undermine their role in safeguarding natural justice by the very act of considering government and agency practices when defining an agency's status on judicial review,<sup>99</sup> courts generally appear to have adopted Justice Sopinka's view in *Matsqui* that although "institutional independence must be considered 'objectively'," this approach "does not preclude considering the operation of a legislative scheme which creates an administrative tribunal," and that "[k]nowledge of the operational reality of these missing elements may very well provide a significantly richer context for objective consideration of the institution and its relationships."<sup>100</sup>

### III. THE POLITICAL ECONOMY OF DELEGATION

In light of both formal and informal aspects of independence described above, a growing number of legal scholars and others have lamented the lack of adequate judicial and legislative

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<sup>96</sup> 2001 SCC 52, [2001] 2 SCR 781 [*Ocean Port*] at para 20. See also, *Bell v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 SCR 884.

<sup>97</sup> See e.g., *Keen v Canada (Attorney General)* 2009 FC 353, [2009] FCJ No 402 (upholding government's decision to remove the President of the Canadian Nuclear Safety Commission based on her status as an "at pleasure" appointment). For further discussion of this case in the context of administrative agency independence, see Sossin, "Puzzle", *supra* note 4.

<sup>98</sup> See Wyman, "Independence", *supra* note 4 at 97.

<sup>99</sup> *Matsqui*, *supra* note 94 at paras 107-109, per Lamer C.J. ("The function of institutional independence is to ensure that a tribunal is *legally structured* such that its members are reasonably independent of those who appoint them").

<sup>100</sup> *Ibid.* at para 128, per Sopinka J. For a review of subsequent cases on this point, see Wyman, "Independence", *supra* note 4 at 97.

safeguards for administrative agency independence, and generally have responded from one of two positions. Those who are most pessimistic about politicians' willingness and capacities to respect agency independence have argued that courts should ultimately take up the invitation it declined *Ocean Port* by providing a degree of constitutional protection for agency independence, and thereby effectively insulating some entities, in some circumstances, from the discretion of their political principals.<sup>101</sup> Others, who are perhaps more optimistic about the responsiveness of democratic politics, have frankly acknowledged that attitudes toward agency independence can be highly unstable, and that the political commitments of lawmakers to respect agency independence in practice are a prerequisite for maintaining legitimate arms-length relationships over the long run. These scholars acknowledge that while statutory and common law safeguards are important, "the hard but important truth about independence in administrative decision-making in a parliamentary democracy" is that "while the rule of law and principles of fairness and impartiality may require independence, only political leadership can sustain it."<sup>102</sup> Some have gone so far as exhort "all who are interested in administrative law and regulation ... to educate our political masters [about] the importance of protecting [agency independence]."<sup>103</sup>

Each of these responses, however, is premised on its own set of assumptions about the preferences of the political principals responsible for delegating authority to administrative agencies in the first place. But observers have largely declined to take the important step of exploring in more precise terms the costs and benefits of delegation, nor have they attempted to draw connections between political preferences and the broader institutional environment in which they operate. In this section I aim to theorize why political actors might choose to delegate

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<sup>101</sup> See e.g. Ellis, *supra* note 92.

<sup>102</sup> Sossin, *supra* note 5.

<sup>103</sup> Janisch, *supra* note 5.



oversight authority to agencies and to illustrate why the independence of those agencies is likely to be highly unstable in the Canadian context. My methodological approach in this section is to adopt a stylized model representing the relevant interests at play as actors who pursue their own ends and react in predictable ways to the interests of others. I draw on a body of delegation theory using the Principal-Agent (P-A) framework, which has been employed extensively by political scientists to study the development of administrative agencies and administrative law in the United States since at least the 1980s, and has recently been expanded to explore the rapid proliferation of administrative bodies in the European Union and at the global level. To my knowledge, the P-A framework has not been used to study issues of administrative delegation in the Canadian context, nor has it been employed elsewhere to study the particular challenges confronting public sector oversight by integrity agencies.

As I argue below, there may be a good reason for this. While the P-A approach is a useful starting point to conceptualize the vertical relationships between political principals and integrity agencies, the descriptive and explanatory power of the classic model rests on important preconditions based on the legislative frictions generated by a system of checks and balances both within and between political branches. Where, as in Canada, these assumptions are unlikely to hold, the classic P-A model fails to reveal any reliable mechanisms by which politicians might credibly commit to agency independence in the face of politicians' time-inconsistent preferences. Nevertheless, as I argue in Part IV, the very shortcomings of the classic P-A framework in this setting may point the way to other possible models that can help to stabilize political preferences toward a better balance of agency independence and accountability in Canada and analogous contexts.

## A. The Classic Principal-Agent Model

P-A models emerged in the 1980s as an analytical tool marshalling the insights of new institutionalism and transaction cost economics to understand organizational relationships—and especially hierarchical relationships—in studies of bureaucracy and firm behaviour.<sup>104</sup> The general P-A framework is modelled on a conventional employment contract: Principals (employers) contract with the Agents (employees) to carry out a specific set of prearranged tasks. In the political sphere, this contractual-type relationship represents the delegation of public authority from elected politicians to public servants and independent agencies, who exercise that power to set policy or carry out the day-to-day business of government. In the case of integrity agencies, Parliamentarians play the role of the Principal, deciding when to delegate oversight authority, monitoring performance, receiving agency reports and deciding when and how to make this information available to the broader public. This relatively simple story is complicated, however, by the involvement of executive actors in certain aspects of decision making and control. Despite the formal independence of most integrity agencies from government, the executive discharges some of the functions of a Principal that shape agency independence, especially in making leadership appointments and budgetary decisions—although the respective decision-making power of Parliament and the executive will often collapse in practice, especially where one party holds a majority of electoral seats.

Drawing heavily from the foundations of rational choice theory, P-A models rely on at least two fundamental assumptions. First, both Principals and Agents each have their own unique

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<sup>104</sup> See Terry M Moe, “The New Economics of Organization” (1984) 28:4 American J of Political Science 739 at 739 (providing a foundational overview of new organizational economics and P-A models, and noting the basic emphasis on hierarchy missing from earlier theoretical approaches). For a recent overview of agency theory across disciplinary perspectives, see Susan P Shapiro, “Agency theory” (2005) Annual Review of Sociology 263.

set of interests, which are presumed to diverge, at least over time.<sup>105</sup> Principals delegate authority to their Agents to meet policy goals or for political gain, while Agents exercise that authority in ways shaped by their own policy preferences or for other motivations, such as for professional advancement. Second, the rationality of these stylized actors is bounded, in the sense that they make decisions and pursue their respective interests using imperfect and asymmetrical information, creating a certain level of uncertainty about future outcomes and making it impossible for Principals to monitor and control the activities of their Agents with much accuracy.<sup>106</sup> Taken together, these assumptions make clear that the analysis derived from P-A theory is a thoroughly functional one, in contrast to approaches that, for example, draw on historical and cultural factors to explain delegation with regard to national contexts or institutional path dependence.<sup>107</sup> Within the P-A framework, Principals rationally assess the costs and benefits of creating an independent agency and delegate to Agents when this choice will maximize their expected benefits, taking into account the probabilities that the predicted benefits will actually emerge in practice.<sup>108</sup>

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<sup>105</sup> See Susan Rose-Ackerman, *Corruption: A Study in Political Economy* (New York: Academic Press, 1978); Barry R Weingast, “The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)” (1984) 44:1 *Public Choice* 147 at 150–51 (explaining the electoral incentives of politicians and the potential for agencies to pursue their own interests); Matthew D McCubbins, Roger G Noll & Barry R Weingast, “Administrative Procedures as Instruments of Political Control” (1987) 3:2 *JL, Economics & Organization* 243 at 246 (identifying the fundamental problem of “bureaucratic compliance”—i.e. that agencies will make decisions different from the policies preferred by Congress and the president at 246); Giandomenico Majone, “Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance” (2001) 2:1 *European Union Politics* 103 at 104 (observing that when the credibility of commitments is the main reason for delegation, such as in creating a central bank, the best strategy for a Principal is to choose a delegate who holds systematically different policy preferences).

