

Rethinking the Bargain?
The Trudeau Government and GIC Appointments

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Abstract:

According to the traditional view of public administration, a critical component of good policy formulation is the provision of frank and fearless advice to elected decisionmakers. This advice can be provided by permanent public officials or by the people selected by the elected governments to fill key and continuing posts. To work effectively, the relationship between the political executive and its senior officials must be based on trust and respect but both must operate with independence from the other. This paper uses the case of the revised appointments process for Governor-in-Council appointments in Canada to determine whether this relationship is being realised. By setting Flinders analysis of patronage appointments within the context of shifting public management norms, it argues that the new process is more open and transparent than past processes but also more susceptible to partisan influence under the guise of being merit-based. We are left to wonder if this important relationship is becoming politicized and thus compromised despite promises to the contrary... or not.

Introduction: Confused Understandings and Responsibilities?

On February 25, 2016, the Trudeau government announced that it was moving forward on one of its federal election promises:

The Government of Canada is moving quickly to apply a more rigorous approach to Governor in Council (GIC) appointments. The selection process will reflect the fundamental role that more than 1500 Canadians play in our democracy as they serve on commissions, boards, Crown corporations, agencies, and tribunals across the country.

To that end, it assured Canadians that the new GIC process would be an “open, transparent, and merit-based selection process,” resulting in “high-quality candidates who truly reflect Canada’s diversity.” The media release concluded by quoting the Prime Minister:

We are committed to raising the bar on openness and transparency in government to make sure that it remains focussed on serving Canadians as effectively and efficiently as possible.

With these commitments to a new open, transparent and merit based (OTMB) process, the Canadian government vowed to fix a process that had been criticized as too partisan, opaque and unaccountable for decades despite previous efforts at reform (Smith 1995, 103-5; Gibbins & Rowat, 1988).

This paper begins with outlining the changes adopted by the Trudeau government to the GIC appointment process in the context of the shift in public sector management from traditional principles of public administration (PA) to new public management (NPM) and through to new public governance (NPG) (Brock, 2018). This transition broadly was intended to render government more capable of addressing policy complexity (Salamon & Toepler, 2015) by facilitating horizontal cooperation and trust across public institutions and with the private and non-profit sectors (VanWaarden, 2012); (Hood & Peters, 2004). However, we make the argument that these shifts in management approaches have been neither discrete nor entirely successive (Dickinson, 2016) resulting in confusion by decision-makers as to how to manage GIC appointments in contemporary governance. In essence, the shifts in approaches to public management have resulted in a layering of norms with conflicting principles that are embedded into the operation of government, particularly at the most senior levels of decision-making. The result is that the NPG norm of horizontality combines with the NPM norm of efficiency and measurement as well as the traditional norm of vertical accountability creating a pull back towards the centre but the dismantling of traditional public sector accountability structures creates a vortex for politicization to occur (Brock, 2018). GIC appointments reflect these shifts and confusion. In effect, federal approaches to GIC appointments are in transition, which means that it is not always clear which paradigm or principles take precedence. As such, Canadian public sectors are realizing that GIC appointments play a much different role under NPG than under previous conceptualizations informed by TPA or NPM (Levi-Faur, 2012); (Osborne & Gaebler, 1992). Under the guise of appearing to reflect societal values, GICs appointments have become more politicized.

Flinders (2012, p. 268) argues that historical discussions of patronage have made the practice of patronage (including GIC appointments) synonymous with corruption, whereas a more “nuanced” understanding would suggest that patronage “may have evolved to fulfill a more positive and critical role within more democratic governance.” In this sense, patronage is a means to provide politicians with a low-cost but high-trust relationship mechanism to coordinate across issues, and as a way to recruit under-represented or socially alienated sections of society to the political sphere. He maintains that NPG forms of patronage to positions such as GICs is a form of risk reduction that is not necessarily corrupt nor undemocratic. The “so what” of this shift is that by reducing the ambit of politicians to process may have the effect of “not only eviscerating the governing capacity of executives but also further narrowing the terrain and jurisdiction of democratic politics” (Flinders, 2012, p. 268).

Flinders further argues that a more sophisticated approach is needed to understand the shift in the social and political views of patronage. At a basic level, he distinguishes between Closed patronage (CP) and Open patronage (OP). The wider literature tends to focus on closed patronage where appointment processes are secretive and motivated by loyalty to party and accentuating vote-getting (Shepherd, Stoney, & Turnbull, 2017); (Peters & Pierre, *Politicization of the Civil Service in Comparative Perspective: The Quest for Control*, 2004). As such, he maintains that OP is distinct from pork-barrel politics in which governmental resources and effort are strategically used to garner electoral support. Rather, OP encourages a new way of approaching patronage that is positive whereby it is a means for politicians to govern in an increasingly disaggregated and fluid state. In other words, patronage is regarded less a means of reward for party loyalists, and more of a “critical organizational and governmental resource employed by political parties” (Kopecky & Scherlis, 2008, p. 356). Flinders offers a useful model for distinguishing between OP

and CP, and a means to evaluate appointment processes. In particular, the model suggests that under OP systems it is important to ensure openness and transparency of processes to ensure there is not a return to former CP systems that emphasize favour over effective governance.

The next section highlights the characteristics of OP and applies it to the statutory appointments processes of regular GIC appointments and Agents of Parliament. Although these are not representative of all appointments, they do provide a glimpse into how public sector leaders are navigating the transition across public management paradigms that are operating in the background. What is important in the transitions, is the attitudinal shifts occurring among citizens and public sector decision-makers on the appropriateness of previous practices associated with GICs as a manifestation of corruption or “pork-barrel” politics. Our key argument, however, is not that NPG approaches to GIC appointments more broadly are necessarily inappropriate or illegitimate in some way, but that elements of the appointment processes in practice show evidence of confusion among the paradigms whereby the potential for politicization in the negative sense could present in faulty decision-making.

We distinguish between patronage as both a process and an outcome, and politicization as a decision process or instrumental practice that underlies the patronage system. Flinders (2012, p. 269) describes patronage “as an incentive system denoting an exchange relationship in which a patron (i.e., an individual, group, country, or institution) exerts control over another agent through the provision of certain goods or services (money, food, protection, jobs, sex, knowledge, etc.).” He distinguishes, however, between patronage writ-large from “party patronage” whereby parties (particularly those in power) exercise “the power of a party to appoint people to positions in public and semi-public life” (2008, p. 357). In this sense, party patronage concerns the “reach” and

“permeation” of politicians to appoint individuals they trust into positions of authority to carry out the will of political masters.

