The Powers of the Canadian Prime Minister

This article was written by a law student for the general public.
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Introduction

The Canadian prime minister is the head of our federal government and as such, he or she has significant powers. However, the PM's powers are not explicitly stated in the Canadian Constitution. Rather, they exist in the form of constitutional conventions.[1] This article provides an overview of the written and unwritten sources that guide and limit the prime minister's powers. Does the prime minister have constitutional obligations if his or her powers are not clearly written?

General Powers

The prime minister's powers are supported by constitutional convention, rather than specific rules written in laws or in the Constitution. For example, section 56(1) of the *Canada Elections Act* states that the Governor General can dissolve Parliament and trigger a federal election.[2] However, this piece of legislation doesn't explain how it has become customary for the Governor General to take these steps only on the prime minister's advice. This means that those who don't know about this unwritten rule may not know that the prime minister is involved in triggering an election at all.

Relying on unwritten rules as a way of guiding the prime minister's powers has both positive and negative aspects. The previous example about the prime minister's role in dissolving Parliament draws attention to how using constitutional conventions as the primary way of guiding the prime minister's power can be problematic, as these rules are not always clear. Disagreement around what these unwritten rules say regarding what the prime minister can or cannot do may make it difficult for these conventions to constrain the prime minister's power.[3] One example is the prime minister's power to determine how long an election campaign will be – a longer campaign can have negative financial consequences for parties that are not prepared for such a timeline, thus weakening their ability to campaign effectively.

On the other side, not holding the prime minister to a set of concrete rules can be advantageous, as it allows the leader to determine the best way to manage responsibilities and the extent to which he or she will consult with cabinet in making decisions.[4]

The PM's Powers re: Executive and Legislative Branches

The prime minister exerts significant influence over the executive branch of government through controlling ministerial appointments.[5] According to convention, he or she has the

power to appoint, assign and dismiss cabinet members. This means that while the prime minister cannot force members of Parliament to take a specific position, cabinet ministers can be motivated to adopt the prime minister's views because they are afraid to lose their positions. The prime minister's indirect influence on an MP's decision-making power has led to some criticisms about buying loyalty, since the MP's ability to represent the best interests of his or her constituency could be jeopardized in certain situations where the MP feels pressured to side with the prime minister.[6]

The prime minister can also have substantial influence over the legislative branch of government, as the ability to decide the timing of a federal election allows him or her to better control what and when laws will be passed.[7] In Canada, bills can be passed through either the House of Commons or the Senate.[8] They must move through three readings "in the House where it is starting from, where parliamentarians debate the idea behind the bill."[9]Once the bill passes the third reading or debate, it passes to the other house, where it goes through the same stages and it becomes law once it has been given to the Governor General for royal assent.[10] This process of passing a bill into law is interrupted when the prime minister recommends that the Governor General dissolve Parliament, thereby triggering a federal election. With dissolution, all government and private members' bills "die," which means that they will be dropped if they have not yet received royal assent by the time Parliament is dissolved.[11]

PM's Appointment Powers

1) Appointing Judges

Section 96 of the *Constitution Act, 1867* gives the Governor General the power to "appoint the Judges of the Superior, District and County Courts in each province." [12]

Because the Governor General makes judicial appointment decisions on the advice of the the prime minister, he or she has significant authority in the judicial appointment process.

The Governor General in Council appoints Supreme Court of Canada judges on the recommendation of the prime minister.[13] First, the minister of justice identifies a pool of qualified candidates, which is reviewed by a selection panel comprised of up to five MPs. The panel then submits an unranked list of three recommended candidates to the prime minister, who makes the final decision about who to recommend.[14] This authority has attracted controversy over the lack of transparency in the decision-making process. However, as there are currently no public hearings on Supreme Court nominees, there is little opportunity for Canadians to learn more about what fuels the prime minister's decision in the judicial appointment process.

2) Appointing Senators

Sections 21 and 32 of the *Constitution Act, 1867* require that a "fit and qualified Person" be appointed to the Senate when there are vacancies, in order to keep membership at 105 senators.[15] As is the constitutional convention, senators are appointed by the Governor

General on the advice of the prime minister, according to established geographical divisions that are laid out in section 22 of the Constitution. The prime minister's ability to recommend to the Governor General which senators are to be appointed is especially important given the long tenure of senators, who can sit until the mandatory retirement age of 75.[16]

A controversy has developed over whether it is possible for a prime minister to impose an indefinite moratorium on all Senate appointments. [17] For example, Prime Minister Stephen Harper did not made any new recommendations for Senate appointment to the Governor General for at least two and half years, which resulted in there being 22 fewer senators than the 105 members required under section 21 of the Constitution.[18] Some have suggested that this question of whether the prime minister has "the authority to appoint or not appoint" senators at his or her discretion has not yet been firmly established, as there is no reference in the Constitution about what might happen if the prime minister refuses to recommend a candidate for appointment.[19]