<sup>106</sup> See Matthew D McCubbins, “The Legislative Design of Regulatory Structure” (1985) 29:4 *American J of Political Science* 721 at 724 (describing the challenges of delegation raised by asymmetric information).

<sup>107</sup> See generally Kutsal Yesilkagit & Jørgen J. G. Christensen, “Institutional Design and Formal Autonomy: Political versus Historical and Cultural Explanations” (2010) 20:1 *J Public Administration Research & Theory* 53 (noting the inconsistencies that arise for functional approaches to delegation in the face of empirical studies and comparing this approach with theories that take into account national historical legacies and political-administrative cultures). See also Mark Thatcher, “Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation” (2002) 25:1 *West European Politics* 125 at 129.

<sup>108</sup> See B Dan Wood & John Bohte, “Political Transaction Costs and the Politics of Administrative Design” (2004) 66:1 *J Politics* 176 at 183.

The basic set-up of the P-A model, however, leads to the question of *why* Principals might choose to delegate part of their authority to Agents in the first place. Scholars have identified several benefits that accrue to Principals through delegation.<sup>109</sup> Three of those benefits are most relevant for understanding the incentives that Canadian politicians face when deciding whether to delegate public oversight authority to integrity agencies or whether to change that authority at some future date. These include: (i) improving the credibility of politicians policy commitments to improving public oversight; (ii) lowering the information costs that Parliament incurs in discharging its oversight responsibilities; and (iii) improving the opportunities for politicians to avoid blame for unpopular oversight policies or for the enforcement of those policies. I discuss each of these benefits in turn, before turning to the concomitant costs of delegation.

#### 1. *Credible Commitments*

Delegation to integrity agencies is one way that politicians might pre-commit to upholding public values that promote good governance in public administration. Such pre-commitment mechanisms figure prominently in electoral politics. For example, the federal Tories were elected in 2006 in the wake of public disgust over a high-profile public service corruption and patronage scandal perpetrated by the outgoing Liberal Government. The scandal arose over illicit kickbacks to Liberal-friendly advertising and consulting agencies in Quebec, paid out of a large federal

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<sup>109</sup> For discussions in the European context that are especially helpful in clarifying these various rationales, see Mark Thatcher & Alec Stone Sweet, "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25:1 *West European Politics* 1 [Thatcher & Stone Sweet]; Mark A Pollack, "Learning from the Americanists (Again): Theory and Method in the Study of Delegation" in Mark Thatcher & Alec Stone Sweet, eds, *The Politics of Delegation* (London: Frank Cass, 2003) 200; Robert Elgie, "Why Do Governments Delegate Authority to Quasi-Autonomous Agencies? The Case of Independent Administrative Authorities in France" (2006) 19:2 *Governance: An International Journal of Policy, Administration and, Institutions* 207.

“unity fund” created to help promote federalism in the province.<sup>110</sup> Responding to broad concerns about public corruption, the incoming Tories made several electoral promises to improve the effectiveness of parliamentary oversight on key issues such as lobbying, ethics and the protection of whistleblowers. In his introduction to Tories’ post-election *Federal Accountability Action Plan*, the Prime Minister Harper asserted that the initiative “is my government’s commitment to delivering the good, clean government that Canadians deserve and expect.”<sup>111</sup>

But what prevents political actors in this type of scenario from later abandoning such commitments when it is politically expedient to do so? This basic problem – sometimes referred to as the problem of time inconsistency – is one in which politicians encounter predictable incentives to renege tomorrow on the policy choices that they make today.<sup>112</sup> There are at least two variations on this theme.<sup>113</sup> One version arises when the same politicians or political parties who make today’s policy commitments face incentives to deviate from those policies in the future. For example, although policy responses to crises such as the federal sponsorship scandal may produce initial benefits for politicians by garnering electoral votes and improving public confidence in government, those same political actors may face strong incentives to alter or erode oversight controls in the future—such as when the gains from bad behaviour become large,

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<sup>110</sup> See generally John Wanna, “Insisting on Traditional Ministerial Responsibility and the Constitutional Independence of the Public Service: The Gomery Inquiry and the Canadian Sponsorship Scandal” (2006) 65 *Australian J Public Administration* 15 (providing a useful overview of the scandal and its aftermath).

<sup>111</sup> Canada, Treasury Board, *Federal Accountability Action Plan: Turning a New Leaf*, Catalogue No BT22-107/2006 (Ottawa: Treasury Board, 2006), online: <<http://www.tbs-sct.gc.ca/faa-lfi/docs/ap-pa/ap-pa-eng.pdf>>.

<sup>112</sup> See Finn E Kydland & Edward C Prescott, “Rules Rather than Discretion: The Inconsistency of Optimal Plans” (1977) 85:3 *J Political Economy* 473 (offering an early description of the time inconsistency problem in the case of economic planning). See also Kenneth A Shepsle, “Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey” (1992) 8:1 *JL Econ & Org* 111 at 116 (identifying the problem of time inconsistency as applied to rationales for delegation).

<sup>113</sup> See Philip Keefer & David Stasavage, “When Does Delegation Improve Credibility? Central Bank Independence and the Separation of Powers” (1998) University of Oxford, Centre for the Study of African Economies Working Paper No 98-18, online: <<http://www.csae.ox.ac.uk/workingpapers/pdfs/9818text.PDF>> [Keefer & Stasavage] (identifying two versions of the time inconsistency problem).

relative to the ongoing benefits of compliance. A second but related situation arises when it becomes reasonable to expect that governments will soon be replaced by “new” actors with different preferences. For example, when the federal Tories succeeded the outgoing Liberals in 2006, they were elected as a minority government with relatively constrained decision-making power. But this power structure changed dramatically in 2011 when the Tories returned to government with a majority mandate. At this point, the relative costs to Tory politicians from oversight activities potentially increased, as the government gained political strength and influence and expanded its policy goals in new directions. In both of these situations, politicians face the problem of convincing affected parties and the general public that their initial policy commitments are credible, because there are few guarantees that such commitments will endure the predictable changes in actors and preferences that develop over time.