From a process perspective, any patronage system has the potential to be politicized in a positive or negative way that not only favours power-holder perspectives, but may be designed in ways that serve either older conceptualizations of closed patronage systems over newer or contemporary ideals of open patronage systems. In other words, GIC appointment processes can be politicized out of party loyalty for example or politicized in ways that serve some public ideal such as appointing those with particular expertise to carry out complex responsibilities and who hold the confidence of political decision-makers. The latter serves a larger governance interest, whereas the former serves to facilitate party loyalty and vote-getting. We, therefore, define politicization in the broad sense as:

“...the purposeful substitution of political or partisan-based criteria for institutional impartial and merit-based criteria in the setting of ideational, policy, public management and institutional oversight and control systems, such that processes could be observed and understood as increasing control, and advantaging some power-holders at the expense of other power-holders” (Shepherd & Stoney, 2016, p. 5).

The danger is that In general, we maintain that the new GIC appointment process appears to embody the OTMB principles, but that there is confusion about the application of larger NPG characteristics that promise greater legitimacy in the use of patronage, including GICs. That is, independent bodies recommend prospective candidates who meet defined criteria for the GIC positions, which adds a level of transparency and confidence that appointments are merit-based. However, once the independent bodies make their recommendations, the process becomes opaque and centred in government with the PCO and the PMO advising the PM and Ministers on the final appointments, reminiscent of previous paradigmatic orientations more associated with closed patronage systems. This opacity creates an opportunity for partisan criteria to be applied in the closed patronage sense that result in certain candidate profiles and merits being favoured. Certain

profiles may be favoured that meet closed patronage orientations, or indeed open patronage systems but limit diversity of views. In the negative sense, the PMO confirmed recently that a partisan database is being used to conduct background checks on candidates for almost all GIC appointments and that certain candidates are being encouraged to apply for the positions (LeBlanc, G&M 5/5/2019) (Caddell, 2019). The potential result of such practices may serve to diminish the positive benefits of open patronage systems by confusing their purpose (open versus closed processes), thereby further eroding public trust in government.

Getting a Lay of the Land: GIC Appointments in the Government of Canada

Governor-in-Council appointments refer to those appointments made by the Governor-General, acting by and with the advice and consent of the Queen's Privy Council of Canada (Canada, Glossary, 2018). Appointments can be made according to statute, or under the direction of ministers. Most statutory GIC positions can be classified under the following types:

- Heads and members of agencies, boards, and commissions;
- Chairs and members of administrative and adjudicative tribunals;
- Agents and Officers of Parliament;
- Ombudspersons;
- Chairpersons, directors, and chief executive officers of Crown corporations (Canada, Governor in Council appointments, 2019).

Exceptions to the statutory GIC appointments classifications relate to:

- Governor-General, Lieutenant-Governors, Senators, Ministers, and Parliamentary Secretaries (separate non-statutory legislative processes);
- Deputy Ministers (non-statutory, managed through PCO, which advises the PM);
- Judicial Appointments (statutory/non-statutory, managed by the Minister of Justice under a separate process);
- Heads of Missions/Consuls (non-statutory, managed by the Minister of Global Affairs under a separate process);
- Territorial Commissioners (non-statutory, made by GIC but using a separate process on recommendations by the Minister of Crown-Indigenous Relations);
- Ministerial Advisors (non-statutory, usually time limited and non-statutory, managed by ministers);

- Third-Party Recommendations or those that require professional qualification requirements (statutory/non-statutory, made on recommendation by third body, such as Public Servants Disclosure Protection Tribunal where appointee must be a judge);
- Other Appointments (non-statutory, specialized appointments such as provincial administrators, deputy judges in the territories, RCMP commissioners and Commanding Officers, Commissioners of Oaths). (Canada, Governor in Council appointments, 2019).

According to Privy Council Office (PCO) documents:

- In September 2017, approximately 4,401 active statutory and non-statutory positions across government are filled using the standardized GIC appointment process or a separate process as indicated, although the total number fluctuates.
- These positions include 2,039 judges, 1,942 officers of Agencies, Boards, Commissions and Tribunals as well as Crown Corporations, Independent Organizations and Parliament, 486 ranking public servants and 21 assorted.
- Of the 1,942 statutory and non-statutory positions, 1,357 are subject to the new OTMB process and 585 to other selection processes.

In February 2016, the Trudeau government announced that it was committed to an “open, transparent and merit-based” (OTMB) selection process for Governor-in-Council appointments in

February 2016. The government defined its criteria as:

- Merit-Based: To establish, publish, use clear criteria for appointments, independent assessments;
- Transparent: To strengthen role of parliamentary committees in the process and to publish clear information about requirements and steps for appointment to each position. Appointments to be publicly available through PCO Order-in-Council database
- Open: To make all positions open to all qualified Canadians, and to ensure Independence and Diversity of appointments. (Canada, Governor in Council appointments, 2019)

The new approach was designed to identify and encourage highly qualified candidates representing Canada’s regional and linguistic duality, to ensure appointments complied with employment equity goals, and to advance towards full gender parity in these positions. In line with its “Sunny Ways” promise of the election campaign, the government promised to do things differently and establish processes of appointments that would be transparent insofar as they could be monitored. In establishing these objectives and criteria, the government could be held accountable for its future appointments.

In 2019, internal PCO documents obtained by the Canadian Press under an access to information request elaborated on what was meant by Merit-Based Criteria. The documents specified:

- Selection processes are merit-based, and candidates are assessed using **a variety of standard tools**, including CV screening, **exams, interviews, reference checks, and language and psychometric assessments as required**. Only candidates deemed highly qualified through the merit-based process are identified to ministers for their consideration and recommendation for a GIC appointment.
- At the time of application, GIC candidates are asked to provide their consent to be considered for positions other than the one(s) for which they applied. All consenting GIC candidates who have had an interview and whose reference checks have been completed and have been deemed to have met the merit criteria by **a selection committee**, are eligible for consideration **for the specific position applied for, or for similar or related positions**. This approach maximizes the opportunity to appoint meritorious individuals. (PCO 2019, emphasis the authors).

In sum, merit was an important component of the process, intended to answer criticisms of past failed processes that were unclear in terms of appointment criteria. The challenge with respect to merit criteria, as will be shown, is that there is often a clash between political/partisan imperatives and service to the public or good governance imperatives. Sometimes these can be made complementary, and at other times they can be perceived as corruptive.

