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CANADA'S PARLIAMENT

A PRIMER

Steven Chaplin

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For my wife, Ann; my children, Alastair and Leslie;
and for generations to come

Author's Note

On 8 September 2022, as this book was going to press, Queen Elizabeth II died, and King Charles III ascended to the throne. In present times, there are few direct consequences for Parliament, or for this book, other than reading all references to the Queen as the King, and the necessary references from Her to His.

But this was not always the case. Prior to 1867 for Canada, and 1843 in the United Provinces of Canada, on the demise of the sovereign, parliaments and legislatures were dissolved. One part of the Parliament, and the person who had summoned Parliament, ceased to exist, and therefore the Parliament came to an end. Similarly, various major players in the parliamentary process, including the Cabinet, would have to reswear oaths of office to the new sovereign in order to continue in their functions. These matters have now been settled by section 2 of the Parliament of Canada Act that provides "Parliament shall not determine or be dissolved by the demise of the Crown and, notwithstanding the demise, shall continue, and may meet, convene and sit, proceed and act, in the same manner as if that demise had not happened." Similar provisions in other federal and provincial statutes allow office holders to continue in their functions without interruption or the requirement to reswear any oath.

It is also worth noting that on the death of the Queen, the Houses of Parliament meet and offer their formal condolences to the King on the death of a person who was not only the Queen but also the parent of the new King. On 12 September 2022 King Charles III met with the two houses of the UK Parliament to receive their Addresses of Condolences and Loyalty. In His reply, the King recognized the centrality of Parliament in the UK constitution, and the responsibility of the King to maintain its role and functions:

> As I stand before you today, I cannot help but feel the weight of history which surrounds us and which reminds us of the vital parliamentary traditions to which members of both Houses dedicate yourselves, with such personal commitment for the betterment of us all.
>
> Parliament is the living and breathing instrument of our democracy. That your traditions are ancient we see in the construction of this great hall and the reminders of mediaeval predecessors of the office to which I have been called. . . .
>
> While very young, Her late Majesty pledged herself to serve her country and her people and to maintain the precious principles of constitutional government which lie at the heart of our nation. This vow she kept with unsurpassed devotion.
>
> She set an example of selfless duty which, with God's help and your counsels, I am resolved faithfully to follow.

This reply, and the King's commitment, are reminders of the history and continuity that lies at the heart of the Westminster system of government as it has developed in both the United Kingdom and Canada — a peaceful and seamless change of head of state, and a major component of our democratic institutions. One that recognizes the past, confirms the present, and will allow for the necessary changes for the future.

September 2022

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Foreword

In the Canadian system of Democracy, Parliament is the focal point of the state. It is the assembly that deliberates the country's great policy issues. It is also the institution that enacts the legislation that applies to the entire citizenry. Most importantly, Parliament is the sole body that can legitimately hold to account the government of the country. It perpetuates the link of legitimacy between citizen-voters and lawmakers. These are enormous responsibilities. As the Canadian Parliament, what the Senate and the House of Commons do to fulfill their respective roles is serious, methodical, and in many respects, continuous from one election to another. To those not actively participating, it may seem complicated, perhaps even distant from daily concerns, but quite to the contrary, Parliament is always relevant.

The question whether the public information about — and citizen knowledge of — Parliament rises to the level of its importance for all of society must be addressed. Regrettably, both information and knowledge are inadequate. The fact that public education is a domain of responsibility dispersed among the provinces and territories results in the teaching of widely diverse views about government. The fact that educational agendas must make time available for more current issues results in the overall decline of attention to governmental institutions and processes. Moreover, in an age

when audio-visual methods of information have largely displaced the printed word, it is that part of parliamentary work that is most photogenic — namely, question period — that is best known. Citizens' impressions of the overall context and work of Parliament have consequently become distorted.

Despite current trends in public information and education, the relevance and importance of Parliament remain. This book is a vital response to the gap between demand for, and supply of, information and knowledge for all citizens. Steven Chaplin approaches the topic with over fifteen years' experience as a lawyer to the House of Commons, including as the House's litigator in several important court cases. He grounds his study in the historical origins of the Canadian Parliament, and he discusses each of the constitutional components of Parliament — the Commons, the Senate, and the monarch. As a discussion of Parliament would be incomplete without mention of political parties, that explanation is also included.

The core of this primer deals with the functions and purposes of Parliament. Almost all countries in the world have deliberative and legislative assemblies. The great interest of this examination of the Canadian Parliament lies in its analysis of how this particular deliberative and legislative assembly ensures that Canada is a Democracy. Over the century and a half of this country's history since Confederation, practices that were originally based on British precedent but are now specific to modern Canada have evolved. These ensure that from one election to the next, Parliament fulfills its functions and remains in a legitimate dialogue with the citizenry. These are matters that should be familiar to all participants in the national life of Canada. Everyone, including students, citizens, and those in the process of becoming Canadians, will benefit from a better understanding of how Parliament functions. This book provides that foundation.