One solution to this problem is for Principals to delegate policy-making and/or policy-implementing authority to Agents, who can help to ensure the credibility of political commitments going forward.<sup>114</sup> Because independent agencies are, at least in aspiration, better insulated from the shifting preferences of politicians, they represent a type of third-party enforcement mechanism that can act as a bulwark against incentives to renege.<sup>115</sup> In the case of integrity agencies, delegating parliamentary monitoring and oversight authority to these bodies—compared, for example, to creating an internal parliamentary committee—is expected to help reassure constituents that good governance initiatives are being undertaken in good faith. Indeed,

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<sup>114</sup> Modern approaches in general to the study of delegation have been termed “theories of credible commitment” because of the dominance of this rationale for delegation. For a contrast with classical public interest theories and special interest capture theories, see Jørgen Grønnegaard Christensen, “Public Interest Regulation Reconsidered: From Capture to Credible Commitment” (2010) Jerusalem Papers in Regulation & Governance Working Paper No 19, online: Hebrew University of Jerusalem <<http://regulation.huji.ac.il/dp.php>>.

<sup>115</sup> See Thomas C Schelling, “An Essay on Bargaining” (1956) 46:3 American Economic Rev 281.

the three new integrity agencies created in 2007, following the federal sponsorship scandal, were presumably created to achieve exactly this goal..

But it is only infrequently noticed by those who study administrative delegation that this type of commitment mechanism rests on a key assumption of the classic P-A model—namely, that the benefits of agency independence “depend on the existence of some costs of withdrawing the independence.”<sup>116</sup> In other words, existing institutional arrangements must provide some way to ensure that agency independence itself cannot simply be withdrawn or attenuated. As Susan Rose-Ackerman has observed, “statutes that delegate power and also seek to constrain agency action are worthwhile only if statutes are difficult to change.”<sup>117</sup> Otherwise, the “solution” that delegation provides to the dilemma of time inconsistency simply recreates the basic problem at another level.

The classic P-A model gets around this problem by assuming the existence of multiple Principals. Here, policy outcomes are understood to be the result of bargaining between discrete sets of constitutionally partitioned political interests—for example, in the United States, between the House of Representatives, the Senate and the President. Such bargains would be unstable, and therefore not credible, if one of the parties could easily change their preference and impose a new bargain in the future; thus, the need for delegation. The key point, however, is that delegation resulting from such political compromises is not easily undone because existing “veto players” can block moves by other parties who are attempting to renege on the original deal and compromise agency independence.<sup>118</sup> These veto players might be “institutional”, such as when

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<sup>116</sup> Peter Moser, *The Political Economy of Democratic Institutions* (Cheltenham, UK: Edward Elgar, 2000) at 129 [Moser].

<sup>117</sup> Susan Rose-Ackerman, “Introduction” in Susan Rose-Ackerman, ed, *Economics of Administrative Law* (Cheltenham, UK: Edward Elgar, 2008) xiii at xv.

<sup>118</sup> See Keefer & Stasavage, *supra* note 78. See also Moser, *supra* note 81.

the checks and balances mechanism of the American presidential system provides two or more bodies with a direct legislative veto, or “partisan”, such as when bargaining in minority or coalition parliamentary systems replicates the formal veto powers of a bicameral regime.<sup>119</sup> The institutional arrangements that provide for such veto points do not necessarily guarantee lasting agency independence, but are more likely to generate friction in the political process such that independence is less sensitive to the shifting preferences of any one party or group of powerful actors.

Conversely, the absence of such frictions might help to explain why, in Canada, the independence of integrity agencies is more vulnerable to being attenuated over time. Because political actors are relatively unimpeded from reversing their original decision to delegate, the benefits of delegation as a commitment mechanism are considerably diminished. Of course, this is not necessarily true in all situations. Minority governments offer some opportunities for producing partisan veto points, but these are unlikely to be viewed by constituents as particularly stable, given the lack of a political culture in Canada that is conducive to the kinds of strong coalition minority governments found in some jurisdictions. Other sources of veto power built into the empowering legislation of particular agencies might also replicate the legislative frictions presumed by the classic P-A model—for example, when a joint House-Senate committee is mutually responsible for making decisions about agency mandates or budgetary matters. However, these mechanisms are also subject to legislative override by majority government and are, therefore, unlikely to generate the same level of stability offered in systems with a constitutional regime of checks and balances.

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<sup>119</sup> George Tsebelis, “Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism” (1995) 25 *British J Political Science* 289.



This discussion suggests that any feasible answer to the “puzzle” of integrity agency independence in Canada is likely to come, at least in part, from outside of the hierarchical relationships that exist between politicians and agencies. Instead, other types of relationships—such as the horizontal linkages that exist between agencies themselves—might offer better possibilities for directly influencing the incentives of politicians in a way that increases their benefits from delegation, or likewise minimizes costs. Before elaborating on this perspective in Part IV, I turn first to discuss additional factors that influence politicians’ benefit-cost structure when making the decision to delegate.

## 2. *Avoiding Blame*

The independence of integrity agencies may also be beneficial to their political Principals when those agencies are engaged in sensitive oversight tasks that have the potential to elicit political backlash. Because much of the work of integrity agencies involves close scrutiny of career bureaucrats in the public service, parliamentarians may be hesitant to carry out these tasks themselves if they risk alienating some individuals or groups. This work ranges from day-to-day access to information requests, which are relatively uncontroversial but which bureaucrats might find burdensome or annoying, to more controversial and confrontational activity, such as the analysis by the Parliamentary Budget Office. By delegating these tasks to Agents that are more likely to be perceived by affected interests as acting independently of their Principals, politicians can shift attention away from their role in oversight activity and, therefore, benefit from the “blame avoidance” function of integrity agencies.<sup>120</sup>

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<sup>120</sup> See R Kent Weaver, “The Politics of Blame Avoidance” (1986) 6:4 J Public Policy 371 at 375 (describing delegation to administrative agencies as one of several strategies that politicians might use to avoid making

An internal study of civil servants' experiences with Canadian integrity agencies commissioned by the federal Treasury Board in 2011 provides a window into the sometimes contentious relationships that can develop in the context of public sector oversight.<sup>121</sup> While the interview data for this study is unavailable, the study report discloses several high-level complaints about interactions with the agencies from senior bureaucrats and "influential stakeholders".<sup>122</sup> Interviewees worried, for example, that the reporting requirements imposed by integrity agencies used up significant departmental resources. Those subject to scrutiny also complained that the agencies pursued their oversight activities too "vigorously", resulting in "service leaders and managers not being able to spend as much time on the mandates of their organizations."<sup>123</sup> In general, this study appears to reveal sometimes tense relationships between integrity agencies and public servants, further suggesting that the oversight work carried out by integrity agencies requires them to navigate complex relationships and requires them to engage in contentious interactions that may have longstanding effects on professional and interpersonal relationships. Politicians may gain from not having to carry out these tasks directly, thus avoiding the risks of incurring the attendant political costs.

### 3. *Reducing Information Costs*

Third, and finally, Principals might choose to delegate power to their Agents in order to reduce the information costs associated with public sector oversight functions. This rationale relates to

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politically costly decisions). See also Thatcher & Stone Sweet, *supra* note 74 at 9 (identifying the "blame avoidance" function as being one of the possible rationales for delegation).