The 2016 process was clearly outlined on the government website and seemed to embody these principles. Key aspects would include:

- Ministers tracking vacancies within their portfolios and then determining if the OTMB or a legislated process is appropriate;
- If appropriate, establishing a Selection Committee with representatives from the PMO, PCO, Minister's office, Department;
- The Committee determining the selection criteria based on organizational needs and requirements to fulfill duties of the position, and selecting head-hunters to recruit candidates;
- Advertising the position(s) in the Gazette and on the Government website with the merit criteria and process specified;
- Applicants, including incumbents in the positions, registering online and submitting applications through the portal;
- The Committee reviewing and vetting the applications, interviewing short-listed candidates and submitting nominated candidates to the Prime Minister or relevant Minister. In the case

of Agents of Parliament, the Committee would submit the list to the Parliamentary committee for vetting;

- The Prime Minister (or relevant Minister) making the recommendation to the Governor-in-Council; and
- Maintaining confidentiality throughout.

The nature and classification of these various GIC appointments appears to be quite technical, and indeed it is. There appears to be little opportunity for pork-barrel politics of yester year, except how does one explain that these appointments seem to be occurring still? And, where is the merit in these merit-based processes? The following section provides a brief narrative of how these shifts in attitude and thinking came about using the transition of public management paradigms to anchor the narrative.

Moving Away From Partisanship: From PA to NPM to NPG

The Canadian state has transitioned from the principles and practices of traditional Public Administration (PA) existing up to the 1970s and 1980s to new public management (NPM) into the 2000s, and then to new public governance (NPG). However, these theories and phases are not entirely distinct and sequential (Gow & Dufour, 2000); (Osborne S. J., *The New Public Governance?*, 2006); (Levi-Faur, 2012). Instead, the transitions have resulted in a layering effect with significant implications for government operations. The argument focusses on ideal-types of these organizational theories in the public sector in Canada, for the purposes of clarity but at the cost of nuance possible in longer studies.

The traditional principles of the Canadian public service were derived from the Weberian ideal of a rational-legal public administration and meshed with the Canadian variant of the Westminster model of parliamentary government. Core principles include rational, scientific decision-making based on the rule of law, political neutrality, impartiality, procedural fairness, the consistent application of rules, and a balance between the stability and certainty of the law and the

need for change when implementing the policy objectives of the government of the day. A professional, permanent public service founded upon the merit principle, security of tenure and independence by fixed salaries, operates in bureaucratic units organized along hierarchical lines with a strict dichotomy between administration and politics (Sossin, 2010); (Wood & Waterman, 1991). Elected politicians make policy decisions and public servants implement those decisions and provide the associated services to the public. Lines of responsibility and accountability are clear in this ideal-type (Savoie, 2003), (Savoie, 2008); (Peters & Savoie, 2000) with the public sector being held responsible to the public through the elected officials. Under this “Schafferian bargain,” adopted from Britain in 1908 and followed generally in Canada, politically neutral public servants provide expert advice to the elected officials without fear of reprisals from the government or media and public, and the politicians answer in parliament for department policies, programs and services (Clarke, 2018); (Savoie, 2003); (Kernaghan & Siegel, 1999)). This arrangement resulted in a primary focus within the public sector on inputs and processes to produce desired and fair outcomes (Osborne & Gaebler, 1992); (Peters & Pierre, 1998); (Peters & Savoie, 2000). As the welfare state expanded and policymaking became increasingly complex, however, questions arose concerning the capacity of elected governments and public sector to ensure efficient delivery of public services (Wood & Waterman, 1991); (Cairns, 1990).

Under this traditional model of public administration within the Westminster system, both statutory and non-statutory GIC appointments were generally viewed as patronage appointments. Formally, the appointments were made by the Governor General upon the advice of the Privy Council Office. It was widely accepted that the Prime Minister had the right in this process to have the final say on all appointments extending from the Senate to Boards and lower level public offices. From Confederation, “part of the political history of Canada could be cast as an endless

struggle for patronage” (Simpson, 1988, p. 25). Prime Ministers successively use the power of patronage to draw talent into their parties and build parliamentary majorities, and to ensure that the public sector complied with their political agenda (Rasmussen & Juillet, 2008). According to Simpson, “Canadian prime ministers have always understood that, properly applied, patronage helps to build and maintain broadly based national parties, turning Canada away from the patchwork coalitions of religious, ethnic or religious parties in some Western European countries” (Simpson, 1988, p. 19). It was intended, in effect, to be used to reflect Canada’s complexity through a party lens. While the people appointed into these positions were expected to offer fearless advice to their political leaders, this task was made easier when they shared similar outlooks. However, this arrangement changed over Canada’s first century:

The demands of efficiency gradually eroded the idea that those who worked for government owed their jobs to the party in power. Merit, always mentioned but seldom valued by those who defended the rewarding of friends, was gradually accepted as the indispensable criterion for deciding appointments to the bulk of civil service positions (Simpson 1988, 25).

While the patronage system worked in small government, as the public sector developed and extended more visibly into the lives of Canadians, the unfairness, “waste and inefficiency” of patronage became more evident to Canadians. The rise of less partisan media and more institutionalised watchdogs in an increasingly urbanized, educated and connected public eroded the patronage system (Simpson, 1988, p. 25); (Rasmussen & Juillet, 2008)). As the number of GIC appointments grew, public tolerance for patronage declined. By the 1980s, new norms of accountability meant the patronage system had to change.