Gregory Tardi
Editor, *Understanding Canada* collection
January 2022

Introduction

Canada is a constitutional Westminster democracy; as such, Parliament is at the centre of its constitutional system. Parliament is not merely a political body. Although often considered only as a legislature, it is more than that. In addition to legislating, it provides legitimacy to government, holds the government to account for its actions, approves all taxation and spending, and inquires into and debates all matters of public importance.

Although the roots of Canada's Parliament are firmly planted in British history, it has developed and evolved to meet the unique conditions of Canada. Parliament here must operate in a country originally conceptualized as one based on two languages, cultures, and legal systems, but that now strives to recognize the Indigenous peoples who lived on the land recognized as Canada, long before there was a Canada, with their own languages, cultures, and systems of government. Parliament must also function as part of a federal state, with provinces that have matured since Confederation in 1867.

As a modern state, Canada also strives to recognize the importance of individual rights and freedoms which, at times, are difficult to reconcile with the collective nature of parliamentary democracy.

It is also a fact that Canada is sometimes seen as living in the shadow of the United States. Much of the news, cultural influence,

and political information in the public realm, particularly on social media, is American-centric. The expectations and experiences of many Canadians are based on views of the American system of government, albeit as seen through a Canadian lens. The result is a focus on strong individual political leaders who are a central pivot of government, with the centralization of power in the hands of the prime minister and a concurrent weakening of parliamentary institutions. Members of Parliament are seen and referred to as politicians, not parliamentarians, and party politics and parliamentary discourse are almost indistinguishable. Senators are considered nobodies at best, and cronies, patronage appointees, and political has-beens at worst.

At the same time, the press and public discourse often misuse terms, confusing the House of Commons with Parliament or government. The prime minister is often given the same status as a president. The Opposition is often ignored, or only referred to by its political party name, rather than as the Opposition.

The system is considered virtually dysfunctional. There are suggestions that the only way forward is to make radical changes to the institutions themselves, with abolition of the Senate and proportional representation as the leading candidates.

I am not so pessimistic, nor do I believe that radical change is necessary or optimal, not at least without a full understanding of how Parliament is designed and is supposed to function, and after expending the effort to make the existing institutions work as they were intended.

The place to start is to remind ourselves of what Parliament is, where it comes from, and how it functions. It is only then that we can ask ourselves how we move forward. Do we strengthen the existing system, expecting those who hold positions within them to do better and respect our form of government? Or do we need to make significant constitutional changes? In either case, we should make these choices with a better understanding of the form of government we currently have.

This short book is an attempt to at least set the baseline for that discussion.

CHAPTER ONE

History and Overview

Preamble

It is only fitting that we begin our study of the Parliament in Canada with the Preamble to the *Constitution Act, 1867*.[1] It states that Canada was formed "with a Constitution similar in Principle to that of the United Kingdom." These are not mere words. They have significance for the way Canada governs itself. The Preamble puts Parliament at the centre of the Constitution. To understand this, it is necessary to consider how and why Parliament is at the centre of the constitutional system of government in the United Kingdom.

English History — Early Development

A form of Parliament has existed in the United Kingdom for at least a thousand years. Although the term Parliament, as a description of a governing body, does not find its way into the English language until 1173, the genesis of an assembly-based system of governing pre-dates the Norman Conquest of 1066. By the time of *Magna Carta*, in 1215, which some believe to be the root of Parliament, both the basic form and purpose of Parliament had been set. The king governed with the advice of a council composed of barons

and senior clerics. The making of law (in the form of decrees) the settling of major disputes, the determination of whether to wage war, and the means of support, either by money or provision of troops, was the business of the various assemblies held. What *Magna Carta* did was to formalize the state of the system to that point, and to have the king agree and sign it. An equally important, but less known companion document, the *Charter of the Forest*, was signed in 1217, during the regency of Henry III, when major barons acted on behalf of the underaged king.[2]

Both Charters were arrived at following a series of unresolved grievances between the barons and an unyielding King John. It was because long-standing grievances had not been resolved that the barons met King John at Runnymede in June 1215 to force the king, by signing *Magna Carta*, to acknowledge their grievances and to recognize the role that the barons had in deciding the affairs of the kingdom. This was closely followed by a period when it was necessary for the barons to act in the name of the young king. By the time Henry III came of age the role of the barons in governing had firmly rooted itself in the English Constitution. For example, twenty-five great councils of barons to conduct the business of state were held during the regency between 1216 and 1225.