<sup>121</sup> Marcel Chiasson and Alison Smith, "Agents of Parliament – Interview Highlights" Institute on Governance (unpublished, no date) [on file with author] [Chiasson & Smith] Perhaps given their unfavourable view of the work of integrity agencies, this commissioned study and three others conducted by the Institute on Governance are not publically available; they were obtained for this study directly through access to information requests.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid* at 2.

both the technical nature of oversight activities and to the benefit that may accrue from building up the professional competencies of integrity agencies over time. For example, areas such as financial accounting and economic forecasting carried out by the Auditor General and the Parliamentary Budget Office require a high level of technical training and expertise. Other areas of oversight, such as those occupied by the Information Commissioner and the Privacy Commissioner, are rapidly developing fields that require not only specific technical know-how, but also the ability to respond to and learn quickly from rapid changes in technology, norms and markets. Specialized independent agencies that, have and cultivate core competencies, employ professional experts and are more nimble in their operations, likely function at lower costs compared to alternative arrangements that might be deployed from within Parliament.

#### B. Costs of Delegation

Balanced against the potential benefits of delegation described above are also an important set of costs faced by political Principals.<sup>124</sup> The most obvious costs derive from the fact that politicians are themselves subject to some of the oversight functions delegated to integrity agencies. Agencies such as the Public Sector Integrity Commissioner, Conflict of Interest and Ethics Commissioner and the Commissioner of Lobbying are responsible for monitoring the misbehaviour of members of Parliament in matters related to taking bribes or influence by lobbying groups. When the compliance costs of these activities exceed the benefits of delegation, politicians will face incentives to avoid oversight scrutiny by hiding non-compliance, by

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<sup>124</sup> In addition to the costs to Principals of compliance with oversight activities and of agency loss, delegation to integrity agencies may of course carry significant direct financial costs related to establishing the agency and funding its ongoing operations.

attempting to compromise agency independence, and/or by reneging on their commitment to delegate altogether.

There are, however, an additional set of costs that accrue to Principals based on the fact that they have only imperfect information about their Agents' activities, making it difficult to predict how Agents will actually exercise their powers in practice. This results in a phenomenon referred to in the P-A literature as agency "drift".<sup>125</sup> Agency drift occurs when the policy preferences of Agents diverge from those originally envisioned by Principals—a phenomenon made possible by the discretion afforded to Agents in carrying out their activities and by the fact that monitoring these activities is itself a costly process. Agents may, therefore, behave in ways not contemplated by Principals at the outset. For example, the controversies surrounding the Parliamentary Budget Officer's investigations into federal austerity measures and the consequent accusations that the Officer was overstepping his mandate may represent a classic case of agency drift, at least from the perspective of the politicians subject to scrutiny. By contrast, agency underperformance can also be a form of agency drift—illustrated by the case of Public Sector Integrity Commissioner Christiane Ouimet, described above – in which Agents "shirk" their delegated responsibilities. This latter case, however, raises some complexities. In light of accusations that Ouimet's office was under political pressure to underperform, it is not immediately clear that this type of "shirking" always represents a clear-cut cost to politicians, and may even be induced by them, although certainly the political fallout after the scandal was exposed carried its own costs.

Overall, the theoretical framework elaborated here helps to describe the unique set of preferences that structure politicians' decisions to delegate oversight authority to integrity

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<sup>125</sup> See Matthew D McCubbins, Roger G Knoll and Barry R Weingast, "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies" (1989) 75:2 *Virginia Law Review* 431.

agencies at the federal level. From a comparative perspective, however, P-A theory also helps to explain why the independence of those agencies from political influence may be so unstable within Canada's particular institutional context. One of the key benefits of delegation is the potential for independent agencies to act as a policy commitment mechanism that addresses problems of politicians' time inconsistent preferences, thereby lending credibility to those policies and ultimately improving electoral outcomes for political actors. But to the extent that an absence of mutual veto points distributed across groups of lawmakers in Canada precludes the necessary traction for these commitment mechanisms to actually bind politicians, the independence of integrity agencies remains vulnerable to politicians' shifting schedules of costs and benefits. Because members of the public may themselves lack good information about agencies' activities and about the relationship between agencies and their political principals, politicians can still benefit from delegation to formally independent agencies yet remain free to degrade that independence, in practice, over the long run – especially when they face rising costs of agency drift and when the relative benefits of blame avoidance and agency expertise are low.

#### IV. ACCOUNTABILITY NETWORKS AS ADMINISTRATIVE JUSTICE ARCHITECTURE

If the analysis of integrity agency independence is confined exclusively to vertical relationships of delegation, control and accountability between Principals and their Agents, it is difficult to envision workable policy options in Canada that can help to stabilize this relationship and create a bulwark against self-interested political action and partisan politics. But once the analytical perspective shifts toward linkages of information exchange, coordinated action and mutual monitoring that can form horizontally between agencies, a range of potential models emerges. In this part of the article, I offer one account of how network formation among agencies might help

to stabilize long-term independence from political influence and outline some of this strategy's potential pitfalls. Set against some early anecdotal evidence of agencies' networked practices, the modest goal here is to theorize how network structures influence the costs and benefits of delegation faced by political Principals and thus affect agency independence. If networks can *predictably* increase the relative benefits of agency independence to politicians—by enhancing the credibility of commitments to independent oversight activity, by increasing agencies' technical capacity and specialized expertise, by improving the ability to avoid blame for controversial measures; and/or by reducing the costs of agency drift—then network formation may offer an important opportunity to strengthen and stabilize that independence over time.

The insight that modern administrative agencies frequently carry out their activities as part of broader networks has attracted considerable attention from scholars interested in solving domestic regulatory problems that reach across multiple policy domains.<sup>126</sup> Others have been interested in networks at the transnational level, where regulatory agencies frequently engage in informal negotiation and coordination outside the conventional channels of international relations.<sup>127</sup> While the basic model of a network of administrative agencies provides a useful starting point, previous work has not had much to say about the relationship between network

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<sup>126</sup> See Jody Freeman & Jim Rossi, "Agency Coordination in Shared Regulatory Space" (2012) 125:5 Harv L Rev 1131 (for a recent comprehensive review of administrative agency coordination in the United States). See also Alejandro E Camacho and Robert L Glicksman, "Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority" (2014) 51 Harvard Journal on Legislation 19 at 53.

<sup>127</sup> See generally Giandomenico Majone, "From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance" (1997) 17:2 J Public Policy 139 (tracing the causes and consequences of the rise of the regulatory state); Thomas Risse-Kappen, *Cooperation Among Democracies: The European Influence on US Foreign Policy* (Princeton: Princeton University Press, 1995); Anne-Marie Slaughter, "The Real New World Order" (1997) 76:4 Foreign Affairs 183 (describing the "unbundling" of the state into its functionally distinct parts and the networking of these with their counterparts abroad); Pierre-Hugues Verdier, "Transnational Regulatory Networks and Their Limits" (2009) 34:1 Yale J Int'l L 113 (offering a recent outline of transnational network scholarship and a critique). The rise of these networks, predictably, has been attended by deep worries about "accountability gaps" that result from their distance from democratic politics and from conventional mechanisms of domestic oversight and control. See Saskia Lavrijssen & Leigh Hancher, "Networks of Regulatory Agencies in Europe" in Pierre Larouche & Péter Cserne, eds, *National Legal Systems and Globalization: New Role, Continuing Relevance* (The Hague: TMC Asser Press, 2013) 183.

formation and the independence of domestic administrative agencies from political influence.