New public management, ushered into Canada largely in the 1980s under the Brian Mulroney administration, was an approach to policymaking and service delivery that was intended to restore democratic accountability in the public sector by shifting the focus of policy delivery from process concerns to policy results. NPM embraced values traditionally associated with the

private sector, including efficiency, effectiveness, strategic planning, evidence-based decision-making and market competition (Dickinson, “From New Public Management to new Public Governance: the Implications for a ‘new public service.’” , 2016); (Dickinson, 2014); (Drucker, 1954); (Klijn, 2012). NPM emphasized the role of managers with autonomy from the centre in delivering results, discretion in program design and delivery, flexibility in operation and allocation of resources and fewer restrictions from traditional bureaucratic rules but also more accountability for results and operations (Conteh, 2018); (Brown, 2018). At the same time, the NPM approach recognized that policy issues spanned the interests and expertise of different departments simultaneously as well as requiring the engagement of interests and expertise outside of government, primarily but not exclusively from the private sector. Under NPM, the policy management approach was decentralized and less hierarchical, with contracting out to the private and non-profit sectors a key tool for achieving policy objectives (Wright, 2000); (Pierre, 2000); (Osborne S. J., *The New Public Governance?*, 2006); (Klijn, 2012)). In the process, ironically, traditional lines of accountability weakened ((Mulgan, 2003); (Savoie, 2008); (Savoie, *Whatever Happened to the Music Teacher: How Government Decides and Why*, 2013). Central agencies were strengthened to define central priorities and monitor results in departments and policy partnerships (Savoie, 1999), (Savoie, 2008), (Savoie, 2013); (Aucoin, *New Political Governance in Westminster Systems: Impartial Public Administration and Management Performance at Risk*, 2012). This signified a shift away from the rules-based, process-driven traditional PA model to a more results-oriented, people-based approach intended to shift the public sector culture toward private sector values (Savoie, *Whatever Happened to the Music Teacher: How Government Decides and Why*, 2013); (Conteh, 2018).

Under the later variants of NPM, Results Based Budgeting (RBB) and Results Based Management (RBM), efforts were made to restore clearer lines of accountability by drawing stronger connections between policy and service delivery results and the priorities and revenue raising capacities of government (Richards, Kronick, & Gallo, 2017); (Good, 2003). RBM emphasized a participatory and team-based approach to management with managers responsible for the efficient delivery of key policy objectives. RBB allocated the budget to achieve defined priorities, objectives and results (Besrest, 2012); (United Nations Development Group, 2011). Audits, evaluation, incentives and performance measures were important for checking results against government objectives (Shepherd, 2017); (Klijn, 2012). The state's focus moved from procedural effectiveness and fairness to ensuring that results were achieved in a cost-effective and efficient way that was measured (Osborne & Gaebler, 1992); (Aucoin & Heinzman, 2000); (Bouckeaert & Halligan, 2008). Under NPM, governments aspired to be leaner, more effective steering organizations.

The NPM approach to management had a significant impact on how GIC appointments were viewed. In 1984, the process of appointment reached a crisis point. To that point, parties had shamelessly used the power of appointment to serve their interests. Upon his departure from office, Pierre Trudeau handed thirteen plum appointments to retiring Liberal members of Parliament and made over 70 non-statutory GIC appointments to primarily Liberals and their supporters (Scratch 2006, 3). In the election campaign leadership debate, Trudeau's successor John Turner was caught off-guard by his challenger, Brian Mulroney, and attempted to defend the appointments by saying he had "no option" but to accept them. Mulroney seized on the line "as an avowal of failure... a confession of non-leadership" (as quoted in Simpson 1988, 23). As the public outrage grew, Mulroney who had been sympathetic to the need for patronage and planning to use the

appointments to his party's advantage when he came into government, found himself in the position of needing to reform the system. On 9 July 1984, he used language very similar to that used by Justin Trudeau almost 30 years later when he promised that "all political appointments will be of the highest unimpeachable quality. I'm going to send out a dramatic signal of renewal in this area of Canadian life" (Simpson, 1988, p. 17). The Mulroney government's first Speech from the Throne announced the creation of the Special Committee on the Reform of the House of Commons (the McGrath Committee) whose mandate included reviewing the GIC appointment process.

In 1985, the third volume of the McGrath Committee Report addressed GIC appointments. The McGrath Committee stipulated that these appointments should elicit the best possible candidates and viewed as more than just patronage with some receiving more scrutiny than others and some being entirely free of political scrutiny (Scratch 2006, 3). Following the recommendation of the McGrath committee that Parliament should review some appointments, the House of Commons Standing Orders were revised in 1989 to include scrutiny of non-judicial appointments (Scratch 2006, 4). Further reforms were proposed in 1999, 2004, and 2005 to ensure that appointments were merit-based, more transparent and subject to scrutiny. All of these proposed changes corresponded to the principles of accountability, fairness and efficiency built into the NPM framework of public management. In 2009, as part of the regular process of measuring and auditing the functioning of government, the Auditor General (AG) evaluated the GIC appointments process, finding a lack of established selection criteria and reference checks, and for key appointments as well as inconsistent consideration of performance in office (AG 2009). Despite the attempts at reform since 1984, serious problems remained in the GIC appointments process affecting the legitimacy and efficiency of government.

New public governance arose out of and yet in contrast to NPM in the 2000s. Rather than focussing on the managerial operations of government, NPG emphasizes the governance framework and the tools or instruments intended to achieve policy results (Salamon & Toepler, 2015); (Klijn, 2012)). Networks among the three sectors are viewed as an effective means of catalysing the state into action and achieving results, particularly as their autonomy from government hierarchy and control increases (Pierre, 2000); (Osborne S. J., *The New Public Governance?*, 2006). Core features of NPG include: inter-organizational governance driven by steering or networked leadership; interdependence of organizations in policy design and delivery; decentering of the state in policy development with shared acknowledgement of each partners' expertise and knowledge; the use of partnerships to address wicked policy problems with far-reaching externalities; and, a plurality of actors, resources and knowledge working together in networks that are autonomous from exclusive state control and direction (Pierre, 2000); (Head, 2008); (Klijn, 2012); (Osborne S. J., *The New Public Governance?*, 2006). Networks share in the allocation of public resources and exercise of public authority (Salamon & Toepler, 2015). NPG departed from the private sector philosophy of NPM to emphasize collaborative governance models based on reciprocal respect, interdependence and trust among the partners rather than on contracting and competition as the animators of relations. Thus, NPG gave rise to ideas of co-production, co-management and co-governance (Pierre, 2000); (Brandsen & Pestoff, 2006); (Conteh, 2018). Under NPG, the assumptions are that one sector possesses insufficient knowledge to define and decipher the policy challenges and bureaucratic paralysis, and that lethargy or intransigence are surmounted by building strategic alliances and partnerships with organizations from the private and non-profit sectors (Osborne S. J., 2010).

Some authors lament the mix of NPM and NPG. Helen Dickinson (2016) maintains that NPM has left its imprint on NPG with serious consequences for the operation of the public sector. Most notably, the governance emphasis on horizontality and collaboration has not resulted in the state relinquishing control over society. Instead, softer policy instruments, such as nudging, may be an indirect but effective means of exercising state dominance. She argues that there is a “shadow of hierarchy”, meaning that governments still set the rules of interactions that shape public sector interactions with partners and society (Dickinson 2016; Thaler & Sunstein 2008; Scharpf 1997; Jessop 2003). The steering role associated with NPM is present in the allocation of state resources and levers of power to effect changes under NPG (Dickinson 2016; Skelcher 2000; Holliday 2000). The result is a form of hybrid governance where individual agency is underestimated, new values are created by state actions, and state actors are concerned with trust and legitimacy and not just efficiency and effectiveness (Dickinson 2016; 2014).