One of the key terms of the initial *Magna Carta* was that there could be no taxation or supply of money without the approval of the barons, and further that the barons as a council must be summoned for this purpose. In 1225, the council insisted that King Henry III, now having reached majority age, agree to abide by all the terms of the two Charters, or the council would not agree to taxes. For the next fifty years or so, until these principles were fully accepted, the barons demanded the agreement of the king to abide by the terms of the Charters or they would not grant any money or agree to taxes. In 1275, the first *Statute of Westminster* was agreed to, which cemented the concept of "parliamentary" consent for taxation as a cornerstone of the English constitution.[3]

Initially, with few exceptions, only barons and the most senior bishops were summoned to the councils. However, in 1258, a

summons for knights from each shire was issued. This was, in part, so that grievances of "commoners" could be brought and reported to Parliament. Also, such participation was likely to allow for greater acceptance of taxation and military participation. The prominence of participation by commoners was rapidly entrenched, and in 1283 the "commons" began to sit and discuss matters separately from the barons or Lords.

By the beginning of the fourteenth century, the basic framework for a Parliament composed of two Houses and the king was established. The actions and decisions of Parliament had to involve all three components of the structure. Consent for taxation from the two Houses, and particularly the House of Commons, was required. The presentation and addressing of grievances, petitions, and legal suits in return for supply (i.e., money) became the basis for the making of legal determinations, either in individual cases or as Acts of Parliament to address broader concerns of the realm and to put in place laws of general application. Since many petitions and grievances were based on various abuses of officials under the authority of the king, or on concerns that taxes had not been spent for the purpose they were granted, addressing these grievances also created a rudimentary form of accountability.

Although in theory Parliaments were supposed to be held on a regular basis, the reality was often one of a reluctant king summoning a Parliament only when he needed something, be it a change to a statute or, more likely, money. Kings were reluctant to summon a Parliament since the two Houses would make demands on the Crown to change laws and address various grievances relating to expenses or alleged abuses of power. In short, the king did not like to have his authority questioned, or his prerogative use of power curtailed. The struggle between the Houses of Parliament and the king was persistent and was exacerbated by the view taken by many monarchs that they had a divine right to rule. Their power came from God and it was therefore not proper for Parliament to try to restrict or constrain such powers.

By the seventeenth century the strain between Parliament, as the two Houses referred to themselves, and the king became untenable when Charles I refused to call a Parliament for eleven years. And when he was finally required to call one, he refused to accept numerous demands of Parliament that he saw as a challenge to his divine right to rule. The result of this confrontation was the English Civil War, Parliament convicting the king of treason and having him executed, and the establishment of the Commonwealth of England, without any monarch.

1689 — The Glorious Revolution and the *Bill of Rights*

The Commonwealth lasted from 1649 to 1660. This was followed by a short period of the Restoration of the monarchy. But it was not long before the kings began to try to reassert their authority. For various reasons, including the inability of James II to come to terms with Parliament, the king fled to France, effectively abdicating the throne. In the meantime, Parliament's preferred contender for the throne, William of Orange, had landed in the south of England. But before William could take the throne, Parliament insisted on his agreeing to terms that would make Parliament the supreme governing body and severely curtail royal authority. This would create a constitutional monarchy.

The result of the bargain was the *Bill of Rights, 1689*.[4] This Bill established, by Act of Parliament, who was to be king and the new line of succession. Parliament would from this point forward determine who would be the reigning monarch, ending any premise of the right to reign being divine. More importantly, the Act established an independent, supreme Parliament at the heart of English constitutionalism. The following provisions indicate the centrality of Parliament, and mark the decline of the Crown's ability to act without the authority of Parliament.

> That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall.

> That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authority, as it hath been assumed and exercised of late, is illegall;
>
> . . .
>
> That levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner then the same is or shall be granted is Illegall.
>
> . . .
>
> That Election of Members of Parlyament ought to be free
>
> That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament
>
> . . .
>
> And that for Redresse of all Grievances and for the amending strengthening and preserveing of the Lawes Parlyaments ought to be held frequently.

Laws were to be made by Parliament and the Crown could neither suspend nor dispense with any law. All taxation had to be approved by Parliament. There were to be free elections of members (albeit by a limited electorate) and Parliaments were to be held frequently. Most importantly, Parliament and its activities were to be free from interference from the courts and others, including the Crown and Crown officials.

These fundamental principles put Parliament at the centre of the English constitution. And by virtue of the Preamble of the *Constitution Act, 1867*, it is at the centre of the Canadian constitution as well.

Reforms to Democratic Institutions in England and Pre-Confederation Canada

Over time the English House of Commons became the centre of constitutional power. Means to control the business and outcome of Parliamentary debate, including the content of laws, and to limit and oversee the exercise of power by government were developed.

These developments led to the advent of political parties. Groups of like-minded people joined together to represent common interests and pursue common goals. These groups strengthened and coalesced as political parties.