The discussion in this section aims, in part, to address that gap.

Below, I use the concept of an “accountability network” to describe the set of functional and operational linkages developing among federal integrity agencies in Canada to deploy their overlapping mandates of improving accountability in the public sector. While this term has been applied to study a variety of different phenomena, I adopt the relatively narrow definition suggested in the work of Harlow and Rawlings, which refers to: “(i) a network of agencies *specialising in a specific method of accountability*, such as investigation, adjudication or audit, which (ii) come together or coalesce in a relationship of mutual support, (iii) fortified by shared professional expertise and ethos”, and share in “(iv) a sense of common purpose.”<sup>128</sup> These types of networks have primarily been studied in settings of multilevel governance, such as the European Union, where “accountability deficits” arises because conventional mechanisms of accountability have difficulty reaching across national boundaries.<sup>129</sup> Although these accountability deficits may not be prevalent in purely domestic settings, my argument below is that networks can offer a (partial) solution to a different problem—the problem of stabilizing integrity agency independence—because they tend to increase the relative benefits of delegation to independent agencies for political principals in predictable ways. On this view, networks can be seen as structures that not only constrain the autonomy and discretion of arms-length agencies (the main focus of European literature) but also, or instead, enhance the independence of integrity agencies in ways that further the aims of good public sector oversight.

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<sup>128</sup> Carol Harlow & Richard Rawlings, “Promoting Accountability in Multilevel Governance: A Network Approach” (2007) 13:4 Eur LJ 542 at 546 [emphasis in original] [Harlow & Rawlings].

<sup>129</sup> *Ibid.* at 542-545.

## A. Network Components

In this section, I describe several components of emerging accountability network architecture, by which I mean the tools or strategies that integrity agencies use to share knowledge and other resources; to coordinate their investigatory, reporting and enforcement activities; and to develop means of peer monitoring and review. As becomes clear in the discussion below, some of these networking strategies appear to be mobilized directly in response to concerns about agency independence, while others are aimed more broadly at accomplishing agencies' substantive mandates in a coordinated way. This latter type of activity is especially interesting because of its potential side effects on agencies' relationships with their political principals. Many of these network components are already being cultivated at an early stage in Canada, while a minority of the examples derive from comparative experiences elsewhere. The goal in this section is not to provide an exhaustive typology of network components or a catalogue of their implementation, but to describe some of the most prominent strategies for networking that have begun to emerge in practice. Thereafter, I theorize the impact of these different strategies on agency independence in light of the conceptual framework established in Part III, above.

### 1. *Informal Coordination*

An easily overlooked component of accountability network architecture is the informal coordination strategies that pervade the day-to-day business of integrity agencies. If there are benefits to be gained from network activity in terms of independence or other agency objectives, it would be reasonable to expect that agencies will undertake some of this activity on their own initiative, within legal, resource and other constraints. Informal coordination activities clearly have their limits as unstable and transitory coordination mechanisms. There may, however, be



good opportunities for integrity agencies to formalize some of these ad hoc linkages as I describe below, building from the experience and relationships that they have developed informally over time.

Canadian integrity agencies have demonstrated a particular willingness to pursue collaborative measures that respond directly to real or perceived threats to their independence, often in response to specific problems or crises that generate effects across the integrity sector. Agencies often come together to deliver a unified message or set of recommendations to politicians, or to identify common problems and share objectives. For example, reacting to the aftermath of the Public Sector Integrity Commissioner's resignation in 2010, seven federal integrity agencies—including the Auditor General, the Chief Electoral Officer, the Commissioner of Lobbying, the Information Commissioner, the Privacy Commissioner and the Commissioner of Official Languages, as well as the interim Public Sector Integrity Commissioner—held a series of informal meetings to formulate a common response that would mitigate the negative spill-over effects of the scandal on their own agencies. The group produced a report identifying several ways in which the agencies' "accountability can be highlighted and enhanced" and presented this document to a number of parliamentary standing committees, including the Advisory Panel on Funding and Oversight of Officers of Parliament.<sup>130</sup> The report addressed several key issues including the relationship between agencies and parliamentary committees; the appointment of agency heads; Treasury Board audits of agency functions; and budgetary processes. Remarkably, the document also contained a strong self-awareness of their

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<sup>130</sup> Letter to the Honourable Peter Milliken, M.P., et al., "Re: Accountability of Agents of Parliament", (16 February 2011) [on file with author].

collective role as “guardians of values that transcend the political objectives and partisan debates of the day.”<sup>131</sup>

The agencies have also coordinated proactively to articulate these shared values and principles to communicate these to parliamentarians and to government. In 2007, the agencies formed a working group to liaise directly with the Treasury Board to address concerns about the Board’s process of auditing agencies’ financial and human resources records. To facilitate this work, the group developed a set of common principles, including “the need to respect the spirit and intent of government policies, to protect the independence of officers of Parliament, to ensure accountability and transparency, and to ensure that appropriate reporting mechanisms are in place.”<sup>132</sup>

Other informal network activities are not directly aimed at securing improved independence, but build up linkages that may have important side effects on agencies’ relationships with politicians—for example, the information sharing and communication that takes place between agencies at all levels, from regular lunch meetings between agency heads to inter-agency requests for assistance on particular subject matters.<sup>133</sup> Integrity agencies may also create shared administrative and procedural practices that get disseminated or dispersed through informal channels.

## 2. *Shared Services Agreements & MOUs*

Some of these informal arrangements may eventually gain formal recognition through shared services agreements and inter-agency memoranda of understanding (MOUs). Partly in response

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<sup>131</sup> *Ibid* at 1.

<sup>132</sup> Hurtubise-Loranger, *supra* note 9 at 77.

<sup>133</sup> Bill Curry, “Watchdogs of Parliament forge closer ties”, *The Globe and Mail* (12 May 2012) A9.

to constrained budgets and increased costs of service delivery, integrity agencies have shown a marked interest in shared services agreements, which enable them to consolidate internal services such as reporting requirements and information management.<sup>134</sup> For example, in 2010, the Public Sector Integrity Commissioner and the Human Rights Commission entered into an agreement to integrate aspects of their financial, human resources and information technology services.<sup>135</sup> Other agencies, such as the Commissioner of Official Languages and the Commissioner of Lobbying, have recently pursued discussions regarding a range of shared services. According to a recent empirical study on this topic, “the chief driver for collaboration would be to strengthen their collective identity as arms-length organizations.”<sup>136</sup>

Even more significantly, MOUs may provide a formal means for integrity agencies to collaborate on substantive oversight activities. Although formal MOUs between federal integrity agencies have not yet emerged, examples of memoranda between federal-provincial integrity agencies and internationally between domestic agencies concerned with overlapping subject matter may serve as models for future movements. The federal Privacy Commissioner has been an innovator in this area, signing MOUs with partner agencies in other provinces and, quite recently, establishing an agreement with the Information Commissioner of the United Kingdom concerning the mutual enforcement of privacy laws.<sup>137</sup> The Canada-UK agreement emphasizes

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<sup>134</sup> David Ennis-Dawson, *The state of information management in the Agents of Parliament and the role of the Treasury Board Secretariat*, (MA Thesis, University of Victoria, 2012) [unpublished], online: University of Victoria <[https://dspace.library.uvic.ca/bitstream/handle/1828/4325/Ennis-Dawson\\_David\\_MPA\\_2012.pdf?sequence=1](https://dspace.library.uvic.ca/bitstream/handle/1828/4325/Ennis-Dawson_David_MPA_2012.pdf?sequence=1)> [Ennis-Dawson] (reporting the results of an inter with the Official Languages Commissioner date July 3, 2012).