The mix of NPM and NPG in government operations two further implications for state-nonprofit sector relations. Klijn (2012) argues that while NPG models cope better with policy complexity but sacrifice democratic accountability through the creation of multiparty stakeholder relations, NPM provides more state control and order consistent with democratic accountability but fails to address satisfactorily the complexity of social and economic problems. Like Salamon and Toepler, he concludes that governance requires elected officials to share their authority, but then moves closer to Dickinson and others in asking whether this is sustainable in an era when the 24/7 media demands strong leaders, agency and accountability. Peter Aucoin (2012) ventures further by arguing that the state has entered an era of new political governance. NPM reforms empowered managers in the public sector by providing them with more control over the use of resources. However, NPG enabled governments to exert more partisan political control over the

public sector, thus undermining core public sector values of impartiality and neutrality in service delivery. Indeed, public sector impartiality and nonpartisanship become obstacles to be managed by government (Craft & Howlett, 2013). Just as Dickinson noted NPG functions in the shadow of hierarchy, Aucoin's analysis questions whether NPG relationships and policy tools are being subjected to partisan manipulation.

It is not surprising that GIC appointments have been a significant part of this vision for governance. NPG emphasizes policy outcomes and effectiveness over process concerns (Osborne 2010) as well as flatter and more inclusive processes of governance. Thus, it is important to have an appointments process with independent bodies that ensure that qualified candidates are appointed who will achieve the government's objectives efficiently and as expected. However, the center is reluctant to relinquish control and exercises it through these softer mechanisms that appear more inclusive. As such, in response to the 2009 AG Report, the PCO (the center) had assumed a more active role in overseeing GIC appointments including:

- Guidance of the appointments process
- Improved management of vacancies
- Better succession planning
- Increased transparency and public access to the GIC appointments process
- Increased rigour of the appointment process
- Enhanced training and orientation for stakeholders and appointees.

Despite PCO assurances to the Standing Committee on Public Accounts, a Code of Practice for the newly created Public Appointments Commission (PAC) was never developed and the PAC was itself abolished in 2012. The 2016 Auditor General's Report on GICs found mixed results. Generally, non-statutory appointments were timely and transparent with some important exceptions, and partisanism remaining a concern. The PCO provided guidance to ministers, departments and tribunals, but it was not publicly accessible. Selection processes were more open

and transparent but there was no evidence that part-time appointments were evaluated against defined selection criteria (AG 2016). In sum, the process had improved ...or had it?

Table 1 summarises the changing orientations in public sector management under traditional PA, NPM and NPG and the corresponding GIC appointments process.

TABLE 1: PA, NPM and NPG: Characteristics and Dominant Relations

| Approach | Public Administration | New Management | Public New Public Governance |
|---------------------------|---|---|---|
| Dominant Tendency | Rule of Law, Predictability Stability & Certainty | Change Agenda | Disruptive Transformation |
| Primary Focus | Process, Inputs | Results, Outcomes | Results, Impact |
| Primary Activity | Policy Implementation | Managing for Results | Policy Solutions |
| Main Tools | Public Sector Expertise Consultations | Market Relations Contracting Out | Trust Relations Collaborations/Engagement |
| Timeframes | Longer Term focus | Limited Time Frames | Limited Time Frames |
| Primary Interest | Public Interest | Government Agenda | Government Priorities |
| Accountability | Hierarchical Command/Control | Dual (Vertical, Horizontal) | Plural (Vertical, Horizontal, Internal) |
| Corresponding GIC process | Patronage-based PM dominant Serve public interest through the party lens Opaque | Merit-based PM, Ministers dominant with Parliamentary review More transparent | Merit-based More independent with public appointments committees established Open and Transparent |

NPG and Open Patronage: A Revised Orientation to GICs

Given the shift to NPG and the imperative to create linkages across an array of policy problems and institutional responsibility centres and actors, a new set of challenges has beset governments to coordinate and control the sheer number of actors in the delivery and regulation of various public services institutions. The combination of declining citizen confidence in government to make decisions behind closed doors under TPA and to some extent NPM, and the pragmatic challenge of ensuring a coherent and cohesive set of policy and other arrangements to address and coordinate among increasingly complex social problems has meant that political actors are looking for solutions such as more nuanced use of and appointment of GICs that can hold the confidence of political actors to act on their behalf. Indeed, Bourgault and Dunn argue in a major comparative

study of federal and provincial deputy ministers in Canada that traditional deputy ministerial responsibilities as guardians, gurus, managers and leaders wax and wane over time, and that the current emphasis or archetype in place appears to be that of leadership that pays attention to “corporate issues, emphasizes corporate human resources planning, engages in succession planning, monitors employee engagement, and generally is sensitive to the issue of government as employer of choice” (Bourgault & Dunn, 2014, p. 436). In other words, managing relationships that can leverage talent through traditional PS appointments and GICs, respond to various interests and constituencies (Kaufman, 50: 1956) and coordinate across multiple and specialized domains is critical to effective governance.

As discussed to this point, there has been a shift in the thinking and approach to patronage as a way of linking institutions and actors. Flinders (2012) distinguishes between open and closed patronage systems, or between patronage under traditional public administration and new public governance. He maintains that patronage has been recast from serving to repay party loyalists through graft to systems that focus on service delivery, risk reduction as well as garnering votes – but through good governance as opposed to rewarding loyalty. The challenge, again, is that many countries, including Canada, are in periods of transition.

Table 1 presents the characteristics of closed versus open patronage systems, and highlights in bold those elements particularly relevant. Specifically, the motivation for patronage in open systems is effective coordination of services in order to reduce governmental risk. Although vote getting is important, patronage is used to support multiple objectives, including ensuring diversity in perspectives, recruiting under-represented individuals, attracting key expertise, and coordinating among divergent policy fields and envelopes. In essence, GIC appointments are seen to enhance governance (Klijn, 2012) (Levi-Faur, 2012).