As political parties grew in importance and strength within a constitutionally powerful Parliament, changes to the way that ministers and eventually prime ministers were selected developed, as did the concept of responsible government. Even though Parliament was independent, monarchs still appointed their own ministers and determined when Parliaments would be dissolved. Toward the end of the seventeenth century the House of Commons began asserting the need for the leader of the "Court" party, i.e., the king's closest adviser, to have its confidence (i.e., support). In 1742, it was first accepted by the king that any first minister and the ministry that supported them needed to have the confidence of the House of Commons. The monarch would thereafter only invite a person they believed enjoyed the confidence of the House of Commons to be prime minister. At the same time, it was accepted that prime ministers and their ministers could be members of either House.

Until the mid-nineteenth century, there were numerous inconsistencies in how members of the House of Commons, the confidence chamber, where to be elected, with some seats having only one elector. In 1832, the *Reform Act* was adopted to provide standards for determining constituencies and the criteria for who was eligible to vote.[5] With standardization, candidates for the same political parties could present a common platform, with the expectation that the known leader of the party with the most seats in the House of Commons would be asked to be prime minister. With these changes, the basic framework for the modern system of Westminster parliamentary government was in place. Elections for members of the House of Commons were standardized, and the person invited to be prime minister was required to enjoy, and to continue to enjoy, the confidence of the House of Commons. A democratically based, representative, and responsible form of government had been achieved.

In 1846, Lord Grey, the Colonial Secretary, wrote to the governors of the colonies in British North America instructing them to institute responsible government modelled on the United Kingdom. In January 1848, the Legislative Assembly in Nova Scotia became the first assembly outside of the United Kingdom to have a representative and responsible government. The other colonies followed later that year.

The stage was set for Confederation.

Canada 1867 — Confederation and the Establishment of Parliament

Canada, as we know it, was created in 1867 by an Act of the UK Parliament, the *British North America Act.* That law is now known as the *Constitution Act, 1867*. As an Act of the UK Parliament merging British colonies, it is not surprising that the parliamentary institutions it established would mirror those of the United Kingdom. As noted above, the Preamble to the Act makes clear that purpose. Canada was to have a Constitution similar in principle to that of the United Kingdom. But, as a confederation of several colonies, the Constitution would have to incorporate provisions that would recognize the new dominion as a federal state. The colonies were of different sizes, had somewhat different cultures, and in the case of Canada East (Quebec), a different language and legal tradition. A means had to be found to accommodate these distinctive characteristics.

The leading members of the colonial assemblies in Canada (Ontario and Quebec) and the Maritime provinces (Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island) met in Charlottetown in 1864 and Quebec City in 1865 to discuss uniting into a single entity. In principle the idea was to create a federal state with a central government. The pre-Confederation colonies would become sub-national provinces. The varying sizes of the colonies required some consideration of how to ensure the voices of the smaller colonies were not lost. No one was prepared to give up the recently acquired form of responsible government. All

those attending readily agreed that the primary mode of governance would be rooted in an elected assembly, based on an equitable seat distribution by population, with a ministry primarily selected from among its members. That ministry would be accountable and responsible to the elected assembly. Similarly, many of the attributes of the Westminster system, such as taxation, legislation, and the relationship between the executive and the assembly, were taken as given to the extent that these relationships were not expressly referred to in the written text.

But the size disparity among the colonies needed to be addressed. It was this disparity, along with the relative power relationship between the provinces and the federal government, that presented the greatest challenges and were the major focus of the debate among the various attendees. The resolution came in both how the federal legislative institutions were designed and how powers and responsibilities were to be distributed between the federal government and the provinces. Both would have an impact on how Parliament and the legislatures would work. It would also be the reason that Prince Edward Island and Newfoundland did not initially join Confederation.

The structural solution included the creation of a bicameral (two House) Parliament, similar to that of the United Kingdom. The House of Commons would be popularly elected and be the House to which the government would be responsible. It was intended to act, look, and feel like the UK House of Commons. The number of seats in the House would be allocated by provincial population with a guarantee of seats to smaller provinces. In addition, there would be an upper house, the Senate, akin to the House of Lords, but with a Canadian twist. It would have senators appointed for life (now age 75), but there would be a limited number of senators, with the seats apportioned equally by region. Initially there were twenty-four senators each for Ontario, Quebec, and the Maritime provinces (Nova Scotia and New Brunswick). The Senate would have the ability to review, amend, or defeat any bill presented in either House. This would, in theory, provide regional balance and protect the smaller provinces from being overwhelmed by a system based solely on representation

in a House founded on population. As the anticipated growth in population occurred elsewhere in Canada, the smaller provinces would always have their protected proportion of seats in the Senate.

The other sticking point was the allocation of legislative, and therefore government, responsibilities between the federal and provincial levels of government. The division of powers had to recognize the cultural and historic differences between the various colonies. In particular, the distinctive character of Quebec and the guarantees of language, education, religion, and legal system granted by the British one hundred years previously had to be respected. Quebec's concern for the probability that the French language and religion would shrink as Canada expanded also needed to be addressed. All provinces were leery of the potential for a centralizing of power by the federal government at the provinces' expense. The solution was to grant exclusive legislative authority over matters of local concern to the provinces while matters of national concern would be the business of the federal government. Matters of local concern encompassed education (including religion-based separate schools), management of local businesses, and the administration of property, family status, and legal systems. Since these legislative and government responsibilities were established as exclusive matters for the provinces, Parliament's legislative capacity and ability to govern in these areas was severely restricted.