<sup>135</sup> See Canada, Office of the Public Sector Integrity Commissioner of Canada, *Learning and Growing: 2010-2011 Annual Report* (Ottawa: Public Works and Government Services Canada, 2011) online: <[http://www.psic-ispc.gc.ca/pdf/PSIC%202010\\_11%20Report%20Eng%20Web.pdf](http://www.psic-ispc.gc.ca/pdf/PSIC%202010_11%20Report%20Eng%20Web.pdf)>.

<sup>136</sup> Ennis-Dawson, *supra* note 98 at 52.

<sup>137</sup> Memorandum of Understanding Between The Office of the Privacy Commissioner of Canada and the Office of the Information and Privacy Commissioner of Alberta and the Office of the Information and Privacy Commissioner of British Columbia With Respect to Co-operation and Collaboration in Private Sector Privacy Policy, Enforcement, and Public Education (22 November 2011), online: Office of the Information and Privacy Commissioner of British Columbia <<https://www.oipc.bc.ca/media/6112/memorandum-of-understanding.pdf>>; Memorandum of

information sharing between agencies relevant to ongoing or potential investigations, consumer and business education, government and self-regulatory enforcement, legislative amendments and staffing and resource issues. This MOU also contemplates short- and long-term staff exchanges and the potential for parallel investigation and enforcement actions. A Canada-Alberta-British Columbia MOU, signed in 2011, covers an even broader range of collaborations concerning information sharing and enforcement, but also mutual policy development and alignment and coordination on public education and compliance resources—both based in a permanent Public Sector Privacy Forum and Working Group. While agreements of this sort are most obviously forged between agencies pursuing similar subject matter mandates, integrity agencies that operate in different subject areas may also find opportunities to exploit substantial overlaps in their mandates through similar forms of coordination.

### 3. *Organizational Initiatives*

One example of highly structured network coordination across integrity agencies operating in different subject areas is the Western Australia Integrity Coordinating Group (ICG), a permanent but non-statutory organization of four state integrity agencies established in 2005, whose membership includes the Auditor General, the Public Sector Commissioner, the Western Australian Ombudsman, the Commissioner of the Corruption and Crime Commission and the Information Commissioner.<sup>138</sup> The primary aim of the ICG appears to be the facilitation of open communication between these agencies, promoting sector-wide understandings of the various

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Understanding Between the Privacy Commissioner of Canada and the Information Commissioner of the United Kingdom on Mutual Assistance in the Enforcement of Laws Protecting Personal Information in the Private Sector (14 May 2012), online: Office of the Privacy Commissioner of Canada <[https://www.priv.gc.ca/au-ans/ii/mou/mou-uk\\_e.asp](https://www.priv.gc.ca/au-ans/ii/mou/mou-uk_e.asp)>.

<sup>138</sup> See Integrity Coordinating Group, “Home” (2015), online: Government of Western Australia: <<http://icg.wa.gov.au/>>.

roles and responsibilities of each agency and identifying gaps in sharing operational information.<sup>139</sup> The ICG's annual forum is a centrepiece of the initiative, which brings together senior personnel from all public sector agencies in Western Australia to promote the work of integrity agencies and to address public servants' specific challenges and concerns related to oversight. The group is also in the process of developing a research network that acts both as a repository for published and in-progress studies on integrity agencies, and facilitates requests from scholars for research assistance and information access related to their work.

#### 4. *Colocation*

A more tangled form of network coordination between agencies is through physical colocation of agency operations, a move now being undertaken by three federal integrity agencies in Canada: the Information Commissioner, Privacy Commissioner and Commissioner of Lobbying.<sup>140</sup> Beginning in 2013, these three agencies will locate their operations in a single shared office space, which provides opportunities not only for combined physical resources but also creates a "single door" approach to service delivery. A primary aim of this strategy may be to increase accessibility by offering one point of access that reduces the upfront costs to users of locating information or resources across different offices.

A further innovation in this vein is the development of "virtual colocation" networks that offer multiple agency users a single web portal to access information about agency activities and mandates. This approach to linking integrity bodies has been pioneered by the European Network of Ombudsmen (ENO), coordinated primarily through the efforts of the European

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<sup>139</sup> David Gilchrist, "Closing the Circle: Integrity Coordination in the West" (2012) 29 *Public Administration Today* 62.

<sup>140</sup> See Office of the Information Commissioner of Canada, *Annual Report 2011-2012* (Ottawa: Public Works and Government Services Canada, 2012), online: <[http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=3d32a518-3317-48d1-a1d9-c360af498dd9&section=32f80770-df44-4a5a-9c16-1294be2f3075&file=OIC\\_AR\\_e6.pdf](http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=3d32a518-3317-48d1-a1d9-c360af498dd9&section=32f80770-df44-4a5a-9c16-1294be2f3075&file=OIC_AR_e6.pdf)>.

Ombudsman at the EU level.<sup>141</sup> Formed in 1995, with the main purpose of overseeing the activities of the European Commission and European Council, the European Ombudsman exercises its functions through complaints, recommendation and reporting procedures similar to those found in domestic integrity agencies.<sup>142</sup> In recent years, the European Ombudsman has taken a lead role in forging a voluntary network of connections with national ombudsman offices in EU member states. In this context, the primary motivator behind network activity appears to be the high number of complaints received by the European Ombudsman that fall within the jurisdiction of domestic authorities.<sup>143</sup> The ENO and its comprehensive online web portal were created as one means to increase the efficiency with which individuals could locate the appropriate forum to lodge their complaints. These modest aspirations, however, have produced a network of agency relationships with potentially much broader implications, as the ENO continues to bolster public awareness about the work of member agencies and provides a host of resources for new national ombudsman—especially those in transition states—to more quickly establish their presence and learn from existing experience.<sup>144</sup>

## 5. *Mutual Monitoring*

Each of the strategies described so far emphasize collaborative activity between agencies, but mechanisms for agencies to engage in collective self-monitoring may also represent important aspects of network architecture that influence agency independence. Some types of mutual monitoring involve informal initiatives, such as the joint reporting processes initiated by the Canadian federal integrity agencies in 2010, discussed above. These informal monitoring

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<sup>141</sup> Harlow & Rawlings, *supra* note 93 at 558.

<sup>142</sup> Anne Peters, “The European Ombudsman and the European Constitution” (2005) 42 CML Rev 697.

<sup>143</sup> Harlow & Rawlings, *supra* note 93 at 556.

<sup>144</sup> *Ibid* at 559–60.

processes may also take the form of basic information exchange and communication between agencies, improving the capacity to recognize and address problems with peer agencies at an early stage. Other and likely more contentious forms of mutual accountability include opportunities for peer review—such as when one agency is called upon to review or investigate the activities of another, either on matters related to the particular mandate of the reviewing agency (e.g. privacy, access to information or conflicts of interest) or by special request of Parliament in response to specific issues or concerns. The Auditor General most frequently performs the latter function, and appears to be the preferred agency to investigate politically sensitive problems that arise in relation to peer integrity agencies.