Table 2: Dissecting Patronage Systems, Adapted (Flinders, 2012, p. 270)

| Characteristic | Closed Patronage | Open Patronage |
|--|---|--------------------------------------|
| Party Patronage | Yes | Yes |
| Ministerial discretion | High/Pure | Low/Constrained |
| State Structure | “Partitocracy” | Meritocracy |
| Impact on State | Divisive | Integrative |
| Directional Thrust | Vertical | Horizontal |
| Logic | Capture Support of Specific Group, Individual, Constituency | Demonstrate Governing Competence |
| Process | Private/Secret | Public |
| Advertised Position | No | Yes |
| Application Field | Single Interviewee | Competitive Interviews |
| Relevant Expertise/Experience | No/Cronyism | Yes/Merit-based |
| Nature of Competition | Closed | Open |
| Sinecures | Yes | No |
| Independent Regulation | No | Yes |
| Perceived as Democratically Legitimate | No | Yes |
| Power | Focused | Diffused |
| Benefit | Particularistic/Clientelism | Universal/Public Interest |
| Politics | Covert | Open |
| Instrument of... | Favour | Governance |
| Essence | Spoils System | Public Service Bargain |
| Party Appointee | Patron | Partisan |
| Reach (Target) | Extensive | Limited |
| Capacity for Political Discretion | Yes/Pure Discretion | Yes/Constrained Discretion |
| Motivation Behind Appointment | Repayment/Loyalty/Votes | Delivery/Risk-Reduction/Votes |

From a public management perspective, open patronage provides the means to also support effective management of institutions and processes. Such approaches to GICs complements recent initiatives by the current Liberal government to managing performance. After the Liberal government was elected in 2015, Prime Minister Justin Trudeau called upon Michael Barber, former advisor to the Blair government in Britain, to address Cabinet on his “deliverology” approach to managing reform initiatives in government (Barber 2015). This approach focuses on linking results to priorities, evidence-based policymaking, measurement and evaluation throughout the policy process, and effectiveness in achieving change (“delivering results”). It

embraces the NPG principles for policymaking and service delivery that are less hierarchical and more collaborative than the traditional command and control model of public administration. Deliverology was also intended to circumvent the limits of the state, particularly bureaucratic lethargy, lack of expertise or intransigence, in resolving complex policy problems through strong leadership, clear, centrally defined policy priorities (PMO and ministerial staff), and drawing external expertise into the heart of policy decision-making (Barber 2015). Embedded in this approach, was an emphasis on linking decentralised practices to centrally defined priorities through the creation of a unit within the PCO and units within departments that would oversee government operations, offering advice and nudging units where necessary (Barber 2015). This instilled new lines of vertical accountability in the public sector with central control nested in the PCO but also PMO. This creates the space for Dickinson's shadow of hierarchy and Aucoin's politicization to creep back in under a veil of decentralization.

It is in the process of GIC reforms characterized as open patronage that the effects of this approach to government may be observed. How has the new process fared? On the surface, the processes seem well-designed to achieve the intended results. However, a separate look at the appointments process for Agents of Parliament to date reveals some apparent cracks in the transition from closed to open patronage systems using the characteristics provided by Flinders (2012).

Agents of Parliament Appointments: The Meilleur Case

There are eight agent of Parliament positions in Canada:

- Chief Electoral Officer;
- Commissioner of Official Languages;
- Access to Information Commissioner;
- Lobbying Commissioner;
- Auditor General of Canada;
- Public Sector Integrity Commissioner;

- Privacy Commissioner; and,
- Conflict of Interest & Ethics Commissioner.

Each of these agents manage offices that serve functions required by the legislative branch of government, and each reports to one or both houses. Each agent adheres to different and separate mandates and uses different sets of tools and instruments to carry them out. For example, some agents are more independent than others and exercise designated authorities on behalf of Parliament such as being an impartial administrator and arbiter of elections, while others deal with complaints, cases or grievances, while others are responsible for providing independent assessments for expenditures or ensure that the executive branch is behaving in accordance with the will of Parliament. Some agents hold quasi-judicial authorities whereas others exercise authorities contained in legislation (Stillborn, 2011). The appointment process for agents is subject to the new OTMB process criteria, although the manner in which agents are appointed is spelled out in the legislation that provides their authorities. Most agents are in office for a term of seven years, with some provisions for renewals (of seven years) or extensions if necessary of limited periods of usually six months. Note that extensions can also be abused. Some agents were extended for consecutive six-month terms to the exclusion of Parliament's approval. This has the effect potentially of politicizing the appointments process if the incumbent is perceived to be serving the government of the day. That said, such abuse also has the effect of tainting the independence of the offices by creating illegitimacy in the agent's decisions.

Graphic 1 presents the appointments process in detail. It shows discrete steps in the appointment process as follows, which will be discussed in turn against the Flinders (2012) characteristics, and the potential for politicization at each step using the case of Madeleine Meilleur, who was nominated by the Liberal government in 2017 and withdrawn.

1. Review of statutory requirements on appointment of an incumbent;
2. Prime Ministerial decision on whether to appoint an incumbent;
3. Application of eligibility criteria (e.g., OTMB assessment) and a short list is created;
4. Prime Minister announces selection of potential appointee(s);
5. Certificate of nomination reviewed by opposition parties in House of Commons, and appropriate Senate committee (if applicable) and approval.

In May 2017, the Liberal government attempted to appoint Madeleine Meilleur as Official Languages Commissioner, a former long-serving cabinet minister in the Ontario Liberal government of Kathleen Wynne. Although she applied to the position as others had, she appeared to have the added edge of being proposed by the PM's Chief of Staff and Principal Secretary and being interviewed by Heritage Minister Mélanie Joly (Hebert, 2017). Although being a former minister proposed for such appointments is not unusual, what was unusual was this was the first agent of Parliament position that was subject to the new OTMB guidelines, which are meant to support not supplant the *Official Languages Act*. The Act stipulates that both houses of Parliament must be consulted on a short list of candidates. In this case, it appears that there was not consultation, but an advisement of this candidate being forwarded for approval by the houses through a PMO announcement as indicated in Graphic 1. Holding a majority government, the Prime Minister felt little need to consult, resulting in the Opposition making the argument that the process up to this point was neither open nor transparent. According to Karine Trudel, MP for Jonquière, "The process continues to be cloaked in secrecy. We remember the time when Liberals promised to be open and transparent, the time when they promised to do better. When will they show true transparency and when will they establish an open appointment process?" (Hebert, 2017). This short case is unpacked against the steps in the appointment process.