Although Canada had a constitution similar in principle to that of the United Kingdom, the federal nature of the constitution, with two levels of government each having exclusive jurisdiction over different matters, and the requirement to treat provinces equitably, required a degree of deviation from the UK model. To allow for a federal state, the powers of Parliament were constitutionally limited by the powers allocated to provincial legislatures.

Canada's Parliament

Notwithstanding these federalism constraints, the component parts of the Canadian Parliament operate in a manner very similar

to those of the UK Parliament. In addition to the Preamble of the *Constitution Act, 1867*, the Act provides for specifics on the structure and powers of Parliament.

The Parliament of Canada, according to the *Constitution Act, 1867*, consists of three parts: "the Queen, an Upper House styled the Senate, and the House of Commons." Since the Queen is not present in Canada, her functions and duties are carried out by her representative, the Governor General, who acts in her name. Like the United Kingdom, laws can only be made by Parliament — that is, all three entities acting together. This ensures that no one participant can make laws, including the government acting in the name of the Queen, without the authority of Parliament. All laws are enacted in the name of the Queen on the advice and consent of the Senate and House of Commons. This is formally known as the Queen in Parliament.

Each component part of Parliament has a role to play. The Canadian Parliament has the same structure as the UK Parliament, and the role played by each component is similar to that of their UK counterparts. When there is confusion or a gap in the written constitution, knowledge, practice, or precedent, it is not uncommon to look to the history and practice of the UK Parliament or to the relevant UK counterpart for guidance.

Each of the component parts will be looked at in more detail in later chapters; however, a brief sketch is provided here.

The Queen as Represented by the Governor General

The Governor General, as representing the Queen as head of state, has various roles to play in Parliament, some formal and ceremonial, some more substantive.

The Governor General is involved in the appointment of senators on the advice of the prime minister, summoning Parliament, calling on the person having the confidence of the House of Commons to form a government as prime minister, reading the Speech from the Throne, proroguing and dissolving Parliament, and issuing writs for

elections. The Governor General is also involved, at least formally, in the legislative process, by granting Royal Recommendations for legislation requiring the expenditure of money, and the granting of royal assent. The granting of royal assent is the final legislative act in the passage of legislation. With the grant of royal assent, a bill becomes an Act. Royal assent is granted on the advice of the two Houses, unlike most acts of the Governor General, which are based on the advice of the Cabinet (as a committee of the Privy Council) or the prime minister. Although theoretically possible, no bill is even likely to not receive royal assent. The monarch has accepted the decision of the other two more representative bodies of Parliament since the early eighteenth century.

House of Commons

Although the Senate is constitutionally the upper house and therefore takes formal precedence over the House of Commons, Canada has evolved into a mature democracy, with the House of Commons, as the democratically elected House, now considered the central institution of Canada's parliamentary system.

The 338 members of the House of Commons, known as Members of Parliament (MPs), are simultaneously elected at a general election. If a seat becomes vacant between general elections, a by-election for that seat will be held to fill the vacancy. Members of Parliament are predominantly elected as representatives of a particular political party, with those members elected as representative of each party sitting together in the House of Commons as a caucus.

The composition of the House of Commons plays a critical role in determining who will govern. Following an election, one of the members of the House of Commons, usually the leader of the party holding the most seats in the House of Commons, is believed to be able to obtain the confidence or presumptive support of a majority of MPs. That person will be asked by the Governor General to form a government and becomes prime minister and leader of the government. The prime minister then selects the ministers who will be

responsible for various parts of the government, including departments, and together they form the Cabinet.

So long as the government retains the confidence of the House of Commons, it has significant control over the agenda of the House. The vast majority of bills that are likely to become laws are introduced in the House of Commons by ministers of the government. Any bill that involves the expenditure of money also requires a Royal Recommendation, effectively Cabinet approval. Constitutionally, all bills that require the raising of revenue, taxation, or the expenditure of public funds must first be introduced in the House of Commons. As a result, much of the work of the House of Commons is focused on the consideration and passing of government bills, budgets, and estimates.

To manage its business, the House of Commons has several standing committees roughly based on broad portfolios, such as justice, government operations, and public accounts. As a bill passes through the House of Commons, it is studied in detail by a committee and possible amendments to the bill are considered and reported back to the House for final consideration. For many reasons, amendments are often not successful because the government commands a majority, or at least the confidence of the House. However, committees play an important role in studying the bills and bringing to the public's attention concerns with the bill that the government may need to pay attention to, at least, politically.

Once a bill has been voted on three times, the final version of the bill is sent to the Senate for the Senate's review, study, and vote.