Certainly, attempts at collective self-monitoring within accountability networks are likely to create tension within the collaborative aspects of these relationships, and in some respects the two network functions may be inconsistent or come into direct conflict. Moreover, self-monitoring within networks raises concerns about the transparency with which these activities are taking place, and ultimately these mechanisms can only supplement rather than supplant Parliament's central role in monitoring agency performance.

## 6. *"External" Networking*

Finally, I note that integrity agencies may well form significant links with other organizations outside of their core accountability networks, with significant implications for agency independence.<sup>145</sup> While the focus of this article is the linkages between integrity agencies themselves, other important actors are likely to include both media outlets and non-governmental

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<sup>145</sup> See e.g., in the Australia context, Chris Aulich, "Autonomy and Control in Three Australian Capital Territory-based Integrity Agencies" (2012) 33:1 Policy Studies 49 [Aulich] ("[w]hat also emerged was ...the significance of securing 'real' autonomy with the development of the reputation, esteem and professional linkages by the integrity agencies themselves" at 49).

organizations (NGOs)—both of whom have been active in the case studies and other examples provided above. For example, the media has played a key role in closely monitoring agency independence in the past, and NGOs such as Democracy Watch, have participated actively with the federal integrity sector by advocating for reforms to strengthen agency independence and issuing annual “report cards” to evaluate progress on the *FAA* reforms.<sup>146</sup>

## B. Network Architecture and Agency Independence

I conclude my discussion of accountability networks by returning to the analytical framework developed in Part III in order to sketch an early analysis of the relationship between network formation and integrity agency independence. I suggest that accountability networks can affect the preferences of political Principals toward agency independence in several ways. First, network linkages can increase the benefits of delegation as a commitment mechanism through reputation effects that increase the legitimacy of agency oversight across the integrity sector. Second, networks can increase the costs of reneging on political commitments, by making agencies more accessible to the public. Third, when networks facilitate information exchange and the development of shared professional practices, they increase the returns to delegation by further reducing the information costs of public sector oversight. Fourth, and finally, networks can help to further diffuse the backlash from public servants against oversight activities and facilitate blame avoidance by coordinating information requests and investigations, thereby minimizing the burdens of oversight. I discuss each of these consequences briefly in turn.

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<sup>146</sup> “Sixth Good Government Report Card” (12 December 2012), online: Democracy Watch <<http://democracywatch.ca/20121212-sixth-good-government-report/#report>>.



## 1. *Reputation Spillovers*

Above I described how, in theory, delegation to integrity agencies can be beneficial to politicians as a credible commitment mechanism, but also how, in practice, a lack of institutional veto points severally diminishes those expected benefits. How might an alternative network architecture stand in as a proxy for these missing veto points, creating greater ‘stickiness’ in arms-length relationships and thereby stabilizing the commitment benefits from delegation?

At least two mechanisms are possible. One is based on the idea that politicians are more likely to adhere to their pre-commitments when their agents hold a high level of perceived legitimacy and public trust, making it more costly for politicians to renege formally or informally by interfering with integrity agencies in pursuing their legitimate mandates. Such reputation effects, however, are not isolated to individual agencies: a dense network of associations between integrity agencies may create reputational spillover effects. As integrity agencies become increasingly active players in Canadian administration, they also share in forms of collective reputation attached to the integrity sector as a whole.<sup>147</sup> In part, this emerging collective identity may be related to a new public awareness of the unique role that integrity agencies occupy in relationship to other sectors of government. David Smith has claimed that these agencies have now coalesced into a fourth “integrity branch” of government in Canada—a claim that elicits a strong sense of mutual enterprise and collective identity.<sup>148</sup> Network models that reinforce and transmit the benefits of agencies’ shared reputation will generate positive

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<sup>147</sup> See Chaplin, “Officers of Parliament”, *supra* note 8 at 97 (describing the perceived legitimacy of integrity agencies by the public).

<sup>148</sup> David Smith, “A Question of Trust: Parliamentary Democracy and Canadian Society” (2004) 27:1 Canadian Parliamentary Rev 24 at 25; Bruce Ackerman, “The New Separation of Powers” (2000) 113:3 Harv L Rev 633. But see Bell, *supra* note 12 at 15 (evaluating the “integrity branch” claim in the Canadian context).

impacts across the integrity branch, over and above those relevant to any single agency in isolation.

For example, efforts by individual agencies that contribute to strengthening their reputation for effective oversight can generate positive externalities or spillover effects that raise the profile of the integrity sector overall. However, because these isolated efforts can generate incentives for free-riding behaviour on the part of agencies that choose not to contribute to building a shared reputation, network formation can be an important means to coordinate and monitor activities that benefit the group as a whole. Both ad hoc efforts, such as creating agency working groups, and more formal strategies, such as colocation or organizational initiatives, may work toward this end.

The opposite result, however, may also occur given that reputational externalities can be negative as well as positive. Public controversies such as the resignation of the Public Sector Integrity Commissioner demonstrate the degree to which shirking behaviour on the part of one agency can project negatively onto others—increasing public mistrust and leading to calls for reform. To the extent that network strategies make agencies more vulnerable to these problems, they may actually decrease politicians' benefits of delegation compared to a model in which agencies operate in insulated silos. Mutual monitoring strategies—if they can themselves operate effectively—are likely to play a prominent role in avoiding these types of negative spill-over effects by improving transparency and preventing bad behaviour at the outset.

## 2. *Accessibility*

A second mechanism to strengthen politicians' credible commitments to independent delegation turns on the improved public *accessibility* that network linkages may bring. When members of the public gain improved access to the services of, and information about, integrity agencies,

public trust in the legitimacy of those entities inevitably increases. Related to the first rationale above, there may also be important scale effects from better accessibility. As integrity agencies consolidate their shared identities, we might expect reputation effects to amplify the benefits of better public information. Moreover, improved accessibility is likely to decrease the costs of delegation for political principals, as the public adopts at least part of the monitoring functions required to ensure against different forms of agency drift.

Integrity agencies share with other administrative bodies in Canada the challenges of having been created on an ad hoc basis over time, without any real consideration by policy makers of how their jurisdictions and functions overlap and interact from the perspective of users.<sup>149</sup> The outcome of this haphazard evolution is a fragmented landscape of public sector oversight that has several possible consequences for accessibility, including: a certain degree of system-wide complexity that impairs public awareness about the purposes and functions of integrity agencies; inconsistencies in the practices, norms and procedures used by different bodies, generating special problems for users with multiple claims across agencies; and inefficiencies in the feedback loops from complaints that actually influence the behaviour of public sector official subject to oversight, making the redress of individual claims less effective overall. “Access” in this sense relates to users’ abilities to obtain both the knowledge and resources that enable them to effectively utilize the services offered by integrity agencies. Agencies that are more accessible to users are, at least in one sense, more transparent to those users and thus generate a greater level of public trust. Accessible agencies also raise the costs of compromising agency independence for the simple reason that the public will have greater

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<sup>149</sup> See Sossin & Baxter, *supra* note 6 at 162–65 (discussing the problems of fragmentation in the context of administrative tribunals).

exposure to oversight activity and will thus be more attentive to agency drift and to politicians' attempts to exert inappropriate influence.