Conclusion

Relying on unwritten rules and conventions to guide the extent of prime ministerial power not only causes differences in power between individual governments and leaders, but can also lead to uncertainty regarding what is constitutionally and legally required and what remains open to a prime minister's discretion. This uncertainty may lead to court challenges, which can be a lengthy and costly way to obtain clarity on the prime minister's powers and responsibilities. Writing the powers of the prime minister into the Constitution could provide more clarity to his or her obligations, which might allow us to better hold our leaders to account. However, binding the prime minister's power to what is written could also limit his or her ability to play to personal strengths when deciding how best to govern. In light of these positive and negative aspects, some scholars have proposed constitutional amendments to include prime ministerial powers in the Constitution, while others argue against the herculean task of "opening the Pandora's Box that is the constitution."[20]

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[1] Conventions are unwritten rules of the Constitution that have become accepted as unquestioned political customs in Canada. However, courts do not enforce them because they are not laws. This means that the penalty for breaking a convention is political, not legal. *See* Élise Hurtubise-Loranger, "Constitutional Conventions" (11 July 2006), online: Parliament of Canada <http://www.parl.gc.ca/>.

[2] Robert E. Hawkins, "The Fixed-Date Election Law: Constitutional Convention or Conventional Politics?" (2010) 19:1 *Constitutional Forum* 129.

[3] Mark D. Jarvis and Lori Turnbull, "Canadian Prime Minister's Have Too Much Power", *The National Post* (12 May 2012) online: The National Post < http://news.nationalpost.com/> .

[4] *Ibid* at 282; In Canada, the Cabinet is a group of federal ministers chosen from the party

with the most seats in the House of Commons by the Prime Minister to lead major government departments. The Cabinet introduces and passes government legislation, oversees government policies and finances. *See The Canadian Encyclopedia, sub verbo* "Cabinet".

[5]Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution* (Markham: LexisNexis, 2013) at 11.

[6] Jarvis, *supra* note 3.

[7] Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2009) at 282 .

[8] "Process of Passing a Bill", online: Parliament of Canada <http://www.parl.gc.ca/>.

[9] *Ibid*.

[10] *Ibid*; "Royal Assent" signifies the approval of the Crown, which is "required for any bill to become law after passage by both the Senate and the House of Commons." As per ss 55-56 of the *Constitution Act, 1867*, the Governor General assents to the bill in the Queen's name. *See* "Royal Assent to a Bill", online: Parliament of Canada <http://www.parl.gc.ca/>.

[11] "Prorogation and Dissolution" *House of Commons Procedure and Practice* (2009), online: Parliament of Canada <http://www.parl.gc.ca/>.

[12] Canada is a constitutional monarchy, which places executive power in the Queen. The Governor General exercises these powers on behalf of the Sovereign, and acts on the advice of the prime minister and his cabinet. One of the governor general's most important responsibilities is to ensure that Canada always has a prime minister and a government in place that has the confidence of Parliament." *See* "The Governor General of Canada: Constitutional Duties", online: The Governor General of Canada < https://www.gg.ca/>.

[13] Hogg, *supra* note7 at 249; *Supreme Court Act,* RSC 1985, c S-26 s 4; "Governor in Council appointments are made by the Governor General, on the advice of the Queen's Privy Council of Canada. The responsibilities of Governor in Council appointees cover a wide range such as making quasi-judicial decisions, providing advice and recommendations on socio-economic development issues, and managing Crown corporations. The authority for most Governor in Council appointments is provided by statute. Statutory provisions with respect to the appointments vary greatly. In most cases, the statute specifies the appointment authority, the tenure and length of term of the appointment and, on occasion, the qualifications required." *See* "Governor in Council Appointments Procedures Guide", online: Privy Council Office <http://www.pco-bcp.gc.ca/>.

[14] "Supreme Court of Canada Appointments Selection Process", online: Prime Minister of Canada < http://pm.gc.ca/>.

[15] The Senate is considered the "Upper House" of Canada's Parliament. Its primary purpose is to provide a chance to revise and examine legislation before it becomes law

(sober second thought). *See* "About the Senate", online: Parliament of Canada < http://sen.parl.gc.ca/>.

[16]*Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 29(2), reprinted in RSC 1985, Appendix II, No 5.

[17] Aaron Wherry, "After appointing 56 senators, Stephen Harper is done", *Maclean's* (24 July 2015) online: Maclean's < http://www.macleans.ca/>.

[18] "Standings in the Senate", online: Parliament of Canada <http://www.parl.gc.ca/>.

[19]*Ibid.*

[20] Jarvis, *supra* note 3.