Most people only see the House of Commons as a place where politicians pass legislation. But this is not the only function of the House of Commons. The government must retain the confidence of the House of Commons, and that confidence is constantly tested by way of open and public accountability. Ministers, including the prime minister, must be prepared to defend the government's actions and decisions in the House of Commons. This is referred to as the House's function of holding the government to account. The most obvious manifestation of this function is daily Question

Period when the members, other than ministers and parliamentary secretaries, have the opportunity to pose questions of the prime minister and ministers about the government's policies and decisions, and about the operations of the various ministries. Other ways that the House of Commons holds the government to account include committee inquiries on any matter within the committee's mandate, including specific actions or omissions in the operation of a government department. Committee reports can demand a government response.

Since the House of Commons is the body in which the prime minister and Cabinet sit and to which the government is accountable, it is the body that is the focus of public attention and is often wrongly referred to as Parliament. Since the members are elected, the general public is more engaged with members and the political happenings and consequences of the work of Members of Parliament and the House of Commons than with Senators and the Senate. At the same time, the work of the House can become very political and focused on political expediency.

As a counterbalance to the politically focused House of Commons, in Canada, there is a second House, the Senate, which plays a significant role as part of Parliament.

The Senate

The Senate is composed of 105 Senators. The allocation of seats is regionally based; twenty-four from each of Ontario, Quebec, the Maritime provinces combined (Nova Scotia ten, New Brunswick ten, Prince Edward Island four), and the Western provinces (Manitoba, British Columbia, Alberta, and Saskatchewan six each), six for Newfoundland and Labrador, and one each for the three territories. Senators are appointed by the Governor General on the advice of the prime minister. A senator is appointed once and sits until age 75 years.

The Senate's practices and procedures are similar to those of the House of Commons. A bill must receive three readings to pass the

Senate, and normally between the second and third reading, the bill is referred to one of the Senate's standing committees for detailed review and consideration. In some cases, the Senate, knowing that significant or time-sensitive legislation has been introduced in the House of Commons, will begin its committee hearings before the bill has passed in the House.

With the exceptions relating to the introduction of money bills (see Chapter 4), the Senate has the same legislative capacity as the House of Commons. Legislation can be introduced in the Senate and, if passed there, referred to the House of Commons for its approval. The Senate also reviews all legislation passed by the House of Commons. Through the Senate's three readings and committee hearings, Senators can propose amendments to bills that, if adopted by the Senate, will require that the bill be returned to the House of Commons for its reconsideration on the bill as amended. Only when both Houses agree on the text can a bill be recommended for royal assent. Failure to reach agreement will result in the bill not progressing to the royal assent stage. The Senate can also defeat a bill and thereby end the bill's progress through the legislative process. Although possible, such defeats or impasses are quite rare since the Senate recognizes that the House of Commons is the democratically elected chamber and is ultimately accountable to the people through elections. Sometimes threats of defeat or amendment slow down the process and focus the public's attention on the dispute with a view to getting the government to change its position, but in the end the Senate will normally yield.

This should not be taken to mean that the Senate serves no purpose, is impotent, or is a mere rubber stamp in the legislative process. The Senate is often referred to as the chamber of sober second thought. This is a relatively accurate description. Whereas the House of Commons is driven by politics and sometimes by political expediency, senators are not subject to the same constraints. Not being subject to the same political pressures, senators have the ability to carefully examine bills and provide less politically motivated suggestions for improvements.

Senators generally accept that it may not be their place in a democracy to block the policy initiative behind government legislation introduced in the House of Commons. However, they see their role as making the legislation based on that policy better. Through Senate review, bills, and therefore laws, can be improved.

Like the House of Commons, the Senate also has the power to inquire into, and make recommendations to the government on, any matter that falls within federal jurisdiction. It is this role at which the Senate has excelled. Since senators do not have to face elections and continue to hold their seats over a number of Parliaments, it is possible for the Senate to conduct in-depth studies over longer periods. With the benefit of time and little risk of political consequences, reports can be more comprehensive and contain recommendations that are not as politically motivated as may be the case when studies are conducted in the House of Commons.

Life Cycle of a Parliament

Parliament is not a continuous institution. A Parliament is called, or summoned together, following each general election, and is dissolved or ended in order to have the next general election. As a result, each Parliament is separate and distinct from other Parliaments. A Parliament lasts from the day it first meets until the date of its dissolution. At the time of writing, Canada is at the beginning of the 44th Parliament. Once it is dissolved, it will cease to exist, a general election will be called, and the 45th Parliament assembled.

A Parliament begins on a day determined by the Governor General, on the advice of a person the Governor General has asked to form a government as prime minister. All senators are invited to reconstitute themselves as the Senate in the Parliament, and all those who were elected in the general election are summoned to constitute the House of Commons for the Parliament. The Governor General will also attend the opening of Parliament, so that at the opening all three parts of Parliament assemble together. The Governor General reads the Speech from the Throne, which

outlines the government's proposed agenda for the first session of the Parliament.