Network strategies can improve accessibility by increasing the knowledge available to users and decreasing the resources that they are required to expend to acquire information. Public education and advocacy initiatives pursued through MOUs or organizational initiatives make it possible for agencies to reach a broader range of constituencies. Likewise, networks can also improve information sharing between agencies and help to standardize processes and procedures in order to make it easier for users to operate across agencies.<sup>150</sup> Efforts to standardize can also improve the efficiency with which users' claims are resolved, as government departments and officials on the receiving end of complaints may find it easier to respond. Finally, when integrity agencies work to provide a single point of entry for users—such as through physical or virtual colocation—this can reduce users' up-front costs of finding the appropriate forum for their complaint and may reduce their reliance on legal counsel..

On the other hand, networking also has the potential to increase the informational burden on users in some ways, for example if the network becomes so dense or complex that accurate information about agency activities itself becomes inaccessible. This observation implies that there may be important thresholds for variables such as the size of or number of connections within a network, over which the marginal benefits in terms of strengthening independence tend to decline.

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<sup>150</sup> See Harlow & Rawlings, *supra* note 93 at 560 (describing rapid exchanges of information, shared analysis of problems and dissemination of best practices).

### 3. *Mandate Efficiency*

For some of the same reasons that networking can increase the returns to delegation as a credible commitment device—such as task and knowledge sharing—networks may also increase the efficiency of oversight activity carried out across agencies, a consequence that will be especially salient when politicians are strongly motivated to reduce the costs associated with oversight activities by taking advantage of and cultivating integrity agencies’ technical and professional expertise. For example, there may be important learning effects produced by agency networking. In discussing what he calls “horizontal accountability,” Thomas Schillemans has noted that network-type arrangements can create feedback mechanisms between public sector actors, enabling them to learn more quickly from mutual experience and refine technical knowledge over time.<sup>151</sup> The straightforward cost-reduction rationale here may seem like an obvious enough point, but its implications for agency independence should perhaps not be underestimated in an era of tight government budgets and widespread austerity measures.

### 4. *Blame Diffusion*

A final connection between network architectures and agency independence rests on the observation that because networks are both dispersed and coordinated, they may be especially well suited to diffuse the inevitable tensions that arise between integrity agencies and the public servants who are subject to their oversight activity. This perspective suggests two distinct but interrelated phenomena. First, agency coordination through networks may reduce the reporting burden on government departments, such as by combining information requests and

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<sup>151</sup> Thomas Schillemans, “Accountability in the Shadow of Hierarchy: The Horizontal Accountability of Agencies” (2008) 8 Public Organization Rev 175 at 180.

standardizing reporting procedures. The recent Institute on Governance study of senior public servants' experiences with agency oversight, discussed above, underscored the strong perception among bureaucrats that the heavy costs of compliance with requests from multiple agencies are a considerable resource strain. As the study noted, "[i]nterviewees said that re-installment of trust, better in-agent coordination and planning would go a long way" to improving government-agency relations.<sup>152</sup> To the extent that bureaucrats still regard integrity agencies as instruments of Parliament, this coordinating function of networks may help to ease criticisms directed toward parliamentarians, thereby indirectly increasing the benefits of blame avoidance.

Second, networks might help to reinforce these benefits directly by making it more difficult for bureaucrats to assign blame to specific agencies—for example, because their operations are more closely intertwined and therefore more difficult to discriminate between—and by further dissociating the work of integrity agencies from their political principals as they gain a stronger collective identity of their own. This result, however, produces an additional problem: As accountability networks become more effective at distancing politicians from negative perceptions among those they oversee in the public sector, integrity agencies may also see their own legitimacy diminish in the eyes of bureaucrats, who increasingly see them as “outsiders” within a direct line of authority to political authority.<sup>153</sup> In other words, integrity agencies that become *too* dissociated from their political principals are vulnerable to accusations that they have become illegitimate and perhaps less credible overall. The questions of where exactly the boundaries and interrelationships of agency independence, accountability to democratic politics, and public legitimacy are located I leave for further debate, but these

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<sup>152</sup> Chiasson & Smith, *supra* note 86 at 7.

<sup>153</sup> *Ibid* at 6 (“[t]here was a great deal of discussion about how [integrity agencies] fit, or do not fit, with Canada’s Parliamentary system. [Integrity agencies] are seen by many to be weakening and even de-legitimizing the Parliamentary system”).

questions do suggest that some functions of network architecture may actually conflict with each other in practice.

## V. CONCLUSIONS

Canada's federal integrity agencies present an ongoing puzzle for those concerned about their independence from political influence and partisan politics, balanced against the desire for parliamentarians to remain actively engaged in transparent and effective public sector oversight. The political economy of integrity agency independence described in this article suggests that future work will benefit from greater attention to the incentives that structure politicians' decisions to delegate oversight authority, with the aim of finding new means to stabilize the hierarchical relationships between agencies and their political principals within existing institutional constraints. Such incentives are pervasive. As Chris Aulich has keenly observed of integrity agencies in Australia:

As with other agencies, integrity agencies seem always to be in a state of flux as governments wrestle with the autonomy-control decision. How much autonomy should they have and how much control should be exercised by central government? This is a critical decision for governments as they seek a stable balance between the need for central political control and accountability and pressures for agency autonomy and professional independence.... This balance will wax and wane as governments change their preferences over time; indeed, a recent survey of Australian agencies reveals a steady shift towards devolution over the past decade or so, but a shift that has more recently been tempered by the exercise of stronger central control over both agencies and departments.<sup>154</sup>

As Aulich makes clear, the effects of shifting political preferences on agency independence are certainly not unique to Canadian integrity agencies. Deconstructing independence from a Principal-Agent perspective, however, suggests that institutional arrangements pose some specific barriers in Canada and comparable contexts. Lasting solutions to the puzzle of agency

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<sup>154</sup> Aulich, *supra* note 109 at 49–50.

independence are therefore unlikely to emerge from strategies that rely exclusively on the dynamics internal to the Principal-Agent relationship. Instead, I have described several mechanisms through which horizontal, network linkages may play an important role in anchoring independence over the long term. To be sure, a good deal of future empirical work is needed to evaluate the real potential of accountability networks in this area, as is a comprehensive theory of how the independence and control of integrity agencies interrelate and are influenced by different network architectures. As a starting point for this research agenda, scholars might elaborate on the menu of network components described above and engage in comparative work to better understand the different means and purposes by which those components are assembled and deployed. Ultimately, important policy questions arise about whether or to what extent integrity agencies' own powers to forge network connections with peer agencies can and should be formalized. From the brief overview presented above, it is clear that whatever nascent collaborations exist between federal integrity agencies are largely based on informal relationships or ad hoc agreements. A further topic for future work is thus for lawyers to explore what opportunities and barriers confront agencies in rearranging their own formal institutional relationships, even in the absence of specific action on the part of their political principals.<sup>155</sup>

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<sup>155</sup> See Elizabeth Magill, "Agency Self-Regulation" (2009) 77:4 The George Washington Law Review 859 at 872 (describing the constraints faced by agencies in the United States).