1. Review of Statutory Requirements on Appointment of an Incumbent

The first step of the appointment process is an initial assessment carried out by the Privy Council Office (PCO) as to the eligibility of the incumbent, usually determined whether the individual is within their term, or whether a renewal or an extension is required. If the incumbent cannot be renewed or extended (some positions are non-renewable nor can they be extended, such as the Auditor General), the process moves to step 2. In the case of Madeleine Meilleur, the incumbent, Graham Fraser, had already retired from the position some time prior to the appointment process being activated by PCO. That said, had the incumbent been in office, a decision would have to be made about renewal, extension or a new appointment. Given that the responsibility for appointing agents of Parliament resides with the Prime Minister, it is conceivable that a priori criteria can be applied, behind closed doors, as to whether the incumbent was firstly suitable to the position in the eyes of the current governing party. It is also conceivable that if the incumbent is viewed as “troublesome” or is labelled a non-team player, the Prime Minister’s assessment ultimately would prevail, despite the fact that agents serve the legislative branch. Under a majority government, prime ministerial power is authoritative, whereas under a minority government presumably, there may be greater impetus to consult opposition parties. Although Flinders (2012) maintains that ministerial discretion is low/unconstrained under open patronage systems, this step in the agents’ appointment process would suggest otherwise.

2. Prime Ministerial Decision on whether to appoint an incumbent

Should the Prime Minister determine that an appointment is required to the position, a call for applications is made through an online portal for GIC appointments. In addition to a public call, oftentimes head-hunter firms are used to seek out qualified candidates (at the expense of the agent’s budget). Using Flinder’s (2012) criteria for Open patronage, the fact there is an open

process applies at this step, but there is certainly an opportunity for PMO via PCO to influence the search criteria for head-hunter firms. In many cases, given the specialization of the mandates and the limited number of candidates, a search is often challenging. However, the range of options is often limited to candidates resident within the federal Public Service, or associated provincial public services, meaning that the diversity of perspectives may be limited. In addition, as in the Meilleur case, candidates for the position can be “encouraged” to apply, resulting in a certain degree of favouritism or politicization of this step to occur. Candidates would be afforded a champion at the recruitment step.

3. Application of OTMB Criteria and a Short List is Created

Once the Privy Council Office has received a list of applicants, it then reviews the applications and creates a short list. Applicants are short-listed using the OTMB criteria. Ideally, as per Flinders (2012), the criteria are intended to be applied impartially, giving equal weight to each applicant prior to making a short list decision. In the case of Madeleine Meilleur, it is conceivable that undesirable or “ineligible” applicants were weeded out against criteria that are applied behind closed doors. The criteria themselves may be publicly available. However, the interpretation and application of such criteria are not obvious in the process, which makes arguments made by opposition parties regarding transparency credible. In addition, the potential for purely partisan criteria to overlay the merit criteria is possible under this step, as again, the decisions are being made in the executive branch thereby negating any possibility of legislative scrutiny.

4. Prime Minister Announces Selection of Potential Appointee

Prior to announcing the nominee(s) to the public for the position, the Prime Minister is obligated according to enabling legislation to consult opposition leaders before making the appointments. In addition, the spirit of the enabling legislation would suggest that the potential candidates to be

vetted by Parliament are acceptable to all parties in the House, and the appropriate committee of the Senate. In the case of Madeleine Meilleur, opposition parties were not privy to the full list, nor did Parliament play a role in the vetting process to come to a short list. In addition, the step requiring consultation with opposition parties was ignored. In this case, the process shows significant evidence of closed patronage systems where the reach of politicians in the process was extensive thereby increasing significantly, as in this case, the politicization of this step of the process.

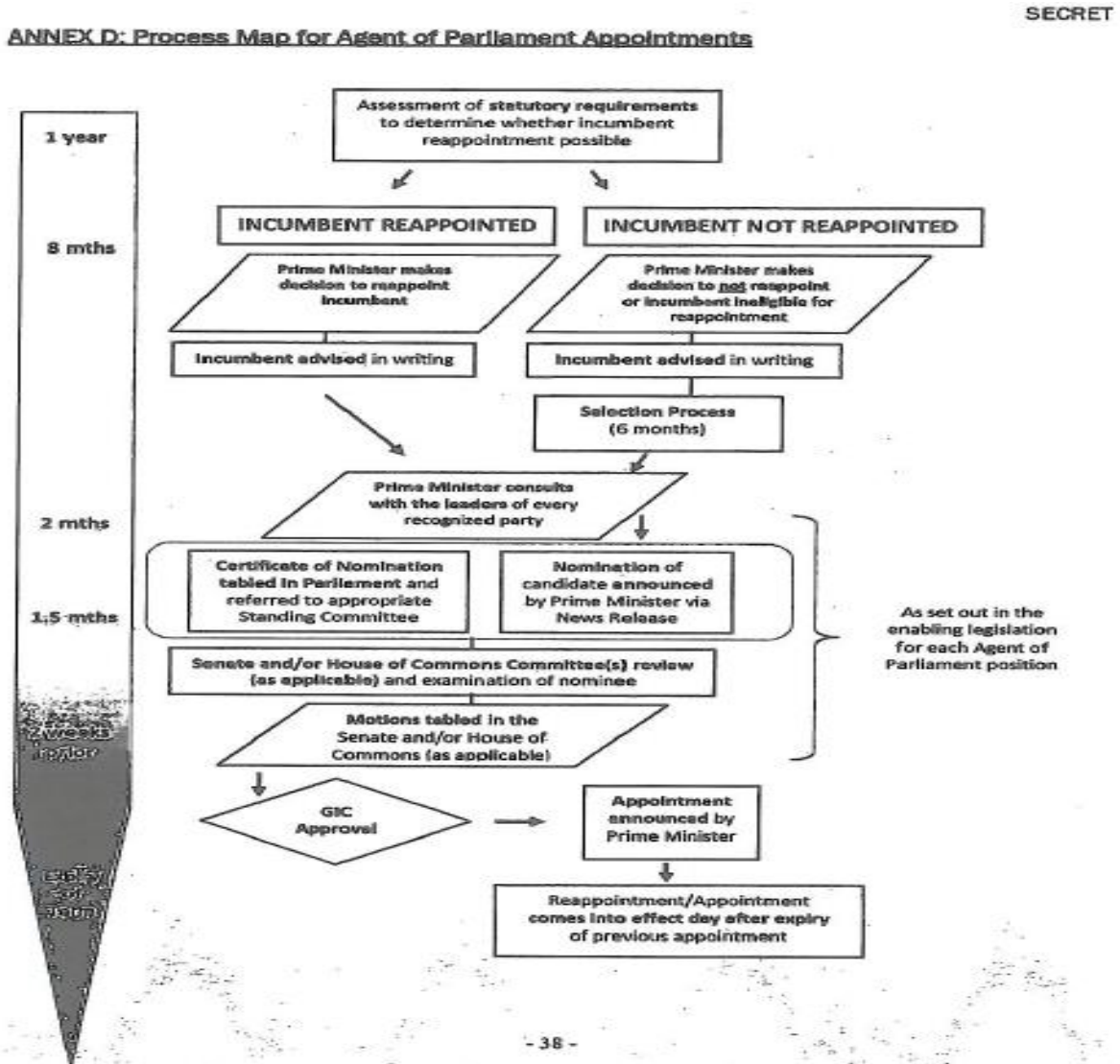
5. Certificate of Nomination is Reviewed by Parliament