A Parliament can last for up to five years, but usually ends in dissolution before the expiration of five years. A Parliament is usually broken into sessions. At the time of writing, Canada is in the second session of the 44th Parliament. Each session ends with a prorogation. At the time that one session ends, the date for the next session is normally indicated. The Governor General, the Senate, and the House of Commons again meet together, with the Governor General reading a new Speech from the Throne for that session. Parliament cannot conduct any business during the period of prorogation. The date and length of a prorogation is determined by the prime minister, who advises the Governor General to prorogue Parliament to the next session date.

While Parliament is in session, the House and Senate each have sitting days that are set out in established calendars, although each House can amend its schedule of sitting days. Between sitting days each House is adjourned. When a House is adjourned, it is still in session and therefore can be recalled to conduct business without the need for another Speech from the Throne.

Constitutionally, a Parliament must sit at least once a year.

Parliament ends with a dissolution. The date of the dissolution is determined by the prime minister advising the Governor General to dissolve Parliament. The advice to dissolve Parliament is given at the discretion of the prime minister. However, if the government loses the confidence of the House of Commons, the prime minister will almost always ask that Parliament be dissolved. By convention, the Governor General will accept the prime minister's advice, unless it is soon after the election and the government loses a vote of confidence shortly after the Parliament's initial Speech from the Throne. In such circumstances the Governor General might ask another member, usually the Leader of the Opposition, to try to form a government, rather than having an election so soon after the previous one.

Once Parliament is dissolved, it ceases to exist. There is no Parliament, therefore no parliamentary functions can take place. The

Senate is suspended, and all Members of Parliament cease to be members. Following a dissolution, a general election is called to elect the individuals who will be Members of Parliament in the next Parliament. At the dissolution of Parliament, a writ for the election of a Member of Parliament is issued for each constituency. Those who seek re-election do not do so as Members of Parliament. They are, like all seeking to be elected, simply candidates. Once the ballots are counted in a constituency, the writ is endorsed with the name of the person who received the most votes. These individuals will be summoned to form the next House of Commons.

Sovereignty and Supremacy

It is not uncommon to hear the terms "parliamentary sovereignty" and "parliamentary supremacy" used when discussing the relative place of Parliament within the Canadian constitutional architecture. It is also not uncommon for the terms to be used incorrectly as interchangeable. Although somewhat related notions, they are not the same, particularly in Canada where there is a written constitution that empowers different levels of government with exclusive authorities and grants specific rights that can act as a constraint on legislative capacity.

Sovereignty is about capacity. Supremacy is about relative power. Sovereignty allows a body the capacity to act within its authority without any other body or person being able to interfere with or override the actions or decisions taken. Historically, the UK Parliament was said to enjoy parliamentary sovereignty in that it could make any law about any matter. Neither the courts nor the government could ignore the law or overturn it. Whatever the Commons, the Lords, and the monarch decided together was the law. No other body, other than Parliament, could change it. Parliament had full, inexhaustible capacity to make law. There may have been moral or political checks, but there were no legal ones.

In Canada, sovereignty is divided between the federal and provincial levels of government. Sections 91 and 92 of the *Constitution*

Act, 1867, in particular, set out the relative powers in such a way as there are no gaps in legislative capacity. All power, and therefore all sovereignty, is divided between the two levels of government. What one level of government cannot do the other can. At the same time, the exercise of each type of power is exclusive to the level of government to which it is assigned. Although there may seem to be much overlap, constitutionally, what one level of government can do, the other cannot. To this extent, the sovereignty of each level of government is limited by the legislative capacity of the other.

In 1982, the sovereignty of each level of government was further limited by constitutional amendments, including the *Canadian Charter of Rights and Freedoms*,[6] which entrenched certain rights within the Constitution. Parliament could no longer legislate in violation of such rights, and any law that violated the rights was of no force and effect to the extent of the violation.

So, there are two types of constitutional constraints on parliamentary sovereignty in Canada: federalism and the rights and freedoms entrenched by the *Constitution Act, 1982*, which included the *Canadian Charter of Rights and Freedoms*. Otherwise, if Parliament is exercising a power granted it and the law does not violate a constitutional right, its sovereignty is intact. Neither courts nor the government can strike down or alter a law because of the policy, effectiveness, or other difficulties they may have with it.

Supremacy, as distinct from sovereignty, is about who gets the last word on settling the law. Again, historically this was the king, then the king in Parliament. Parliament was the highest legal authority and therefore enjoyed parliamentary supremacy. It was considered the High Court of Parliament. In the end, Parliament could resolve any legal dispute, generally by statute or on a case-by-case basis. While the capacity to determine individual cases has passed to the courts, in the United Kingdom the last vestige of this power was the fact that until 2009, the House of Lords could hear cases and appeals. This power was abolished with the creation of the Supreme Court of the United Kingdom.