Once an announcement is made, both houses (for most agent positions except Conflict of Interest and Ethics Commissioner) review the Certificate of Nomination according to the process in the enabling legislation, and then use criteria established in each House regarding the eligibility, and by this step, acceptability of the nominee. In the case of Madeleine Meilleur, the Trudeau government faced unprecedented pressure from opposition MPs (and the Liberal caucus) and Senators to withdraw the candidate given that there were no other options presented, and the optics of the nomination were not regarded as ethical (Hebert, 2017). In the interim, Madeleine Meilleur withdrew her application given the public outcry by this point, especially when it was communicated in the House of Commons Official Languages Committee that she was recruited to apply by two senior staffers in the PMO.

To prevent such appearances of characteristics of closed patronage, some countries such as the United Kingdom created the Office of the Commissioner of Public Appointments, an independent regulatory system in 1995 that limits the reach and permeation of politicians' appointment powers. In addition, several reforms to the process have been made since then in the UK, thereby further limiting political interference in the recruitment of qualified candidates, and

the vetting of applications. In fact, the UK uses specialized processes for different GIC appointments to ensure that the eligibility and qualifications criteria are respected (GovUK, 2019). While this was considered by Canada, it was not adopted. Had it been implemented, then the real or perceived bias of partisanship would have been significantly diminished.

Graphic 1: Process Map for Agent of Parliament Appointments



Conclusions

The paper set out to make the argument that GIC appointments in Canada's federal government appear to be in transition from a closed patronage system to an open patronage system. Flinders (2012) makes the argument that the rationale for GIC appointments has shifted between the public management paradigms from considerations of rewarding party loyalists to using GICs or patronage to facilitate public good considerations of sound and effective governance. In its ideal form, open patronage systems hold the potential for serving partisan ends, but in ways that facilitate effective coordination among complex policy issues and envelopes. A key feature of open patronage systems is a respect for the expertise, experience and judgement of appointees in independent positions with the aim of serving the public good. Indeed, there is ample evidence to suggest that the public has long moved on from blatant partisan nominations that support or reward party faithful to appointees that at the very least are perceived to serve the mandates of their positions impartially and with minimal ties to patrons.

Although our paper shows that there has been a marked shift in public management paradigms, and a resultant change in appointment processes that appear merit-based, there is the potential for such processes to be politicized if not designed in a way that aligns with an open patronage system. As shown in the agents of parliament example provided, the OTMB criteria may be optimal in terms of supporting a meritocratic system. However, their application can still be politicized if the governance is not regarded as legitimate, and the criteria themselves are not clear in their application. Most notably, the current OTMB criteria have not been legislated, but are merely a policy of the current government that can be revoked at any time. In addition, the

current appointments process, whether the regular GIC or agent of Parliament process, is modelled on the public service merit-based recruitment process. The guidelines state that ministers may use other methods of recruitment to identify candidates if it chooses, which appears to be the case in the Meilleur example. The “merit” of these other processes remains an open question. Again, there is no available information regarding the number or extent of unsolicited applications – a troubling possibility when merit is being positioned as the ideal. Equally important, our discussion shows that various steps of at least the agent of parliament appointment process is non-transparent, leaving the very real possibility that steps in these processes can be politicized in ways that show evidence of closed patronage systems under the guise of merit or open systems.

Significantly, a key element of the agent’s appointment process that is largely opaque is who is doing the assessing of the merit criteria. The available evidence shows that review committees are largely made up of PMO staffers, with head-hunter firms serving their wishes in the recruitment of candidates. When selecting highly specialized individuals such as agents of Parliament, one would presume that those on the selection committee would have some understanding of the mandates and operations of the offices. In the Meilleur case, there is no evidence to suggest that reviewers possessed the expertise to assess candidate qualifications against the responsibilities of the office. This suggests that Dickinson’s shadow of hierarchy and Aucoin’s predictions of politicization are becoming all too real as the centre exerts its control in a more partisan way. Consistent with the emphasis of deliverology on linking government results to centrally defined (PMO) objectives, it becomes critical to ensure that these offices and their holders will act in accordance with the government vision.

We conclude that a truly merit-based process takes significant effort, high transparency, accountability for the process and the ultimate decision, and validation of results. In essence, each

of the steps in the appointment process require clear guidelines and documentation to ensure a robust, fair and open system. In this regard, former agents of parliament took the unprecedented step of making the argument before Parliament for a more open appointment system akin to that of Supreme Court justices, because that process “involves all federal political parties and stakeholders at the federal and provincial levels as well as legal stakeholders” (Hebert, 2017). They also called for a review of the idea for an independent appointments commission as proposed by the Harper government (and later withdrawn) that included a legislative mechanism for vetting GIC appointments thereby further reducing the reach of the executive branch and encouraging a collaborative process. Even this system, as in the UK, requires external oversight to ensure that it is operating as intended. The current appointments process for agents of Parliament appears to have been designed internally by PCO, leaving the very strong impression that a closed patronage system remains intact. To be truly merit-based, the OTMB process should be legislated, and ample documentation created to ensure the criteria are clearly understood and applied. Finally, the governance of the process has to be significantly amended to remove the responsibility for appointment from the executive branch altogether as it is fundamentally with the appointment of Supreme Court justices. Then, and only then, might we observe what Flinders (2012) labels an open patronage system in the true spirit of NPG and diminish the ill-effects of the shadow of hierarchy and politicization as identified by Dickinson (2016) and Aucoin .

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