In Canada, the same degree of supremacy has never quite existed since there have always been constitutional constraints on the exercise of powers by Parliament. It has always been the role of the courts to determine whether Parliament had exceeded its jurisdiction by legislating in areas of provincial jurisdiction. Since the adoption of the *Charter of Rights and Freedoms* in 1982, courts have the power to determine if Parliament has exceeded its powers by legislating in such a way as to violate constitutional rights and freedoms. As a result, it has been said that in Canada parliamentary supremacy has been replaced by constitutional supremacy.

There are still, however, circumstances when Parliament is supreme. So long as it legislates within its constitutional authority, Parliament can enact legislation that creates or changes the law, including reversing court decisions on the law or modifying the consequences of court decisions for future cases. In an emergency, or in certain specified and temporary circumstances, this allows Parliament to act, even if to do so would ordinarily or otherwise be prohibited by the Constitution.

Parliament's Relationship to Other Constitutional Actors

Parliament is the central pillar in the Canadian constitutional architecture. In a democracy, it is proper that the institution with the largest elected component should be. It also means that all other constitutional actors have a relationship with Parliament.

Parliament's relationship with the government is the closest. The ministers, who collectively form the government, emerge from the elected House of Commons. The government is accountable to the House of Commons. Every minister is answerable to the House of Commons for their department and various government agencies, tribunals, and commissions assigned to their charge. Each minister is also accountable, as members of the Cabinet, for the decisions of the Cabinet. Collectively, they must constantly have the confidence of the House of Commons, and if confidence is lost,

the government must resign and an election for a new House of Commons be called.

Ministers, as the government, are also responsible for the carrying out of the functions and duties prescribed by legislation. They are responsible for the management of government departments and agencies created and empowered by Parliament to conduct various tasks and make decisions required by legislation. They are also responsible for making the various regulations authorized by Parliament and for exercising administrative powers given to them by statute. And it is to Parliament that they must account for the carrying out of all of these functions.

The government also introduces the bulk of legislation within the House of Commons. It has control over the agenda of the House but must work with members of both Houses to ensure as smooth a passage of legislation as the processes and the necessary parliamentary scrutiny will allow.

The relationship of Parliament to the courts is more indirect. The simple outline of responsibilities within the Constitution is that Parliament makes the law, through legislation, and courts interpret the law and ultimately determine its application. Since Confederation, courts have been able to determine whether legislation falls within the matters assigned to Parliament's jurisdiction. Since 1982, courts have had a broader basis on which to consider the constitutional validity of laws where it is alleged that a law violates a right or freedom. These rights and freedoms are stated in relatively broad terms with a scope that people can disagree about, but which the courts ultimately determine. At the same time, the rights are not absolute, and Parliament has a margin of discretion if it can be shown that the limits on the rights in legislation are demonstrably justified. With the entrenchment of constitutional rights and freedoms, this relationship has become more complicated and has sometimes taken on a feel of confrontation tempered by dialogue. In this way the role of the democratic institution of Parliament is reconciled with the rule of law and the protection of rights, which is the domain of the courts.

The courts also play a role in protecting the independence of Parliament through ensuring that the constitutional privileges of Parliament and its members are respected and protected. Parliament has the constitutional ability to carry out its business without interference from the courts or anyone else outside of Parliament. As such, the courts cannot interfere, or allow anyone else to interfere, in the business of Parliament. In short, no one is able to use the courts or their processes to restrict members from attending or participating in proceedings or to censor them for anything done in proceedings. Nor can anyone attempt to use the courts to slow down or meddle in the passage of legislation, or in committee proceedings. The courts will ensure that Parliament is free to conduct its business.

Parliament's Accountability to the Electorate

Constitutionally, Parliament appears to be, and is, powerful. There are few legal constraints on its activities. Courts may, for limited purposes, be able to invalidate or limit the effects of legislation. But they cannot do so on political or policy grounds. One can imagine laws being passed, or decisions taken, that damage society but do not necessarily violate constitutional rights or boundaries. In contemplating such scenarios, one is left to consider whether there are means to limit Parliament from acting in such a manner. Succinctly put, the answer is democracy and elections. The greatest constraint on parliamentary and government action is political. Governments and parliamentarians are ultimately accountable to the people through elections. There are many ways that a policy can be achieved through legislation. The form and limits of the legislation implementing the policy are tempered and shaped by public opinion and potential electoral consequences.

This public accountability takes on numerous guises in parliamentary activities, including political party formation, leadership contests, electoral success, caucus formation, government formation, and legislative agenda setting. The political and electoral activities

carry through into the business of a responsible Parliament. For all the activities of Parliament, consideration of the electorate is in the background. In a democracy, it is healthy for the electorate to continue to play a role, or at least to be considered, when the government puts its agenda to Parliament and Parliament holds that government to account. This is as important between elections as it is at the time of a general election. Elections are measured in weeks, Parliaments in years.